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Joshua C. Tate

Southern Methodist University, Dedman School of Law

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ARTICLES

IMMORTAL FAME: PUBLICITY RIGHTS, TAXATION, AND THE POWER OF TESTATION

*Joshua C. Tate**

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* Assistant Professor of Law, Southern Methodist University. I would like to thank Gregory Alexander, Anne Alstott, Mark Ascher, Daniel Ballard, Jonathan Blattmachr, Regis Campfield, Bridget Crawford, Gregory Crespi, Robert Ellickson, David Epstein, Mitchell Gans, Christopher Hanna, Lisa Hasday, Richard Helmholz, Adam Hirsch, Michael Knoll, John Langbein, Stephen Lind, Henry Lischer, Ray Madoff, Grayson McCouch, Matthew Mirow, Adam Mossoff, Jeffrey Pennell, Kerry Ryan, Lee-ford Tritt, Lawrence Waggoner, and those who attended my presentations at the William and Mary Law School Faculty Colloquium, the SMU Tax Policy Colloquium, the Property Works-in-Progress Conference in Boulder, and the annual meeting of the Association of American Law Schools in San Diego for their comments and suggestions. I am also grateful to Laura Justiss, Lynn Murray, and the staff of the Underwood Law Library at Dedman School of Law, along with my research assistants Thomas Arnold, Denise Johnston, and Kaaren Shalom, for their help. Finally, I wish to thank Dean John Attanasio for awarding me a grant from the George and Pedie Bramblett Endowed Faculty Research Fund.

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I. INTRODUCTION

Doing It to Death, a 1973 album featuring a rousing vocal performance by James Brown, begins with a solemn proclamation that the listener is about to experience the eighth acknowledged wonder of the world.[1] Despite his battles with addiction and a few unpleasant encounters with the law, Brown tried hard to deliver on this promise in a lifetime of music and showmanship. Nevertheless, on Christmas Day 2006, Brown departed this world,[2] reducing its number of acknowledged wonders once more to seven. In the ensuing months, evidence emerged that the "Godfather of Soul" was also a natural father to many individuals, including some who saw his death as an opportunity to enrich themselves from Brown's estate.[3] Not surprisingly, litigation followed.[4]

In his will, executed on August 1, 2000, Brown specified that his personal and household effects were to be distributed in accordance with any written memoranda he left at his death, and if no such memoranda existed, they were to be divided among his children.[5] Through a pour-over clause,[6] he devised the residue of his property to the trustees under an irrevocable trust agreement executed prior to the will.[7] Although the will did not set forth the terms of the trust

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[1] THE J.B.'S, *Introduction to the J.B.'s*, *on* DOING IT TO DEATH (People Records 1973). The announcer does not mention Brown in his introduction, referring instead to his backing band, the J.B.'s, to whom the album was credited. *Id.* Indeed, except for the title track and the pragmatic anthem *You Can Have Watergate: Just Gimme Some Bucks and I'll Be Straight*, the songs on the album are mostly instrumental. *Id.* It was Brown, however, whom the Rock and Roll Hall of Fame honored in 1986 among its first group of inductees. Rock and Roll Hall of Fame and Museum, http://www.rockhall.com/inductee/james-brown (last visited Sept. 3, 2009).

[2] Jon Pareles, *James Brown, the 'Godfather of Soul,' Dies at 73*, N.Y. TIMES, Dec. 26, 2006, at A1.

[3] *See* Brenda Goodman, *Godfather of Soul; Father Many Times Over*, N.Y. TIMES, Aug. 23, 2007, at A14 (noting about a dozen requests for DNA tests, three of which returned positive).

[4] *See* David Segal, *Soul Survivors: James Brown's Children, In Court*, WASH. POST, Aug. 11, 2008, at C01 (noting that fight over Brown's estate "now encompasses 10 lawsuits, 30 lawyers and enough theatrical hostility and cheap shots for a night of professional wrestling").

[5] Last Will and Testament of James Brown, at Item I, App. to Brown Aff., *In re* Estate of Brown, No. 2007-ES-02-0056 (S.C. Prob. Ct. Aiken County Jan. 18, 2007).

[6] For information on pour-over dispositions by will, see generally UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1991), *codified at* UNIF. PROBATE CODE § 2-511 (2008); and RESTATEMENT (THIRD) OF TRUSTS § 19 (2003).

[7] *Id.* at Item II.

agreement,[8] news reports soon indicated that Brown had in fact created two trusts.[9] One of the trusts was to provide for the education of James Brown's grandchildren who were under age thirty-five.[10] The bulk of Brown's property, however, reportedly went to the so-called "I Feel Good Trust," created to help educate underprivileged children in South Carolina and Georgia.[11]

Court filings and newspaper articles indicated that Brown gave his home, as well as the rights to his music, image, and likeness, to the I Feel Good Trust.[12] A few weeks after Brown's death, however, his children and grandchildren claimed that the trustees were engaging in improper conduct and mismanaging the trust property.[13] Five of Brown's children later argued that the devise was void on the ground of undue influence.[14] A woman claiming to be Brown's spouse also claimed a share.[15] By the first anniversary of Brown's death, there were as many as twenty-seven lawyers arguing over his estate on behalf of various parties.[16] As the litigation proceeded,

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[8] *Id.* at Item 11 (naming trustees, while giving no other terms of trust).

[9] *See Children Contest James Brown Will*, N.Y. TIMES, Dec. 31, 2007, at E2 [hereinafter *Children Contest*] (discussing Brown's trusts). As a rule, the terms of *inter vivos* trusts are not publicly recorded, which makes them popular among celebrities and others desiring secrecy. *See* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 440–41 (8th ed. 2009) (noting that *inter vivos* trusts are kept private); Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 559–60 (2008) (discussing privacy advantage of revocable trusts).

[10] *See Children Contest*, *supra* note 9 (discussing terms of Brown trusts); *see also* Segal, *supra* note 4 (stating that all of Brown's grandchildren were included in family trust).

[11] *See* Segal, *supra* note 4 (discussing rights devised to and purposes of I Feel Good Trust). The trust shared the name of one of Brown's biggest hit songs, *I Got You (I Feel Good)*, which reached number three on the Billboard Hot 100. *See* Artist Biography: James Brown, http://www.billboard.com/artist/james-brown/4186#/artist/james-brown/bio/4186 (last visited Sept. 3, 2009).

[12] *See, e.g.*, Brown v. ACMI Pop Div., No. 1-06-0870, slip op. at 8 (Ill. Ct. App. Aug. 2, 2007), http://www.state.il.us/court/OPINIONS/AppellateCourt/2007/1stDistrict/August/1060870.pdf (discussing devises to I Feel Good Trust); *Children Contest*, *supra* note 9, at E2 (same); Sandi Martin, *Further Disputes Are on the Way: Children's Attorney Plans More Filings over Singer's Trusts*, AUGUSTA CHRON., May 7, 2007; Segal, *supra* note 4 (same).

[13] *See* Emergency Petition for Appointment of Special Administrator para. 19, *In re* Estate of Brown, No. 2007-CP-02-0122 (S.C. C.P. Aiken County Feb. 5, 2007) (noting that trustees mismanaged trust "to the detriment of the beneficiaries").

[14] *See Children Contest*, *supra* note 9 (reporting that children sought to invalidate will on ground of undue influence).

[15] *See* Segal, *supra* note 4 (noting that Brown's putative widow sought half of estate).

[16] *See* Bo Emerson, *James Brown's Estate Still in Dispute a Year After His Death*, KAN. CITY STAR, Dec. 26, 2007, at A7 (quoting Brown's former personal representative).

however, it emerged that Brown's estate was in fact of very little value, due to an estimated debt of $1.6 million.[17] Brown's executors soon auctioned off hundreds of Brown's personal effects at Christie's, realizing just over $800,000 from the sale.[18]

James Brown is not the only deceased celebrity whose legacy or assets have attracted recent media attention. Not long after the September 2008 death of legendary actor Paul Newman, an image surfaced of his will, in which he devised his publicity and intellectual property rights to his personal charity, Newman's Own Foundation.[19] In April 2009, Marlon Brando's trustees brought a lawsuit claiming that Brando's name was being wrongfully used in connection with an apartment complex in Southern California.[20] Michael Jackson, who died in June 2009, left behind a complicated estate whose long-term commercial potential has been compared to that of Elvis Presley.[21] Moreover, although she died nearly a half-century ago, Marilyn Monroe continues to make headlines, as when a film of her on the set of her last completed movie, *The Misfits*, sold for $60,000 at a 2008 auction of cinema memorabilia.[22] Thanks to her publicity rights, Monroe's estate produces millions of dollars in annual revenue, earning her a place on the Forbes list of top-earning dead celebrities.[23] When a court decision threatened to invalidate those publicity rights,[24] the California legislature intervened by

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[17] *See* Segal, *supra* note 4 (characterizing Brown's estate as "[b]eyond broke").

[18] *See id.* (discussing sale of Brown's personal property).

[19] *See Paul Newman, Philanthropist, Does Hereby Leave . . .*, N.Y. TIMES, Nov. 26, 2008, http://cityroom.blogs.nytimes.com/ (Type "Paul Newman" into "search this blog"; click search) (discussing terms of Newman's will). On the charitable purposes of Newman's Own Foundation, see Newman's Own Foundation, http://www.newmansownfoundation.org (last visited Sept. 3, 2009).

[20] *See* Michael Cieply, *Protecting Brando Legacy, Trustees You Can't Refuse*, N.Y. TIMES, Apr. 20, 2009, at C1 (discussing alleged abuse of Brando's name).

[21] *See* Tim Arango & Ben Sisario, *Despite a Will, Jackson Left a Tangled Estate*, N.Y. TIMES, July 7, 2009, at A14 (noting talk of turning "Neverland" into Graceland-like museum).

[22] *See* Steven McElroy, *'The Misfits' on Block*, N.Y. TIMES, June 23, 2008, at E2 (discussing auction of film of Monroe on the set of *The Misfits*).

[23] *See* Matthew Belloni, *Marilyn, Money Fueling Right of Publicity Battle*, REUTERS, Sept. 14, 2007, http://www.reuters.com/article/entertainmentNews/idUSN1424817820070914 (noting that Monroe's estate reportedly earned $8 million through publicity rights in 2006); Peter Hoy, *Top-Earning Dead Celebrities: It's Still a Bull Market in the Bone Yard*, FORBES.COM, http://www.forbes.com/2008/10/27/top-dead-celebrity-biz-media-deadcelebs08-cz_ph_1027celeb_slide_10.html (discussing Monroe's estate).

[24] *See* Belloni, *supra* note 23 (discussing lawsuits in New York and California involving

enacting a statute to protect the rights for the residuary beneficiary of her will.[25] A new dispute then arose regarding whether Monroe died domiciled in California, which now recognizes her publicity rights by statute, or in New York, which continues to deny the existence of postmortem rights of publicity.[26]

The original issue presented in the litigation over Monroe's estate was whether Monroe could have disposed of her publicity rights by will, given that such rights were not recognized as devisable at the time of her death.[27] When Monroe died in 1962, publicity rights were not seen as a form of property that could be transmitted by will or intestacy.[28] During the following years, courts continued to debate the legal status of survivable publicity rights.[29] More recently, however, courts and legislatures have begun to recognize a celebrity's right of publicity as a property interest that may survive his or her death.[30] Some states allow celebrities to give their publicity rights to named individuals by will, so that they do not pass by intestacy.[31] This comports with the basic U.S. principle of

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Monroe's postmortem publicity rights, both resulting in court decisions against a holding company formed by the widow of Monroe's residuary beneficiary).

[25] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (West Supp. 2009); Belloni, *supra* note 23 (discussing bill's retroactivity).

[26] *See* Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939(CM), 2008 WL 4127830, at *1 (S.D.N.Y. Sept. 2, 2008) (discussing New York's nonrecognition of postmortem publicity rights).

[27] *See* Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1155–56 (C.D. Cal. 2008) (discussing court's initial decision and subsequent abrogation by § 3344.1).

[28] *See* Miller v. Comm'r, 299 F.2d 706, 707–11 (2d Cir. 1962) (rejecting Petitioner's contention that a capitalizable property interest in Glenn Miller's publicity rights survived his death).

[29] *See, e.g.*, Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958–60 (6th Cir. 1980) (concluding that interests weighed in favor of not recognizing postmortem publicity rights); Lugosi v. Univ'l Pictures, 603 P.2d 425, 431 (Cal. 1979) (reversing lower court's ruling that name and likeness are property that may survive an artist's death).

[30] *See* David Westfall & David Landau, ***Publicity Rights as Property Rights***, 23 CARDOZO ARTS & ENT. L.J. 71, 83–84 (2005) (noting that vast majority of states recognize survivable publicity rights).

[31] *See, e.g.*, CAL. CIV. CODE § 3344.1(b) (West Supp. 2009) (providing that publicity rights "shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death," and "[i]n the absence of an express transfer," to the residuary beneficiary). Florida provides that the publicity rights of a deceased person vest in "any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and

freedom of testation, which gives the testator an unlimited power to disinherit children in favor of other persons.[32]

Therefore, states that recognize postmortem publicity rights may allow celebrities to leave those rights to whomever they please, as long as the celebrities have competent volition and the devises do not violate public policy.[33] Yet, like other valuable property interests, publicity rights are subject to federal transfer taxation.[34] When a decedent dies holding an interest in property, that property will generally be included in the decedent's gross estate for purposes of the federal estate tax.[35] If the celebrity devises his or her publicity

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surviving children." FLA. STAT. § 540.08(1)(c) (2009).

[32] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 9.6 cmt. i, 10.1 cmt. c (2003) (discussing general deference to donative intent). For an historical discussion of the principle of freedom of testation in U.S. law, see generally Adam J. Hirsch, *Inheritance: United States Law*, *in* 3 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 235, 235–40 (Stanley N. Katz ed., 2009) ("[T]he United States stands out as a country peculiarly deferential to the wishes of the dead."). Louisiana, which offers some children limited protection from disinheritance, is an exception. LA. CONST. art. 12, § 5; LA. CIV. CODE ANN. art. 1493 (2000); *see also* Katherine Shaw Spaht, *Forced Heirship Changes: The Regrettable "Revolution" Completed*, 57 LA. L. REV. 55, 146 (1996) (discussing Louisiana's changes to forced-heirship system). Spouses, unlike children, are protected in nearly all states by community-property law or elective-share statutes. Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 739 (2006). Only Georgia has neither community-property law nor an elective-share statute. *See* Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447, 463–70 (1975) (debating need for statutory protection for spouses in Georgia). Elective-share statutes, however, may be evaded to some extent by *inter vivos* transfers. *See* 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING, § 10.18, at 10–50 (2008 ed.) (examining variance among states in treatment and recognition of elective share); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 10-24 to -25 (4th ed. 2006) (suggesting that U.S. Treasury bills may be mechanism for evasion); Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, *in* THE THIRTY-SECOND ANNUAL PHILIP E. HECKERLING INST. ON ESTATE PLANNING ¶ 904.3(C), at 9-35 (Tina Hestrom Portuondo ed., 1998) (discussing option of changing one's domicile).

[33] On the requirement of competent volition, see Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37, 245–46 (1996); and Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 589–92 (1997). On the public policy limitations imposed on testamentary freedom, see Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 644–47 (2008); and Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1301–06 (1999).

[34] *See* 26 U.S.C. § 2033 (2006) (including "all property" as part of taxable estate).

[35] *See id.* (defining value of gross estate).

rights to a charity or a charitable trust, as Brown and Newman seem to have done, the rights will escape taxation because of the charitable deduction.[36] On the other hand, if the celebrity devises the rights to his or her spouse, the tax will be postponed until the spouse's death by virtue of the marital deduction.[37] If no deduction applies, however, the publicity rights will be part of the taxable estate, and the tax may be due at the celebrity's death.[38]

Because publicity rights are included in the gross estate at death, some executors of celebrity estates may be compelled to sell the rights in order to pay the tax, even when doing so conflicts with the wishes of the testator or the family. With this conceivable difficulty in mind, two law professors, Mitchell Gans and Bridget Crawford, have collaborated with estate planner Jonathan Blattmachr to imagine a hypothetical revolution in the treatment of postmortem publicity rights. In successive essays published in the *Yale Law Journal Pocket Part*, Gans, Crawford, and Blattmachr suggest that a state like California could solve the alleged "estate tax problem" associated with postmortem publicity rights by enacting a statute that would vest those rights automatically in specified statutory heirs regardless of the terms of the decedent's will.[39] Under this "relatively simple legislative solution," unless the celebrity destroys the right of publicity *inter vivos*, the right would pass to the surviving spouse or children or, in the absence of such heirs, to other collateral relatives.[40] This, the authors contend, would result in the exclusion of the publicity rights from the celebrity's gross estate, and therefore the avoidance of estate tax.[41]

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[36] *See id.* § 2055 (discussing charitable deductions).

[37] *See id.* § 2056 (governing deductions for surviving spouse's interest).

[38] *See id.* § 2011 (describing calculation of estate tax).

[39] Mitchell M. Gans, Bridget J. Crawford & Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203, 207 (2008), http://thepocketpart.org/2008/04/01/ganscrawfordblattmachr.html [hereinafter Gans et al., *Postmortem Rights*]; *see also* Mitchell M. Gans, Bridget J. Crawford & Jonathan G. Blattmachr, *The Estate Tax Fundamentals of Celebrity and Control*, 118 YALE L.J. POCKET PART 50, 50 (2008), http://yalelawjournal.org/content/view/709/14/ [hereinafter Gans et al., *Fundamentals*] (responding to my critique of their original proposal).

[40] *See* Gans et al., *Postmortem Rights*, *supra* note 39, at 207–08 (discussing "solution" to federal estate tax problem).

[41] *See id.* at 208 (discussing how publicity rights would avoid estate tax if hypothetical statute were enacted).

In my own *Pocket Part* essay, I replied to Gans, Crawford, and Blattmachr, concluding that their "legislative solution" will not in fact remove publicity rights from the gross estate.[42] A testamentary disposition, I noted, is "no less taxable when it is compelled by statute."[43] Gans, Crawford, and Blattmachr have in turn defended their original proposal, drawing analogies to cases involving employment contracts and wrongful death statutes.[44]

In this Article, I respond to the latest arguments of Gans, Crawford, and Blattmachr, explaining why the abolition of testamentary freedom in a particular state would not, by itself, facilitate the avoidance of federal tax. It is unlikely that simply eliminating the power of testation would dissuade the federal government from collecting revenue to which it is entitled under the Internal Revenue Code (the Code), and Gans, Crawford, and Blattmachr have not yet addressed the consequences that might follow if a state takes more drastic measures. My primary goal in this Article, however, is to take the debate to another level by considering the broader questions at stake. First, should celebrities such as James Brown and Paul Newman—assuming their publicity rights do not die with them—be permitted to give their rights to a charitable trust or foundation, or should the rights pass to certain statutorily specified relatives of those celebrities? Second, if survivable publicity rights were to vest automatically in statutory heirs, how might that impact the distribution of wealth over time, and how would that fit with the policy justifications for transfer taxation?

The first of these questions may, at first glance, seem easy to answer. Given our legal system's preference for freedom of testation,[45] why would we want to treat publicity rights differently from other property interests? The problem is more complicated than it might appear. Publicity rights are a relatively new legal

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[42] Joshua C. Tate, *Marilyn Monroe's Legacy: Taxation of Postmortem Publicity Rights*, 118 YALE L.J. POCKET PART 38, 38 (2008), http://yalelawjournal.org/content/view/700/14/.

[43] *Id.* at 41 (citing I.R.S. Tech. Adv. Mem. 86-51-001 (Aug. 8, 1986)).

[44] *See* Gans et al., *Fundamentals*, *supra* note 39, at 51–52 (drawing parallels to Kramer v. United States, 406 F.2d 1363 (Ct. Cl. 1969) and Conn. Bank & Trust v. United States, 465 F.2d 760 (2d Cir. 1972)).

[45] *See supra* note 32.

creation, but they are deeply connected with the holder's personal reputation. Accordingly, they have something in common with two other kinds of rights with a much longer history: (1) the right to control the postmortem disposition of one's body[46] and (2) the right to profit from one's artistic creations.[47] In these two limited contexts, the Anglo-American legal tradition has historically tolerated some restrictions on testamentary freedom.[48] A case could be made that publicity rights merit special treatment as well.[49]

My own view regarding these two other contexts is that the reasons for restricting a testator's control of his corpse do not apply to publicity rights, and that there is no good policy reason for limiting the power to devise a copyright. I will further argue that even if there were a valid argument for creating a statutory forced share in publicity rights, such a measure would not justify an exclusion from the federal estate tax. Scholars and policymakers have justified federal transfer taxation on the grounds that it supports the progressive nature of the overall tax system,[50] acts as a "backstop" to the income tax,[51] prevents excessive accumulation of dynastic wealth,[52] promotes equality of opportunity,[53] and compensates the state for its role as a "silent partner" in the accumulation of wealth.[54] Above all of these goals is that of raising

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[46] *See infra* Part III.A.

[47] *See infra* Part III.B.

[48] *See infra* notes 192–93, 212–14 and accompanying text.

[49] *See infra* notes 215–16 and accompanying text.

[50] *See* Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 273 (1983) ("[A]ny tax system which relies solely on an income tax to attain progressivity will not sufficiently tax the underlying wealth that generated the income.").

[51] *See* Harry L. Gutman, *Reforming Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1191 (1983) ("The transfer tax serves as a 'backstop' to the income tax by taxing the wealth that taxpayers accumulate through tax-preferred income sources.").

[52] *See, e.g.*, S. REP. NO. 97-144, at 124 (1981), *reprinted in* 1981 U.S.C.C.A.N. 105, 226 ("Historically, one of the principal reasons for estate and gift taxes was to break up large concentrations of wealth."); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 825–28 (2001) (exploring possible role of estate tax in decreasing concentration of wealth in United States).

[53] *See, e.g.*, Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 470 (2007) ("Equality of opportunity is understood to be one of the bedrock principles supporting the taxation of inheritance."); Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73 (1990) (arguing that curtailing inheritance through federal transfer taxes would have effect of "increasing equality of opportunity while raising revenue").

[54] *See, e.g.*, JEFFREY N. PENNELL, FEDERAL WEALTH TRANSFER TAXATION 11 (4th ed. 2003) ("The wealth transfer tax is the most convenient way—it comes at a relatively easy time—to

revenue for the federal government, which was a significant impetus for the creation of federal transfer taxes.[55] By contrast, ensuring the specific financial security of individuals who happen to be related to deceased celebrities is not a defensible policy goal.[56]

Before proceeding, I should clarify the limited scope of this Article. I do not attempt to resolve the broad question of whether publicity rights should survive the death of the celebrity; that issue has already been the subject of much scholarly debate.[57] Nor do I advance any new argument in favor of the general wisdom of testamentary freedom, a task I have already attempted in an earlier piece.[58] This Article has two narrow goals. First, I intend to show that there is no compelling reason to deviate from the default rule of testamentary freedom in the specific context of postmortem publicity rights. Second, I wish to demonstrate that neither current law nor any known policy considerations would justify treating publicity rights differently for federal tax purposes due to restrictions on the power of testation.

This Article is divided into five parts. Part II discusses the history of publicity rights and the arguments for and against allowing them to be asserted after a celebrity's death. A primary purpose of recognizing publicity rights during a celebrity's lifetime is to give the celebrity the power to safeguard his or her public image from misuse by others.[59] By allowing publicity rights to survive the death of the celebrity, the law makes it possible for a third party to protect the celebrity's reputation after death. As a consequence, however, the law permits the transfer of significant wealth to

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pay back the contributions that the government, the economy, and society made to the decedent's accumulation of wealth.").

[55] *See* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 225–26, 230 (1956) (explaining that foreign policy crises and Civil War motivated the first and second attempts at federal death taxes, respectively, and onset of World War I drove revenue need that led to 1916 estate tax).

[56] In fact, many consider just the opposite to be true. *See* sources cited *infra* notes 298–300.

[57] *See infra* notes 107–09 and accompanying text.

[58] *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 129 (2008) (defending broad freedom of testation in context of rewarding caregivers).

[59] *See infra* notes 135–36 and accompanying text.

individuals who already have many advantages in our society.[60] Commentators have offered various justifications for this, including theories of unjust enrichment[61] and the notion that postmortem transmission of publicity rights encourages lifetime creativity and effort.[62] Regardless of the merits of these theories, courts and legislatures have generally held that publicity rights should survive a celebrity's death.[63]

Part III considers whether, in light of the policy bases for recognizing postmortem publicity rights, the law should recognize freedom of testation with regard to those rights as well. Testamentary freedom has been relatively restricted in two other contexts having to do with one's person: the law pertaining to the disposition of one's body after death and the law of copyright.[64] While publicity rights are similarly connected with one's personhood, they are sufficiently distinct to warrant separate consideration under the law.

First, publicity rights are not subject to the thick overlay of state regulation that, for good or ill, governs the disposition of the body after death. Moreover, the decisions that heirs and devisees must make regarding the exploitation of valuable publicity rights may be far more complicated than the choice of where to bury the deceased and are less closely associated with the immediate grief that follows a family member's death.[65] Second, unlike copyrights, publicity rights are not created by federal statute and should not be subjected to rules that are of doubtful merit even in the copyright context.[66] The connection between publicity rights and personhood does not

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[60] This does not mean that a transfer of significant wealth will necessarily occur whenever a celebrity dies, but only that the law permits such a transfer to occur. *Cf. infra* note 312 and accompanying text (explaining why publicity rights may be worthless in many cases).

[61] *See infra* note 136 and accompanying text.

[62] *See infra* notes 115–17 and accompanying text.

[63] *See* Westfall & Landau, *supra* note 30, at 83–84 (noting that most states now recognize postmortem right to publicity).

[64] *See infra* Part III.A–B.

[65] See Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1374–98 (2008) for a discussion of problems raised by strictly deferring to the decedent's testamentary intent with regard to the postmortem disposition of the body.

[66] For criticism of the limits on testamentary freedom imposed by copyright law, see Leeford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 167–89 (2006).

justify depriving a celebrity of the right to choose who will best protect his or her image over the long term.

Part IV addresses tax law and policy. I will begin by addressing the technical legal arguments of Gans, Crawford, and Blattmachr, who rely on authorities that, in my view, offer insufficient support for their conclusion. Section 2033 of the Code includes property in the decedent's gross estate "to the extent of the interest therein of the decedent at the time of his death."[67] Employee death benefits, the centerpiece of the latest arguments of Gans, Crawford, and Blattmachr,[68] admittedly may fall outside the scope of § 2033 in some circumstances.[69] This, however, is not a consequence of any statutory constraint on the power of testation, but rather relates to the fact that the decedent never had an ownership interest, while living, in the assets from which the survivor's benefit may be paid.[70] By contrast, when a decedent owns certain assets in fee simple at death, state statutory limitations on testamentary freedom do not remove those assets from the gross estate under § 2033.[71] Gans, Crawford, and Blattmachr concede that descendible publicity rights, as presently constituted, are "property owned by the decedent at death . . . that likely will be included in a decedent's gross estate."[72] To make publicity rights comparable to excluded employee death benefits, a state would have to impose substantial limitations on the *inter vivos* transferability of those rights, with potential consequences that Gans, Crawford, and Blattmachr have not yet

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[67] 26 U.S.C. § 2033 (2006).

[68] *See* Gans et al., *Fundamentals*, *supra* note 39, at 51–52 (discussing § 2033's applicability to employee death benefits).

[69] *See* Estate of Royce v. Comm'r, 46 B.T.A. 1090, 1093 (1942) (restricting § 2033 to probate assets); Edward A. Zelinsky, *Transfer Taxation Without Transfer: Reflections on Employer-Provided Death Benefits, Section 2039, Disclaimers, New Forms of Wealth, and the Evolution of the Federal Estate Tax*, 58 TUL. L. REV. 974, 983–84 (1984) (discussing Higgs' Estate v. Comm'r, 12 T.C. 280 (1949), *rev'd*, 184 F.2d 427 (3d Cir. 1950), in which the Internal Revenue Service attempted to tax a widow's portion of a joint survivor annuity, but failed to argue under § 2033).

[70] *See* Estate of DiMarco v. Comm'r, 87 T.C. 653, 663–64 (1986) (concluding that employee had no property interest in death benefits when those "benefits were payable out of the general assets of [the employer], not out of any fund in which decedent had a vested interest, and the benefits did not accrue until decedent's death").

[71] *See* Estate of Frost v. Comm'r, No. 17333-89, 1993 WL 75053, at *14 (T.C. Mar. 18, 1993) (holding that property subject to surviving spouse's elective share under state law is nonetheless "plainly subject to Federal estate tax" under I.R.C. § 2033).

[72] Gans et al., *Postmortem Rights*, *supra* note 39, at 206 & nn.16–17.

explored. Without such lifetime restrictions, only an amendment of the Code could remove postmortem publicity rights from the gross estate.

I will then move on to the more fundamental question of whether publicity rights should be given a special tax status as a matter of policy. Although current law does not support exempting publicity rights from taxation on the basis of a forced-heirship scheme, the Code could be changed to produce this result.[73] I will argue, however, that such a change would lack a coherent policy justification, because it would favor the children of celebrities in a tax scheme that arguably should aim to promote equality of opportunity.[74] Moreover, if forced heirship were generally recognized as a basis for tax avoidance, the abolition of freedom of testation could preempt the entire system of federal transfer taxation.

I will conclude Part IV by noting that publicity rights do pose valuation difficulties under tax law independent of any forced-heirship statute.[75] In many cases, perhaps most, the rights may actually be worthless. Rare is the celebrity whose fame is truly immortal and whose death will trigger a substantial estate tax liability at death. To guard against overvaluation, Congress could shift the statutory burden to the Internal Revenue Service (the Service) to establish that a celebrity's publicity rights are indeed worth enough to justify the imposition of tax. This would not prevent the Service from collecting tax at the death of a timeless icon, like Marilyn Monroe, to the extent that it could prove the value of her publicity rights at the time of her death. It would, however, offer more protection for the estates of celebrities whose fame dies along with them. On the other hand, if the Code were amended so as to undervalue postmortem publicity rights, such an amendment might lessen the tax incentive for giving the rights to charity. Congress would likely wish to promote charitable gifts like those

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[73] *See infra* Part IV.B.

[74] *See infra* notes 299–301 and accompanying text.

[75] On one difficulty, see Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 780–82 (1998). Madoff focuses on the potential that the estate tax may force certain families to exploit postmortem publicity rights in a way contrary to the preference of the deceased celebrity.

made by Brown and Newman.[76] Part V will offer some brief concluding thoughts.

II. THE PATH TO POSTMORTEM PUBLICITY RIGHTS

The right of publicity, defined as the right to control the commercial use of one's identity by others, traces its origins back to the general concept of a right of privacy.[77] Publicity rights were not made alienable until the 1950s,[78] and it took many years for courts to accept the notion that publicity rights could survive the death of a celebrity.[79] Because the right of publicity permits an individual to restrict another person's speech, any expansion of the right in the United States may collide with the constitutional limitations of the First Amendment.[80] Nevertheless, in the last few decades of the twentieth century, American celebrities and their heirs and devisees successfully persuaded courts and legislatures to extend the right of publicity beyond the holder's death.[81] This Part will discuss the history of the right of publicity and how it came to be accepted as a legitimate property interest. There is no single compelling rationale for recognizing a right of publicity, but scholars have made several policy arguments that are relevant to the issue of testamentary freedom.

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[76] For pertinent policy discussions, see, for example, Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 273–320 (2007) (finding a strong normative case for a charitable deduction but a weaker case that it should be unlimited); and Xuan-Thao Nguyen & Jeffrey A. Maine, *Giving Intellectual Property*, 39 U.C. DAVIS L. REV. 1721, 1734–43 (2006) (arguing that the tax system should generally encourage the donation of intellectual property to charitable organizations).

[77] *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 1:3–:4 (2d ed. 2008) (chronicling the development of the right of publicity, beginning with the establishment of the right to privacy).

[78] *See* Westfall & Landau, *supra* note 30, at 76–79 (discussing Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953)).

[79] *See id.* at 83–89 (discussing debates among courts and commentators leading to recognition of survivable publicity rights).

[80] *See* Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment and the Right of Publicity*, 51 B.C. L. REV. (forthcoming 2010) (manuscript at 21), *available at* http://ssrn.com/abstract=1410372 (noting that analysis is "particularly complex" when publicity-right claim "involves potential damage to human dignity"); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 908–13 (2003) (discussing core constitutional dilemma).

[81] *See infra* notes 101, 105 and accompanying text.

A. PUBLICITY RIGHTS: A SHORT HISTORY

Publicity rights in the United States are grounded in the right of privacy,[82] which in turn traces its origins to an 1890 article by Samuel Warren and Louis Brandeis.[83] Perturbed by the publication of newspaper gossip about private persons, Warren and Brandeis argued that a right to privacy is inherent in the law's protection against unauthorized publication of manuscripts and artistic creations, and that this right was not grounded in the concept of property in its ordinary sense.[84] According to Warren and Brandeis, however, the right came with limitations.[85] It did not, for example, protect against the "publication of matter which is of public or general interest," as when "a man's life has ceased to be private."[86]

Although the concept of a right of privacy was not immediately embraced by the courts, it gradually gained approval, until, by 1960, few U.S. jurisdictions rejected the concept and a broad majority embraced it.[87] Warren and Brandeis's original conclusion, that those bothered by "idle or prurient curiosity" should have a legal cause of action,[88] has had a greater impact on legal theory than on actual U.S. practice.[89] By discovering an inherent right of privacy in the

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[82] *See supra* note 77 and accompanying text.

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

[84] *See id.* at 196–205 (noting that because part of the value of the right is the "peace of mind or the relief afforded to prevent any publication" of the claimant's work, "it is difficult to regard the right as one of property"). On the circumstances that led to the writing of the Warren and Brandeis article, which may have involved newspaper reports of a party given by the Warrens, see, for example, Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 295–96 (1983). The article may also be seen, however, as an attempt to introduce into U.S. law a broader concept of privacy protection from Continental Europe. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1204–06 (2004) ("[I]t is best to think of the Warren and Brandeis tort not as a great American innovation, but as an unsuccessful continental transplant.").

[85] *See* Warren & Brandeis, *supra* note 83, at 214 (excluding matters of public interest).

[86] *Id.* at 214–15.

[87] *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 384–88 (1960) (chronicling the gradual acceptance of the right of privacy by state courts beginning with New York).

[88] Warren & Brandeis, *supra* note 83, at 220.

[89] *See* LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 221 (2007) ("The twentieth-century story . . . is in part a story of the decline and fall of one form of protection of privacy and secrecy for the rich and the powerful."); *see also* Rodney A. Smolla, *Privacy and the First*

law, however, Warren and Brandeis laid the essential foundation for the development of the right of publicity.

The term "right of publicity" was first used in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a Second Circuit case from 1953 involving a dispute between two manufacturers of chewing gum.[90] In the case, a baseball player had entered into a contract with the plaintiff that granted the plaintiff an exclusive right to use the player's image in connection with the plaintiff's chewing gum. Despite an exclusivity provision that limited the right solely to the plaintiff, the player subsequently entered into a similar contract with another chewing gum manufacturer, the defendant.[91] The issue was whether the baseball player had a right to the use of his photograph that was assignable to the plaintiff on an exclusive basis.[92]

In resolving the case, the court turned to sections 50 and 51 of the New York Civil Rights Law,[93] which, under the rubric of a right of privacy, prevented the unauthorized use of a living person's image for commercial purposes.[94] The New York legislature enacted these provisions in 1903 in response to a Court of Appeals decision denying the existence of an actionable right of privacy of the sort envisioned in the Warren and Brandeis article.[95] Prior to the *Haelan* decision, however, it was unclear whether the right delineated in the New York statute could be assigned to others. Presented with this question, the *Haelan* court held that an assignable "right of publicity" existed "in addition to and independent of" the statutory right of privacy.[96] The court declined to decide whether the right of publicity could be considered a " 'property' " right, calling the

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Amendment Right to Gather News, 67 GEO. WASH. L. REV. 1097, 1101 (1999) (stating that the tort of publication of private facts "often seems to exist more 'in the books' than in practice").

[90] 202 F.2d 866, 867 (1953).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney Supp. 2008) (making unauthorized use of image a misdemeanor and authorizing private right of action for retrospective and prospective relief).

[95] *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443, 447–48 (N.Y. 1902) ("[T]he so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence. . . ."); Prosser, *supra* note 87, at 385 (discussing *Roberson* opinion).

[96] *Haelan*, 202 F.2d at 868.

question "immaterial" notwithstanding the obvious pecuniary value of the player's image.[97]

Law review commentators soon began to address the question left unanswered by the *Haelan* court. Melville Nimmer insisted in 1954 that the right of publicity "must be recognized as a property (not a personal) right."[98] In 1960, Harold Gordon reinforced this view, arguing that the status of the right as a property interest determined the severity of the injury.[99] By contrast, William Prosser echoed the sentiment of the *Haelan* opinion, calling it "pointless to dispute over whether such a right is to be classified as 'property' "; nevertheless, he agreed that the right had a "proprietary nature."[100]

In 1962, the Second Circuit was forced to address the issue of whether publicity rights were property. In *Miller v. Commissioner*, an income tax dispute arising nearly two decades after the death of renowned bandleader Glenn Miller, the court was asked to determine whether the right to create and distribute a film based on Miller's life was a capital asset under the Code, which in turn depended on its status as "property" as a matter of state law.[101] Acknowledging that the *Haelan* decision had recognized a right of publicity, the *Miller* court nonetheless noted that the *Haelan* court had carefully avoided defining such a right as a property interest and the *Miller* court declined to take this extra step.[102] At least after Miller's death, the court held, the right to make use of his image was not property.[103]

Over the two decades following the *Miller* decision, the weight of opinion gradually shifted in favor of recognizing publicity rights as

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[97] *Id.*

[98] Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

[99] *See* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 607 (1960) ("[I]n the light of the state of the law in this field, the tag 'property' becomes material as furnishing a firm basis for distinguishing between claims which have a solid pecuniary worth and those involving injured feelings.").

[100] Prosser, *supra* note 87, at 406.

[101] 299 F.2d 706, 707–08 (2d Cir. 1962). Miller died in 1944, but his popularity continued long afterward. *See id.* at 707 (noting that a motion picture on Miller's life yielded over four hundred thousand dollars for his widow ten years after his death).

[102] *Id.* at 707–11.

[103] *See id.* at 711 ("We do not believe that for income tax computation purposes the beneficiaries of the estate of a deceased entertainer receive by descent a capitalizable 'property' in the name, reputation, right of publicity, right of privacy or 'public image' of the deceased . . . .").

property. In 1977, the *Restatement (Second) of Torts*, drafted under Prosser's supervision as Chief Reporter, stated clearly that the appropriation of a person's name or likeness "is in the nature of a property right."[104] With the question of whether the right was property answered, the debate turned to whether the right terminated upon the celebrity's death. A few early opinions inferred from the designation of publicity rights as property interests that the rights must survive the death of the holder.[105] Other courts, however, declined to draw this conclusion, reasoning that considerations of policy, especially the public's interest in the free flow of information, counseled against the recognition of postmortem publicity rights.[106]

Law review commentators soon took up the issue. A few argued in favor of survivability on grounds of public policy,[107] while others concluded that survivability followed from the conclusion that

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[104] RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977); *see also* Westfall & Landau, *supra* note 30, at 81 (discussing Prosser's influence in writing section 652C).

[105] *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978) ("The identification of this exclusive right [of publicity] as a transferable property right compels the conclusion that the right survives [the celebrity's] death."), *vacated as moot*, Pirone v. MacMillan, Inc., 894 F.2d 579, 585–86 (2d Cir. 1990); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975) ("There appears to be no logical reason to terminate [the publicity] right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a 'property right.' "), *abrogation recognized by* Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc., 867 F. Supp. 175, 190 n.17 (S.D.N.Y. 1994); State *ex rel.* Elvis Presley Int'l Memorial, 733 S.W.2d 89, 97–98 (Tenn. Ct. App. 1987) ("If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death.").

[106] *See* Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 960 (6th Cir. 1980) ("It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few. An equal distribution of the opportunity to use the name of the dead seems preferable."); Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) ("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."), *superseded by statute*, CAL. CIV. CODE § 3344.1 (West 2008), *as recognized in* Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1024 (C.D. Cal. 1998).

[107] *See, e.g.*, Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1132 (1980) ("The inheritance of publicity rights serves to support a major social policy already recognized in the copyright laws."); Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 228 (1983) ("[A] freely descendible right of publicity for all individuals is the only approach which truly vindicates the primary interests protected by the right of publicity.").

publicity rights were property.[108] Some contended that policy considerations actually weighed against making the right survivable.[109] Courts and legislatures, however, generally opted in favor of survivability. Currently, nineteen states recognize a postmortem right of publicity, either by statute or by judicial decision, while only two states, New York and Wisconsin, continue to deny survivability.[110] Nevertheless, the issue is not entirely settled, as the recent litigation over Marilyn Monroe's estate has shown.[111] Continued resistance to survivable publicity rights in New York stems from the fact that the right to privacy is recognized in the state only by virtue of a statute, and the existence of an independent common-law right of publicity is denied.[112] Even if a postmortem right of publicity is recognized, there are compelling reasons to impose a temporal limitation on the right so that it does not become a perpetuity; yet any temporal limitation is likely to be

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[108] *See, e.g.*, Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 497 (1981) ("The right of publicity should be survivable generally in the hands of heirs, beneficiaries, and assignees because of its essentially proprietary nature . . . ."); Ben C. Adams, Recent Development, *Inheritability of the Right of Publicity Upon the Death of the Famous*, 33 VAND. L. REV. 1251, 1252 (1980) ("[T]he right of publicity should be inheritable for a designated period of time and that inheritability should not depend upon previous exploitation of the right."); Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527, 545 (1976) ("[O]nce the publicity right is accurately depicted as a property right, the conclusion that it passes on death flows as a matter of course.").

[109] *See, e.g.*, Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 137 (1980) ("[T]he arguments against recognition of a post-mortem right of publicity appear compelling. . . . To the extent that the right of publicity conflicts with the right of free expression, such conflict would be prolonged by post-mortem recognition of the right.").

[110] 2 MCCARTHY, *supra* note 77, §§ 9.18–.40. Survivability has been repudiated by a state court in New York, and a federal court has held that publicity rights do not survive death in Wisconsin. *See* Hagen v. Dahmer, No. 94-C-0485, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995) (concluding that Wisconsin's common-law right of publicity is only recognized for living people); James v. Delilah Films, Inc., 544 N.Y.S.2d 447, 451 (Sup. Ct. 1989) (holding no cause of action on behalf of successors-in-interest of right of publicity). A recent effort to overturn the New York case law and provide for survivability by statute has stalled in the state legislature. *See* S.B. S6005, 2007 Gen. Assem., Reg. Sess. (N.Y. 2007), *available at* http://public.leginfo.state.ny.us (click "Locate by Document Number" and search Bill number "S6005" in year "2007"); 2 MCCARTHY, *supra* note 77, § 9.31 (discussing New York's legislative proposal).

[111] *See supra* notes 25–27 and accompanying text.

[112] *See* Antonetty v. Cuomo, 502 N.Y.S.2d 902, 905–06 (Sup. Ct. 1986) (noting absence of common-law cause of action for violation of right of privacy). This is a consequence of the *Roberson* decision, discussed *supra* note 95 and accompanying text.

an arbitrary limitation.[113] Despite the tide of opinion in favor of survivability, the ultimate derivation of publicity rights from the right of privacy continues to be a source of dispute.[114]

B. THE CASE FOR PUBLICITY RIGHTS

Since the concept first emerged in the 1950s, scholars and jurists have offered many different justifications for recognizing a right of publicity. Some are concerned merely with the existence of the right during a celebrity's lifetime, while others aim to defend a postmortem right as well. Although the numerous justifications that have been offered defy simple categorization, one useful distinction might be between arguments that are primarily economic, evaluating the impact on society as a whole, and those that take a more moral and individualistic approach. Both types of arguments have some bearing on the survivability of publicity rights, but neither has escaped scholarly criticism.

1. The Economic Case. A common economic argument made in defense of publicity rights generally, and postmortem publicity rights in particular, is that they provide an incentive for a celebrity to work hard and engage in creative endeavors that benefit society.[115] This claim is related to the standard justification for granting patents to inventors and allowing authors to retain copyrights in their works.[116] As applied to postmortem publicity

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[113] *See* Hoffman, *supra* note 109, at 138 ("If the right of publicity is to descend yet not extend to perpetuity, a durational limit must be set. Yet any term of years chosen would be arbitrary . . . ."). The California statute sets a time limit of seventy years from the death of the deceased celebrity, and provides that no action may be brought regarding use of the celebrity's name, likeness, or image occurring after this period. CAL. CIV. CODE § 3344.1(g) (West Supp. 2008).

[114] *Cf.* Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1, 64 (1985) (attributing the inadequacy of reform proposals to the fact "that the right of publicity cannot be separated easily from its roots in the right of privacy, as some have apparently thought").

[115] *See, e.g.*, Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982) ("Recognition of the right of publicity rewards and thereby encourages effort and creativity."); Felcher & Rubin, *supra* note 107, at 1128 ("The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts.").

[116] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."); Zacchini v.

rights, moreover, it is a branch of a general argument that has long been made in defense of freedom of testation.[117] At least in the publicity rights context, however, the incentive argument lacks supporting empirical evidence.[118]

Given that millions of consumers are willing to pay substantial sums to hear and see well-known musicians and actors, those entertainers who are successful can expect generous compensation regardless of whether a legal right of publicity exists.[119] Merchandising and advertising, the two main contexts in which a publicity right matters, are ancillary activities for many celebrities, whose main income stream comes from performance.[120] The lack of a right to publicity in the early twentieth century does not seem to have deterred young Americans from seeking careers in show

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Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (reasoning that protection of right of publicity "provides an economic incentive for [the performer] to make the investment required to produce a performance of interest to the public" and that "[t]his same consideration underlies the patent and copyright laws long enforced by this Court").

[117] *See, e.g.*, 1 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY, IN THREE BOOKS 352 (1755) (arguing that "industry shall be much discouraged" if the right of testation were eliminated); HENRY SIDGWICK, THE ELEMENTS OF POLITICS 53 (4th ed. 1919) ("[T]he abrogation of the power of bequest would remove from [the individual] an important inducement to the exercise of industry and thrift in advancing years. . . ."). The argument dates to at least the medieval period, appearing in the thirteenth-century English treatise known as *Bracton* as a defense of testamentary freedom. *See* 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine ed., Samuel E. Thorne ed. & trans., Harvard Univ. Press 1968) (c. 1235) ("[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives.").

[118] *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 207 (1993) (arguing that there is no evidence in support of incentive argument). This objection is not necessarily limited to the publicity rights context. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992) (noting that individuals may strive to accumulate wealth beyond needs of lifetime consumption for variety of reasons unrelated to power of testation); *see also* A.C. PIGOU, THE ECONOMICS OF WELFARE 718–19 (4th ed. 1932) (suggesting that transfer taxes "should impose a relatively small check upon the creation of capital" because individuals have other reasons to accumulate wealth besides desire to direct its disposition after death). Indeed, some wealthy individuals go to great pains to avoid publicity. *See, e.g.*, *In re* Estate of Hearst, 136 Cal. Rptr. 821, 822–25 (Cal. Ct. App. 1977) (reviewing petition to seal probate records of wealthy decedent in order to protect family members from kidnapping).

[119] *See* Madow, *supra* note 118, at 209–11 ("Abolition of the right of publicity would leave entirely unimpaired a celebrity's ability to earn a living . . . .").

[120] *See* Westfall & Landau, *supra* note 30, at 88 ("[A]dvertising and merchandising is usually an incidental and not a primary activity for the celebrity . . . .").

business.[121] Furthermore, even if the prospect of *inter vivos* publicity rights encouraged celebrities (or would-be celebrities) to work harder, it does not follow that making those rights devisable or descendible would have substantially increased that incentive.[122] One suspects that if publicity rights were held to terminate at death—or even abolished entirely—Hollywood studios would nonetheless be able to hire competent actors for next year's summer blockbusters, and major-league sports teams would encounter little difficulty drafting new players.

Another economic argument in favor of publicity rights has to do with the so-called "tragedy of the commons," i.e., the notion that a resource that can be exploited by everyone without regulation will eventually be reduced to nothing.[123] According to this argument, because private property rights internalize the externalities that result from overuse, they can reduce or eliminate this problem.[124] In the advertising context, this means that celebrity images will not be overused, but rather will be licensed to those advertisers who value them the most.[125] If granting a property right in a celebrity's image protects its pecuniary value to commercial licensees, making the right survivable further increases the value, as the licensees need not fear losing their interests at the celebrity's death.[126]

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[121] *See, e.g.*, 42ND STREET (Warner Bros. Pictures 1933) (depicting allure of Broadway employment in depths of Great Depression).

[122] *See* Hoffman, *supra* note 109, at 136 ("[I]t is hard to see how making the right of publicity inheritable could result in an increase in creative endeavors over that which would result if the right were limited to living celebrities.").

[123] *See, e.g.*, H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124, 135 (1954) ("Wealth that is free for all is valued by none because he who is foolhardy enough to wait for its proper time of use will only find that it has been taken by another."). The term "tragedy of the commons" comes from an article by Garrett Hardin, although he did not invent the concept. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[124] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) ("[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.").

[125] *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978) ("There is a perfectly good economic reason for assigning the property right in a photograph . . . this assignment assures that the advertiser to whom the photograph is most valuable will purchase it.").

[126] *See* Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982) ("If the right of publicity dies with the celebrity, the economic value of the right of publicity would be diminished . . . ."); Westfall & Landau, *supra* note 30, at 88 (noting that licensees would prefer rights with fixed duration rather than "arbitrary cut-off

Like the economic incentive argument, the tragedy of the commons argument for recognizing publicity rights has its flaws. It is not clear, for example, whether overexploitation of a celebrity's image actually reduces the value of the image to society as a whole, as opposed to the value to the celebrity. As Michael Madow has argued, "A Madonna T-shirt may be worth *more*, not less, to consumers precisely because millions of her fans are already wearing them."[127] Unlike land, fish, and other scarce resources, the supply of celebrity images is limited only by the public's willingness to accept particular individuals as being worthy of fame.[128] Some forms of property are better owned and managed by society as a whole rather than by individuals.[129]

Consumer protection provides another rationale for publicity rights, stemming from the tragedy of the commons argument. Celebrity endorsements arguably provide useful information to consumers because consumers could view a celebrity's willingness to risk his or her reputation by endorsing a product as a signal of the product's quality.[130] A principal difficulty with this argument, apart from the lack of supporting empirical evidence, is that rights of publicity allow celebrities to prevent not only misleading or fraudulent uses of their images, but also relatively benign uses.[131] Thus, publicity rights overprotect against the danger that consumers will be deceived. Moreover, any reliance on celebrity endorsements by consumers may be a consequence of the current legal recognition

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date" at celebrity's death).

[127] Madow, *supra* note 118, at 222 (emphasis in original).

[128] *See id.* at 224 (noting that celebrity is a "social creation" and a renewable resource).

[129] *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986) (describing a category of "inherently public" property that is "collectively 'owned' and 'managed' by society at large").

[130] *See* James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 645 (1973) ("Even in areas outside the celebrity's specialty the notion of sponsorship may contribute to a consumer's reactions to his endorsement."); Douglas G. Baird, Note, *Human Cannonballs and the First Amendment:* Zacchini v. Scripps-Howard Broadcasting Co., 30 STAN. L. REV. 1185, 1186 n.7 (1978) (analogizing right of publicity to trademark).

[131] *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 833, 837 (6th Cir. 1983) (denying right to market portable toilets using entertainer's catchphrase on ground of entertainer's right of publicity); Madow, *supra* note 118, at 230–35 (arguing that consumers are adequately protected by federal and state law regarding deceptive trade practices, and any additional safeguard provided by the right of publicity is "redundant").

given to publicity rights.[132] If consumer protection were the sole concern with regard to celebrity endorsements, the law could allow unlimited use of a celebrity's image but require a disclaimer if the celebrity had not personally consented to the use.[133] In any case, the consumer protection argument does not effectively justify postmortem publicity rights, because a deceased celebrity cannot vouch for the quality of a new product, or for the continuing quality of a product endorsed during the celebrity's lifetime.

2. *The Moral Case.* In addition to economic arguments, certain philosophical arguments are made in favor of recognizing publicity rights. First among these arguments is the so-called labor theory of property as articulated by the seventeenth-century philosopher John Locke. In Locke's view, because "every Man has a *Property* in his own *Person*," it follows that "[t]he *Labour* of his Body, and the *Work* of his Hands . . . are properly his."[134] Commentators and judges have used similar reasoning in defending a celebrity's right of publicity, alleging it to be a product of the celebrity's labor or an outgrowth of the celebrity's personhood.[135] A corollary argument is that anyone who makes use of a celebrity's image without his or her permission is thereby unjustly enriched.[136] Thus, there is a moral case in favor

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[132] *See* Madow, *supra* note 118, at 235 (noting that reduced legal protection of publicity rights would likely change consumer reaction to celebrity advertising).

[133] Alternatively, the law could allow celebrities to designate certain products with an "official" endorsement, and permit only a producer that had received this seal of approval from marketing its product as the "official version." *Id.* at 236.

[134] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis in original).

[135] *See, e.g.*, Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) ("A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property."); MCCARTHY, *supra* note 77, § 2:1 ("Perhaps nothing is so strongly intuited as the notion that my identity is *mine*—it is my property to control as I see fit." (emphasis in original)); Sims, *supra* note 108, at 459 ("Like the goodwill of a business or a self-employed professional, the value of the celebrity's right of publicity lies in his creation of a positive or otherwise intriguing image in the public mind . . . .").

[136] *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 581 (1977) (Powell, J., dissenting) (suggesting that unjust enrichment is reason for recognizing publicity rights); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978) (holding that postmortem publicity rights must be upheld in order to avoid giving "windfall" to nonlicensees), *vacated as moot*, Pirone v. MacMillan, Inc., 894 F.2d 579, 585–86 (2d Cir. 1990).

of recognizing publicity rights, independent of whatever incentive effect might result from recognizing them.

Publicity rights, however, may differ from other property created through labor, to the extent that they derive their value from a combination of luck, media attention, and public acclaim, not from the celebrity's own efforts.[137] The recent story of Vickie Lynn Marshall illustrates this point. Vickie, a former waitress and exotic dancer, catapulted to fame as Anna Nicole Smith after being selected as the 1993 "Playmate of the Year" in *Playboy* magazine and attracting the attention of J. Howard Marshall, one of the wealthiest men in America.[138] Howard, who met the young and attractive Vickie in a Houston strip club, married her despite being more than sixty years her senior.[139] During her marriage, and after Howard's death in 1995, Vickie (as Anna) acted in several movies, hosted her own television show on the E! network, and served as a spokeswoman for TrimSpa, a diet supplement, before dying an early death in 2007.[140]

The story of Anna Nicole Smith is not easily reconciled with Locke's labor theory of property.[141] Although Anna may have worked hard to become a celebrity, a tremendous amount of good fortune—being the right person at the right place at the right time—clearly played a significant role.[142] Had Anna never met

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[137] *See* Madow, *supra* note 118, at 188–96 (discussing fame as socially-created construct that depends on factors other than merit).

[138] Abby Goodnough & Margalit Fox, *Anna Nicole Smith Is Found Dead at a Florida Hotel*, N.Y. TIMES, Feb. 9, 2007, at A12.

[139] *In re* Marshall, 275 B.R. 5, 18–23 (C.D. Cal. 2002).

[140] *See* Goodnough & Fox, *supra* note 138 (chronicling Smith's later career).

[141] Another contemporary example might be Samuel "Joe the Plumber" Wurzelbacher, whose chance encounter with Barack Obama during the 2008 presidential campaign and subsequent centrality to the final presidential debate made him a national icon among conservatives, leading to a book deal and eventually an assignment as a war correspondent in Israel. *See* Timothy Egan, *Typing Without a Clue*, N.Y. TIMES, Dec. 7, 2008 (discussing Wurzelbacher's quick rise to fame); Shelly Paz, *Joe the Plumber Is Here, and He Ain't Happy*, JERUSALEM POST, Jan. 12, 2009 (reporting on Wurzelbacher's visit to Israel); Larry Rohter, *Plumber from Ohio Is Thrust into Spotlight*, N.Y. TIMES, Oct. 16, 2008, at A27 (chronicling Wurzelbacher's various appearances on national television).

[142] On the relative insignificance of individual merit in the achievement of fame, see generally MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 17–20 (2008) (noting that successful people "are invariably the beneficiaries of hidden advantages and extraordinary opportunities and cultural legacies that allow them to learn and work hard and make sense of the world in ways others cannot").

Howard, and had *Playboy* not selected her for a pictorial, she might have spent the rest of her life working at a strip club. One may doubt whether either of these momentous events had much to do with Anna's own personal work ethic. It is difficult, therefore, to disentangle Anna's natural right to the profit made from her image from that of *Playboy* magazine, or Howard's estate, or society at large. It is even more difficult to view Anna's heirs or devisees as having some natural claim to that profit, to the extent that any profit can be made from Anna's image in the future.[143]

In short, the labor theory of property provides a weak justification for publicity rights, because a celebrity's image is not necessarily a product of the celebrity's own labor. This does not mean, however, that publicity rights lack moral justification. In a recent article, Mark McKenna raises a different moral argument, which he terms "autonomous self-definition."[144] According to McKenna, "because an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning."[145] McKenna uses an example of an elderly couple who were unwittingly filmed walking through a park, and discovered the footage was being used in a television commercial for erectile dysfunction medication. The husband became angry, not because his image was being shown on television, but because of the implication that he suffered from impotence.[146] McKenna concludes that each individual, celebrity or otherwise, should be able to prevent the public use of his or her image in a manner that conflicts with the individual's self-definition.[147]

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[143] Although the right of publicity is a creature of state law, federal law recognizes a "right of attribution and integrity" for the author of a work of visual art. Unlike state publicity rights, however, this federal right is expressly limited to the life of the author. *See* 17 U.S.C. § 106A(d) (2006) ("[T]he rights conferred by subsection (a) [regarding attribution and integrity] shall endure for a term consisting of the life of the author.").

[144] Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 231 (2005).

[145] *Id.* at 279.

[146] *Id.* at 280.

[147] *See id.* at 294 ("Because the things with which individuals choose to associate reflect the way they wish to be perceived, unauthorized use of one's identity in connection with products or services threatens to define that individual to the world.").

McKenna's moral argument may be the strongest case to date for recognizing a right of publicity. By grounding the right in reputational concerns, McKenna has reestablished the right's pedigree as a descendant of the right of privacy. Reputational concerns, however, were not the driving force behind the movement to make the right of publicity survivable, which took its cue primarily from the definition of the right as a property interest.[148] If reputational protection is the sole persuasive rationale for publicity rights, it is not self-evident that they should be survivable, or even transferable.[149] Nevertheless, the recent intervention of the California legislature in favor of the Monroe estate suggests that postmortem publicity rights are not likely to disappear in the near future.[150]

Some have defended freedom of testation as a general principle on the grounds that humans are naturally or socially predisposed to give effect to the last wishes of deceased persons.[151] As Adam Smith

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[148] *See supra* notes 105–06 and accompanying text.

[149] For a recent critique of the postmortem extension of publicity rights, see Michael Decker, Note, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243, 256–71 (2009). For a discussion of how extending publicity rights to noncelebrities on reputational grounds implicates special First Amendment concerns, see Alicia M. Hunt, Comment, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 1611–12 (2001). Overall, American law has traditionally frowned upon the monopolization of intangible property, except when some compelling policy rationale exists, as in the case of patents and copyrights. *See* Madow, *supra* note 118, at 200–05 ("The general American rule . . . has long been that absent some special and compelling need for protection . . . *intangible* products . . . are as 'free as the air to common use.' " (emphasis in original)). Institutional pressures in the American legal system, however, can lead to a lack of consistency in the application of such principles. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 68 (2000) (suggesting that "compact and well-organized private interests" may have pressured local courts in Tennessee to recognize right of publicity); J. Eugene Salomon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1179–91 (1987) (criticizing development of divergent state and federal regulatory regimes regarding publicity rights); *cf.* Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 N.Y.U. ANN. SURV. AM. L. 291, 295–98 (2000) (discussing general problem of inconsistency in appellate adjudication).

[150] *See supra* note 25 and accompanying text.

[151] *See, e.g.*, LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955) ("A compelling argument in favor of [testation] is that it accords with human wishes."); *see also* Sherman, *supra* note 33, at 1298 ("[P]eople want the right to bequeath, and . . . as a matter of . . . self-protection on the part of the governors—the law should give people what they want unless powerful principles or constraints countervail.").

once explained, we "naturally find a pleasure in remembering the last words of a friend and in executing his last injunctions," because of our so-called piety for the dead.[152] If this is true, it might provide a justification for survivable publicity rights that does not depend on their status as a property interest.[153] Giving effect to the last wishes of the dead, however, means recognizing freedom of testation, and American law has historically imposed some limits on that freedom with regard to rights intimately connected with personhood.[154] The next Part will explore the reasons for this and ask whether publicity rights should be treated in a similar way.

III. PERSONAL RIGHTS AND FAMILY PROTECTION

Freedom of testation is the fundamental principle underlying inheritance law in the United States.[155] There are some limitations on this freedom, especially with regard to a testator's spouse, who may be protected by an elective-share statute or community-property law.[156] In general, however, each individual has a broad right to leave property to persons of his or her choosing, even if this means disinheriting the individual's own descendants.[157] Nevertheless, when it comes to certain rights closely intertwined with the person of the testator, American law has ironically tended to give more weight to the wishes of the testator's family, even when they conflict with the testator's stated intention.

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[152] ADAM SMITH, LECTURES ON JURISPRUDENCE 466 (R.L. Meek et al. eds., 1978) (1766). This may be related to a concept of intergenerational equity found in some traditional legal cultures, which see "no valid temporal distinction between the dead, the living, and the yet to be born." H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 75–76 (2d ed. 2004).

[153] On the psychological implications of self-expression through bequests, which can serve a utilitarian function, see Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 199–200 (1989); and Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 52–56 (1999).

[154] *See supra* notes 65–66 and accompanying text.

[155] *See* Hirsch, *supra* note 32, at 239 (noting that testamentary freedom is broader in America than anywhere in Western world).

[156] *See* sources cited *supra* note 32.

[157] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) ("The organizing principle of the American law of donative transfers is freedom of disposition."); *cf.* Tate, *supra* note 58, at 134 (arguing that U.S. rule is justified in order to allow elderly persons to reward their caregivers).

In an influential article, Margaret Radin argues that some types of property, such as "a wedding ring, a portrait, an heirloom, or a house," should be treated differently under the law in some circumstances because they are intrinsically bound with personhood.[158] Moreover, some potential assets, such as the cells in one's body, are so intimately connected with one's personhood that courts may not consider them "property" at all.[159] Because commercial transactions with respect to those assets violate general moral sensibilities, the law may follow a paternalistic approach and adopt a rule of inalienability, at least during the lifetime of the person concerned.[160] This paternalism may not apply to gratuitous transfers at death.[161] The question, then, is whether moral or other concerns should lead courts or legislatures to restrict testamentary transfers of rights that are a reflection of the owner's personhood. This Part will discuss two contexts where this has historically been the case: (1) state law pertaining to the control of one's body at death and (2) federal copyright law. The historical interference with

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[158] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61, 1014–15 (1982). Building on Radin's theory in the context of estate taxation, Ray Madoff has criticized what she terms the "myth of fungibility," or the false notion that all property interests can be assigned an objective value independent of their personal connection with the owner. *See* Madoff, *supra* note 75, at 795–800 ("Although the estate tax system treats all property as fungible, people do not think of or treat all of their property as fungible."). For recent commentary on Radin's theory of property as personhood, see, for example, Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 341–46 (2008); and Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1109–15 (2009).

[159] *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 491–92 (Cal. 1990) (holding that patient has no property interest in cells excised from his body). *But see* Hecht v. Superior Ct., 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (holding that decedent's sperm is property that may be part of his estate). Another example is a person's name, which is generally not considered a property interest, although French law treated it as such prior to the late nineteenth century and the modern law is more complicated than one might assume. Audrey Guinchard, *Is the Name Property? Comparing the English and the French Evolution*, 1 J. CIV. L. STUD. 21, 22–25 (2008).

[160] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972) (discussing inalienability and moralism with respect to selling oneself "into slavery," taking "undue risks of becoming penniless," and selling "a kidney").

[161] *See, e.g.*, REV. UNIF. ANATOMICAL GIFT ACT §§ 4–5, 7, 11 (amended 2006), 8 U.L.A. 61–62, 65, 72, 84–85 (Supp. 2009) (allowing, but not requiring, individuals to donate all or part of their bodies for specific purposes or to specific individuals or institutions). *But see* ERIC RAKOWSKI, EQUAL JUSTICE 167–95 (1991) (discussing compulsory postmortem transplants of human organs).

testamentary freedom in these contexts does not offer much, if any, support for a forced share for publicity rights.

A. DISPOSITION OF THE BODY

The United States inherited its legal tradition from England, a country that, unlike our republic, has long had an officially sanctioned church.[162] From an early date, the presence of an established church shaped the development of English law relating to the disposition of a deceased person's body.[163] Sir Edward Coke summed up the common law's position in the seventeenth century by explaining that "[t]he buriall of the Cadaver . . . is nullius in bonis [no one's property], and belongs to Ecclesiasticall cognizance," although a common-law action would lie for the destruction of a funeral monument.[164] While the disposition of a corpse was generally a straightforward matter in pre-industrial England, disputes could and did arise concerning the place and manner of burial.[165] Such disputes were governed by canon law and could be heard by an ecclesiastical court, even though church officials generally treated these disputes as administrative matters.[166]

When burial issues arose in English law prior to the late nineteenth century, Parliament and the courts generally favored the interests of the church and the needs of the community as a whole over the preferences of individuals.[167] Unless some ecclesiastical prohibition applied, every person who died in England had the right to Christian burial.[168] Special requests, however, would not

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[162] *See* 1 R.H. HELMHOLZ, OXFORD HISTORY OF THE LAW OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 1–64 (2004) (describing development of English church law).

[163] *See id.* at 392 (discussing how churches oversaw burial wishes).

[164] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 203 (London, M. Flesher 1644).

[165] *See* cases cited *infra* notes 169–72.

[166] *See* 1 HELMHOLZ, *supra* note 162, at 495. This did not mean that canon law was silent on the subject of burial. *See, e.g.*, X 3.28.3 (holding that a parishioner's choice of burial site would be invalid if it was a less sacred site, which parishioner selected out of malice); X 3.28.7 (ruling that a married woman could freely choose a burial site).

[167] *See* sources cited *supra* note 165.

[168] The Queen v. Stewart, (1840) 113 Eng. Rep. 1007, 1009 (K.B.).

necessarily be followed. For example, if a parishioner wished to be buried within the church itself, as opposed to the churchyard, his petition would be left to the discretion of the relevant church official.[169] The same rule applied if a parishioner wished to be buried in a particular part of the churchyard.[170] If a parishioner wished to be buried in another parish, he generally could not do so without the permission of the churchwardens of that parish.[171] Church officials also had the right to approve or disapprove monuments proposed to be erected in their churchyards.[172] A statute enacted during the reign of Charles II, ostensibly aimed at promoting the domestic textile industry, required deceased individuals to be buried in woolen clothes, excluding more lavish burial attire.[173] A parishioner could opt to be buried in an iron coffin if he paid an additional fee to the church.[174]

Because burial and "protection of the grave" was a matter for the church, the common law did not recognize "property in a corpse."[175]

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[169] In two related cases from the seventeenth century, the royal courts suggested that the discretion lay in the incumbent of the church. *See* Day v. Beddingfield, (1615) 74 Eng. Rep. 1070, 1070 (K.B.) (holding that only parson can grant burial license); Frances v. Ley, (1615) 79 Eng. Rep. 314, 315 (Star Chamber) (same); *see also* PETER SHERLOCK, MONUMENTS AND MEMORY IN EARLY MODERN ENGLAND 176 (2008) (discussing *Frances v. Ley* litigation). In 1867, however, the Privy Council held that the discretion to approve a family vault in a church or chapel lay with the Ordinary, who could approve the request over the incumbent's objection. *See* Rugg v. Kingsmill, (1867) 16 Eng. Rep. 445, 449–50 (P.C.) ("[T]he Ordinary would have jurisdiction over the vault itself."); JAMES BROOKE LITTLE, THE LAW OF BURIAL 22–23 (3d ed. 1902) (discussing *Rugg* case).

[170] *See Ex parte* Blackmore, (1830) 109 Eng. Rep. 732, 733 (K.B.) (holding that parishioner had "no legal right" to specify burial location).

[171] *See* Bardin v. Calcott, (1789) 161 Eng. Rep. 459, 460 (London Consistory Ct.) (noting that "there can be no absolute claim" by a stranger to be buried in parish). It may have been necessary to secure the approval of the parson as well. See 1 RICHARD BURN, THE ECCLESIASTICAL LAW 258–258a (Robert Phillimore ed., London, Sweet, Stevens & Norton 9th ed. 1842) (1763) (discussing a 1780 opinion on burying of strangers by George Harris, "[a] very eminent civilian").

[172] *See, e.g.*, Maidman v. Malpas, (1794) 161 Eng. Rep. 526, 527 (London Consistory Ct.) (holding that monuments cannot be erected without permission); *Bardin*, 161 Eng. Rep. at 459 (reserving ordinary's right to approve).

[173] An Act for Burying in Woollen Onely, 1666, 18 & 19 Car. 2, c. 4 (Eng.).

[174] *See* Gilbert v. Buzzard, (1820) 161 Eng. Rep. 1342, 1350–51 (London Consistory Ct.) (requiring additional payment for iron coffin).

[175] Regina v. Sharpe, (1857) 169 Eng. Rep. 959, 960 (Crim. App.). Contemporary English law has moved away from this position. *See, e.g.*, Yearworth v. North Bristol NHS Trust, [2009] EWCA (Civ) 37, ¶ 45(a) (appeal taken from Eng.) ("[D]evelopments in medical science now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body.").

In the 1882 case of *Williams v. Williams*, the Court of Chancery took the next logical step and declared the law of wills to be irrelevant to burial as well.[176] In that case, Henry Crookenden left a codicil directing that his body be given to a friend, Eliza Williams, and instructed Williams to have his body cremated.[177] Crookenden's widow buried the body instead and Williams subsequently received permission from the Home Secretary to disinter the body so she could cremate and rebury it. After Williams had the body burned, she sued the executors for reimbursement of the cremation expenses.[178] The court held that Williams was not entitled to recovery because "a man cannot by will dispose of his dead body."[179] Thus, more than three centuries after the Reformation, burial in England remained essentially governed by the law of the church.[180]

In the United States, the lack of an established church forced state courts and legislatures to rethink the rules relating to disposition of the body. One early and influential treatment of the issue came in the unlikely form of a report issued by a referee, Samuel B. Ruggles, in a case involving the division of damages occasioned by the widening of a New York street.[181] Because the proposed widening necessitated the taking of certain burial vaults, Ruggles took the opportunity to examine the law relating to burial and its historical development in England and elsewhere.[182] Ruggles ultimately inferred several conclusions from the fact that New York lacked an established church, including "[t]hat the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect," and "[t]hat such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin."[183] By acknowledging testamentary disposition, Ruggles left open the possibility that the last wishes of the decedent could be

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[176] (1882) 20 Ch.D. 659.

[177] *Id.* at 659–60.

[178] *Id.* at 661.

[179] *Id.* at 665.

[180] Under the 1832 Anatomy Act, however, an individual had the right to direct in writing that his body be examined (or not) for scientific purposes. An Act for Regulating Schools of Anatomy, 1832, 2 & 3 Will. 4, c. 75, §§ 7–8 (Eng.).

[181] *In re* Widening of Beekman St., 4 Bradf. app. at 503 (N.Y. Sur. Ct. 1856).

[182] *See id.* at 516–31 (discussing history of burial law).

[183] *Id.* at 532.

given precedence over the intentions of the decedent's surviving relatives.

Although much of Ruggles's report had no relevance to the case he was appointed to resolve, his learned discussion had a wide-ranging impact on the subsequent development of the American law of burial.[184] In the nineteenth and early twentieth centuries, however, American courts generally did not conclude that testamentary directions with regard to the body would take precedence over all else. Rather, courts tended to hold that the decedent's wishes would be entitled to "respectful consideration," but that the preferences of the testator's family were also relevant.[185] Cases on the subject often concerned claims by a surviving spouse against third parties who mutilated or mistreated the decedent's body,[186] or conflicts between the deceased's family members in which the last wishes of the decedent were aligned with the preference of the spouse.[187] When there was a direct conflict between the decedent's wishes and those of close family members, courts generally upheld the latter. For example, in a 1900 case involving an attempted testamentary delegation of burial decisions to a nonrelative, the California Supreme Court declined to enforce the will, citing *Williams* and state statutes on burial duties.[188] In a 1902 case, the Nebraska Supreme Court stated that the last wishes of the decedent might give way to the preference of his next of kin.[189]

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[184] *See* R.F. Martin, *Removal and Reinterment of Remains*, 21 A.L.R.2d 472 § 4(b) (1952) (discussing report's influence on American burial law). For some early citations to the Ruggles report, see Bogert v. City of Indianapolis, 1859 WL 4747, at *3 n.1 (Ind. 1859); Wynkoop v. Wynkoop, 1861 WL 5486, at *6–7 (Pa. 1862); and Pierce v. Proprietors of Swan Point Cemetery, 1872 WL 3582, at *5 (R.I. 1872).

[185] Pettigrew v. Pettigrew, 56 A. 878, 879–80 (Pa. 1904).

[186] *See, e.g.*, Louisville & Nashville R.R. Co. v. Wilson, 51 S.E. 24, 24–25 (Ga. 1905) (allowing widow to sue railroad for improper care of her late husband's body); Larson v. Chase, 50 N.W. 238, 238 (Minn. 1981) (recognizing cause of action on behalf of widow for unlawful mutilation and dissection of late husband).

[187] *See, e.g.*, Johnston v. Marinus, 18 Abb. N. Cas. 72, 72 (N.Y. Sup. Ct. 1886) (recognizing right of husband to dispose of deceased wife's body in accordance with her wishes).

[188] *See* Enos v. Snyder, 63 P. 170, 171–72 (Cal. 1900) (upholding rights of testator's widow and daughter).

[189] *See* McEntee v. Bonacum, 92 N.W. 633, 634 (Neb. 1902) ("That a dying request by a decedent as to the disposition of his remains is obligatory upon his next of kin, we very much doubt.").

Courts generally took an individualized approach in such cases, exercising broad discretion to resolve family conflicts.[190]

Over the years, American law has gradually moved toward embracing the principle of testamentary freedom with regard to the disposition of human remains.[191] Nevertheless, the law of burial has retained a focus on the interests of the decedent's family—interests that sometimes coexist uneasily with freedom of testation.[192] When a testator names someone other than a spouse or biological relative as the custodian of his or her remains, it is not certain that the nonrelative's choices will be respected in the event that those choices conflict with those of the testator's legally-defined family.[193] An individual who wishes to override the preferences of family members may make prepaid arrangements with a funeral home, hoping that matters will be handled according to the contract before the next of kin are able to interfere.[194] Therefore, while the American law of burial has veered far from its English origins, state courts have not yet demonstrated a commitment to the wishes of the dead that can withstand family resistance.

B. COPYRIGHT

Although the right to direct the disposition of the body at death may have some relevance to postmortem publicity rights, copyright law may provide a closer analogue. In *Zacchini v. Scripps-Howard*

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[190] *See* Foster, *supra* note 65, at 1385–98 (discussing such cases).

[191] *See, e.g.*, Kasmer v. Guardianship of Limner, 697 So. 2d 220, 220–21 (Fla. Dist. Ct. App. 1997) (requiring personal representatives to carry out decedent's wish to be cremated); Briggs v. Hemstreet-Briggs, 681 N.Y.S.2d 853, 855 (App. Div. 1998) (holding that an expressed wish to be buried near decedent's first spouse can prevail even if second, surviving spouse disapproves).

[192] *See* Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 982–89 (1999) (detailing tensions between courts' recognition of testamentary freedom and familial preferences); *cf.* Ann M. Murphy, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 398–99 (2007) ("Courts . . . have recognized a decedent's right to dictate the disposition of his or her remains. There are, however, limits on this right.").

[193] *See* Hernández, *supra* note 192, at 983–84 (noting courts' preferences for the wishes of the family); *cf.* Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, Inc., 606 N.Y.S.2d 965, 967–68 (App. Div. 1993) (noting that testamentary directions are "*usually* paramount to all other considerations, including the objections of the next of kin" (emphasis added)).

[194] *See* Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883, 901 (1989) (recommending this option as part of planning one's estate).

Broadcasting Co., for example, the U.S. Supreme Court expressly compared the right of publicity to patents and copyrights on the ground that, like those other rights, the right of publicity "provides an economic incentive . . . to make the investment required to produce a performance of interest to the public."[195] As discussed above, this argument has its flaws.[196] Before one could seriously consider a forced-heirship scheme for rights of publicity, however, one would need to take into account the history of testamentary freedom in the copyright context. Unlike state inheritance law, the federal law of copyright has tended to privilege the interests of the family over the wishes of the decedent. As will be discussed, however, this tendency in copyright law is best explained as an historical accident, which modern scholars have criticized as lacking any sound policy justification.

Copyright law in the United States traces its origins to a British statute enacted during the eighth year of Queen Anne's reign, referred to as the "Statute of Anne."[197] This 1710 statute established a two-term renewal system for copyrights in England and Scotland.[198] Under the statute, authors could assign a copyright to a printer for fourteen years, but at the end of the term the copyright would revert to the author, if living, for another fourteen years.[199] The purpose of this renewal provision was to give authors an opportunity to sell their copyrights a second time if the work had become more valuable at the end of the first term.[200]

In 1790, the U.S. Congress enacted the first federal copyright statute, and adopted the two-term renewal system used in the Statute of Anne.[201] Because the renewal rights only vested if the author survived the original term, the renewal provisions in

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[195] 433 U.S. 562, 576 (1977).

[196] *See supra* Part II.B.*1*.

[197] Copyright Act, 1710, 8 Ann., c. 19 (Gr. Brit.); *see* Tritt, *supra* note 66, at 144–47 (analyzing evolution of copyright law). The statute is sometimes erroneously cited as having been enacted in 1709, when in fact it was enacted the following year. *See* HARRY RANSOM, THE FIRST COPYRIGHT STATUTE 98 (1956) (providing explanation for confusion of details).

[198] Copyright Act, § 1; RANSOM, *supra* note 197, at 104.

[199] Copyright Act, §§ 1, 11.

[200] *See* RANSOM, *supra* note 197, at 104 (explaining author's options at the end of second term).

[201] *See* Act of May 31, 1790, ch. 15, 1 Stat. 124, 124 (repealed 1831) (stating protections provided by copyright and requirements for renewal).

the 1790 Act and its British model did not impact estate planning.[202] In 1831, however, Congress enacted a second federal copyright statute.[203] The 1831 statute extended the initial term to twenty-eight years, and vested a right of renewal not only in the author, but in the author's "widow, or child, or children" in the event that the author died survived by such individuals.[204] By granting a statutory right of renewal to specified individuals, the 1831 Act effectively created a protected inheritance under federal copyright law that could conceivably trump any contrary provisions in the author's will, resulting in what Francis Nevins has termed "will-bumping."[205]

In 1909, Congress enacted a comprehensive revision of the Copyright Act.[206] This time, the statute provided that in the event an artist died during the initial term, and was not survived by a spouse or children, the renewal rights would vest in "the author's executors, or in the absence of a will, his next of kin."[207] Commentators subsequently interpreted this provision to mean that, during the initial term, an artist could only devise the renewal rights to his spouse or children.[208] In *De Sylva v. Ballentine*, the U.S. Supreme Court described the 1909 Act as creating a "compulsory bequest of the copyright to the designated persons."[209] Although the nature of this apparent forced share was never spelled out clearly in case law, it served as a potential trap for estate planners who were not familiar with federal copyright law.[210]

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[202] *See* Tritt, *supra* note 66, at 147–48 ("Any transfer of rights for the renewal term essentially adeemed because no renewal term was available due to the author's death.").

[203] *See* Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870) (establishing second copyright law in United States).

[204] *Id.* §§ 1–2.

[205] Francis M. Nevins, Jr., *Copyright Law vs. Testamentary Freedom: The Sound of a Collision Unheard*, 23 REAL PROP. PROB. & TR. J. 47, 48 (1988) (noting that estate planners are often unaware of impact that federal copyright law might have on author's will); *see also* Tritt, *supra* note 66, at 150–51 (describing how 1831 Act's language caused will-bumping).

[206] *See generally* Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1075 (revising Copyright Act).

[207] *Id.* at 1081.

[208] *See* Nevins, *supra* note 205, at 63 & n.62 (citing relevant authorities).

[209] 351 U.S. 570, 582 (1956).

[210] *See* Nevins, *supra* note 205, at 63 (noting general ignorance of copyright law among estate planners); Michael Rosenbloum, Note, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 187–97 (1996) (discussing will-bumping scenarios).

In 1976, Congress eliminated the will-bumping provision for works created after 1978, allowing those rights to "be bequeathed by will or pass as personal property by the applicable laws of intestate succession."[211] Section 304 of the 1976 Act, however, retained the will-bumping scheme for works created before 1978.[212] More importantly, the new provisions left open the possibility that an artist's surviving spouse or children could nullify *inter vivos* transfers such as transfers accomplished by revocable trusts.[213] Thus, while federal copyright law no longer interferes with testamentary freedom in a literal sense, it may frustrate donative intent in a wide variety of estate planning contexts.[214] A proponent of a forced-share regime in the publicity rights context could therefore find some precedent in the historical treatment of copyright under federal law, although the modern trend is toward respecting the donor's intent.

C. PUBLICITY RIGHTS COMPARED

As discussed above, one of the most compelling justifications for recognizing a right of publicity is that it gives a celebrity the power to define the use of his or her image.[215] Out of respect for the dead, moreover, society may wish to protect the image of a deceased celebrity from being used in a way that would conflict with the celebrity's lifetime self-definition.[216] One might assume, however, that close relatives of a deceased celebrity are likely to be the most zealous guardians of his or her image, since they live in the shadow of the celebrity's public identity. Why should the celebrity have the power to divert the income stream associated with publicity rights away from those persons who would be most damaged by misuse of the rights?

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[211] 17 U.S.C. § 201(d)(1) (2006).

[212] *See id.* § 304(a)(C)(ii) (providing will-bumping hierarchy).

[213] *See* Tritt, *supra* note 66, at 166–67 (outlining estate-bumping effect).

[214] *See id.* at 167–81 (noting interference with revocable trusts, lifetime transfers, family holding entities, and charities).

[215] McKenna, *supra* note 144, at 231; *see also supra* notes 144–47 and accompanying text.

[216] *See supra* notes 151–52 and accompanying text.

Such a power might be justified under a general argument that Hirsch and Wang termed the "father knows best" hypothesis.[217] According to this theory, testamentary freedom is preferable to forced heirship because it permits "more intelligent estate planning": the testator knows his or her family members better than anyone else and can use that knowledge to achieve an ideal distribution of the estate.[218] One can question the validity of this general argument on many grounds,[219] and it does not explain why celebrities should have the power to devise their publicity rights to charity. Nevertheless, the fact is that freedom of testation is the norm in every American state.[220] In the absence of a change in the law's overall tolerance for testamentary freedom, any forced-heirship scheme for publicity rights must rely on a finding that those rights differ from other property rights in some significant way, presumably because they are tightly bound with the celebrity's personhood. This subpart will compare publicity rights to copyright and the law of burial in order to assess whether the restrictions on testamentary freedom historically present in those highly personal contexts ought to extend to publicity rights as well.

Scholars who have considered the history of donative restrictions in federal copyright law seem to agree that Congress imposed those restrictions largely unintentionally.[221] When the author survived the original copyright term and renewed the copyright himself, federal law did not interfere with the author's testamentary freedom.[222] If paternalistic or moral concerns had been the primary motivation for

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[217] Hirsch & Wang, supra note 118, at 12.

[218] *See* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 3.1, at 123–24 (3d ed. 2004) (explaining the theory).

[219] *See* Hirsch & Wang, supra note 118, at 13 (criticizing father-knows-best argument on grounds that many wills are drafted with little thought and testators cannot be relied upon to make rational decisions).

[220] Even in Louisiana, which protects some children from disinheritance, testamentary freedom is the norm. *See* sources cited *supra* note 32.

[221] *See, e.g.*, Nevins, *supra* note 205, at 51 ("The legislative history suggests . . . that will-bumping entered the law essentially by inadvertence."); Tritt, *supra* note 66, at 154 ("The silence in the legislative history . . . indicates that Congress did not understand the impact of the revised renewal system [in the 1831 Act] on testamentary freedom."); Rosenbloum, *supra* note 210, at 168 ("The silence of history implies that Congress never realized that provisions for copyright renewal would interfere with an individual's testamentary freedom.").

[222] *See* Tritt, *supra* note 66, at 151 (providing example of such non-interference).

limiting the power to devise, Congress would likely have imposed the same limitations when the author survived the initial term. Moreover, in the 1976 Copyright Act, Congress eliminated the will-bumping provisions entirely for works created after January 1, 1978, which means that copyright law no longer preempts contrary provisions in an author's will.[223] Although current copyright law may continue to interfere with certain *inter vivos* will substitutes, there is no good reason for this interference because it merely reflects Congress's ignorance regarding contemporary estate planning techniques.[224] Thus, federal copyright law does little to bolster the case for creating a forced share in postmortem publicity rights.

The law of burial poses a more difficult problem, because there may be valid reasons for deviating from the normal inheritance rules when the disposition of the body is at stake. Empirical research suggests that burial rituals can play a positive role in the family's grieving process.[225] Grief is typically at its most intense for the six months immediately following the death of a family member.[226] Conflicts concerning appropriate burial rituals can "compound mourners' already painful burden of acute grief with additional afflictions borne out of adverse funeral events."[227] Thus, some departure from the usual deference to the testator's intent may be justified when the rituals of burial are at stake.[228]

Even if testamentary freedom ought to be restricted in the burial context, a position I do not take here, a celebrity's right of publicity implicates entirely different concerns. Two examples can be

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[223] *See id.* at 157–59 (noting that will-bumping "cease[d] to be a problem on December 31, 2008").

[224] *See id.* at 167–90 (denouncing present "estate-bumping" features of copyright law as potentially unconstitutional and "unacceptable" on policy grounds).

[225] *See* Louis A. Gamino et al., *Grief Adjustment as Influenced by Funeral Participation and Occurrence of Adverse Funeral Events*, 41 OMEGA 79, 91 (2000) ("[P]articipation in funeral and burial rituals aids the affective adjustment of mourners grieving the loss of a loved one.").

[226] *See* Paul K. Maciejewski et al., *An Empirical Examination of the Stage Theory of Grief*, J. AM. MED. ASS'N, Feb. 21, 2007, at 716, 722.

[227] Gamino et al., *supra* note 225 (noting that "adverse events," including "conflicts among survivors" and "decedent's wishes versus survivors' wishes," might contribute to "a perception of the funeral rituals as not comforting").

[228] *Cf.* Foster, *supra* note 65, at 1400–01 (arguing in favor of "individualized justice" in burial disputes).

provided. First, the process of disposing of a person's body typically is profitable only for the funeral home, not for the decedent's surviving relatives.[229] By contrast, postmortem publicity rights can become extremely valuable for those who inherit them, at least in rare cases like that of Marilyn Monroe.[230] When a celebrity becomes a cultural icon like Monroe, his or her publicity rights can remain valuable for decades after his or her death.

Second, postmortem publicity rights are not subject to the overlay of state and federal regulations that apply to cremation and burial.[231] While the English law of burial denied freedom of testation, English law also limited the range of choices a family could make regarding the disposition of the decedent's body.[232] Had the family members been free to bury the deceased in any manner they pleased, the law might not have been so willing to disregard the testator's wishes. Thus, the history of interference with testamentary funeral instructions under the common law does not support a forced-heirship scheme for long-term, unregulated publicity rights.

When a celebrity's image is misused, the celebrity's children may suffer regardless of who inherited the publicity rights. If John Lennon's image were used to sell handguns, for example, his sons would most likely be upset even if Lennon had devised his publicity rights to charity.[233] Nevertheless, the same might be true if a

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[229] *Cf.* GARY LADERMAN, REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA 179–94 (2003) (describing rise of so-called death-care industry in late twentieth century). *But cf.* Ron Franscell, *Big Bopper's Casket a Macabre Marketable on eBay*, BEAUMONT ENTERPRISE, Dec. 27, 2008, http://www.beaumontenterprise.com/news/local/36759549.html (describing son's effort to auction off used casket of his long-deceased but recently exhumed celebrity father).

[230] Elvis Presley, John Lennon, and, more surprisingly, Albert Einstein are also examples of deceased celebrities whose estates continue to enjoy a large income stream, although some of the income, as in Lennon's case, comes from publishing royalties rather than publicity rights. *See* Hoy, *supra* note 23; *see also infra* note 233 (discussing John Lennon's estate).

[231] *See, e.g.*, 40 C.F.R. § 229.1 (2008) (regulating burial at sea); FLA. STAT. §§ 497.270–.272, .386, .607 (West 2009) (setting minimum acreage for cemeteries; adopting standards for mausoleums; regulating storage, preservation, and transportation of human remains; and specifying procedure for cremation). On this body of regulation, which is admittedly limited in scope regarding disposition of remains, see Murphy, *supra* note 192, at 389–96.

[232] *See supra* notes 172–73 and accompanying text.

[233] Lennon, who died a resident of New York, devised the bulk of his estate to an *inter vivos* trust. *See* The Last Will and Testament of John Lennon, http://www.rockmine.com/Reaper/LennWill.html (last visited Sept. 7, 2009) (disposing of Lennon's estate). New York currently does not recognize survivable rights of publicity, which has led Lennon's widow, Yoko Ono, and

company incorporated the words to Lennon's ironic song *Happiness Is a Warm Gun* into a handgun advertisement without using Lennon's image,[234] and yet current U.S. copyright law grants no rights to an artist's children who are disinherited by will.[235] In any event, the abuse of Lennon's music or image would not just harm his own children. This abuse would harm his millions of fans who treasure his contribution to musical and cultural history. If we can trust artists to choose the best protectors for their creative works, why should we not trust them to do the same for their publicity rights?[236]

In summary, without considering tax concerns, the case for recognizing a forced share for postmortem publicity rights (but not for other forms of property) appears to be weak. Although freedom of testation has historically been restrained concerning some other personal rights, those historical restraints are either unwarranted or based on considerations that do not apply in the publicity rights context.[237] In the decades since the recognition of postmortem publicity rights, no evidence has emerged that allowing celebrities to devise their rights of publicity to persons of their choosing causes great hardship to grieving families or great offense to society as a whole. The next Part will therefore consider whether a different result must or should be reached when federal transfer taxes are taken into consideration.

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other celebrities to support bills creating retroactive survivable publicity rights similar to those now recognized in California. *See* Decker, *supra* note 149, at 252–56 (discussing developments in New York law governing publicity rights); Linda J. Wank & Elisabeth H. Cavanagh, *The Lasting Effect of Star Power*, N.Y. L.J., Sept. 17, 2007, at S1 (discussing California law allowing transfer of publicity rights).

[234] According to Lennon, he was inspired to write the song after reading the title of an article in a gun magazine. DAVID SHEFF, ALL WE ARE SAYING: THE LAST MAJOR INTERVIEW WITH JOHN LENNON AND YOKO ONO 188–89 (G. Barry Golson ed., 2000).

[235] *See* sources cited *supra* note 223.

[236] Maximizing the wealth of one's descendants is not the sole conceivable goal of estate planning. *See, e.g.*, Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, The Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1191 (2008) ("[M]any settlors engage in estate planning and establish trusts in order to benefit their chosen beneficiaries in a variety of ways—not only financially, but also personally and perhaps even spiritually.").

[237] *See supra* Parts II.B–II.C.

IV. TAXATION OF POSTMORTEM PUBLICITY RIGHTS

Since the early twentieth century, Congress has continuously imposed taxes on gratuitous transfers of property. The 1916 estate tax applied to transfers at death, while the 1924 gift tax covered *inter vivos* gifts.[238] Decades later, Congress enacted a third tax (the GST tax) to capture certain generation-skipping transfers missed by the earlier statutes.[239] Federal transfer taxes are levied on intangible property as well as tangible assets,[240] and would thus extend to a celebrity's right of publicity.[241] In two essays published in the *Yale Law Journal Pocket Part*, however, Gans, Crawford, and Blattmachr argue that states could immunize publicity rights from federal transfer taxation by vesting them automatically in specified statutory heirs of the celebrity, unless the celebrity opted to destroy the rights *inter vivos*.[242] If such measures are adopted, the authors argue, the rights will be excluded from the gross estate under § 2033 of the Code, which governs property owned by the decedent at death.[243]

This Part will explain how the proposal of Gans, Crawford, and Blattmachr would be problematic under current law and unjustified in light of familiar policy considerations. If there is a case for excluding property from the gross estate on the basis of a state statute limiting freedom of testation, it has yet to be made. I will then discuss the more vexing question of how postmortem publicity rights should be valued for tax purposes. Although Congress could alter the tax code to reduce the tax valuation of the rights, this

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[238] The original 1924 gift tax was repealed shortly after its enactment, but a gift tax was reenacted in 1932, and has remained in effect ever since. *See* 5 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 120.1, at 120-1 to -2 (2d ed. 1993).

[239] The GST tax was originally enacted in 1976, but was repealed and replaced with a substantially revised version in 1986. *See id.* ¶ 133.1, at 133-2 to -3.

[240] *See* 26 U.S.C. §§ 2031(a), 2511(a) (2006) (describing transfers to which gift and estate taxes apply).

[241] *See* Estate of Andrews v. United States, 850 F. Supp. 1279, 1295 (E.D. Va. 1994) (holding deceased author's name to be asset of her estate).

[242] *See* sources cited *supra* note 39.

[243] *See* Gans et al., *Fundamentals*, *supra* note 39, at 50, 53 (characterizing "post-death control" of public rights as necessary prerequisite for § 2033 inclusion).

change could have the undesirable effect of discouraging charitable bequests.

A. CURRENT LAW

In their second *Pocket Part* essay, Gans, Crawford, and Blattmachr call attention to what they refer to as a "bedrock principle" of the federal estate tax: that "inclusion under § 2033 is not appropriate unless the decedent has the right to control the post-death disposition of the interest."[244] While the decedent's post-death control over an asset may have some relevance to its inclusion in the decedent's gross estate, this does not mean that federal transfer taxation may be avoided in every situation where testamentary freedom is restricted.

To take one example suggested by Gans, Crawford, and Blattmachr,[245] suppose that *S* creates an irrevocable *inter vivos* trust specifying that the income will be paid to *A* for life, and then the remainder will belong to *B* at *A*'s death. It is well-established that when *A* dies, any trust property that was not distributed to *A* will not fall under § 2033, as the termination of *A*'s life interest is not a taxable transfer under the Code.[246] Although estate tax will not be levied at *A*'s death, however, other federal transfer taxes may apply. If *B* is *S*'s granddaughter, the GST tax will now apply to the termination of *A*'s life estate in order to ensure that such intergenerational transfers do not avoid federal transfer taxation.[247] Moreover, regardless of the identity of *B*, the initial transfer by *S*

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[244] *Id.* at 50.

[245] *See id.* at 52 (noting that § 2033 would not apply in situation where interest in trust terminates at death).

[246] 5 BITTKER & LOKKEN, *supra* note 238, ¶ 125.5, at 125-10 to -13; ¶ 133.1, at 133-3.

[247] For statutes defining the GST tax and explaining its applicability, see 26 U.S.C. §§ 2601, 2611–2612, 2613(a)(1) (2006). For commentary on these provisions, see 5 BITTKER & LOKKEN, *supra* note 238, ¶ 133.1, at 133-3. Because each taxpayer has a lifetime GST exemption, however, widespread abolition of the Rule Against Perpetuities may be frustrating this purpose of the GST tax. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359–63 (2005) (discussing states' abolition of Rule Against Perpetuities in order to attract trust assets).

may be a taxable gift, in which case the gift tax would be imposed at the creation of both *A*'s life estate and *B*'s remainder.[248]

The taxability of *A*'s life estate at its creation may partly explain why Congress and the courts have never deemed *A* to have a taxable interest "at the time of his death" for purposes of § 2033.[249] Rather, *A*'s life estate is viewed as having disappeared at the moment of death. Furthermore, because *A* has no other interest in the underlying asset, he owns nothing that can be transferred at death or taxed under § 2033. By contrast, if *S* were to transfer a remainder interest in the property while retaining a life estate for himself, the property would be included in his gross estate.[250]

Although a voluntary release of dominion and control may be an occasion for imposing the gift tax, a limitation on control rights imposed by a state statute may not yield the same result. It is noteworthy that the U.S. Tax Court does not consider a spouse's elective-share rights under state law when determining the inclusion of the applicable assets in the gross estate under § 2033.[251] Elective-share statutes, adopted in some separate-property states, protect a certain percentage of the property for the surviving spouse, who can

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[248] *See* 26 U.S.C. § 2501(a)(1) (imposing gift tax); Smith v. Shaughnessy, 318 U.S. 176, 178–81 (1943) (imposing gift tax upon life estate and contingent remainder).

[249] This is not the only way the statute could logically be construed. *See* 5 BITTKER & LOKKEN, *supra* note 238, ¶ 125.5, at 125-10 ("The statutory language . . . could, with equal plausibility, be interpreted to fix upon either the instant before death or the instant after death."). While the Revenue Act of 1916 imposed an estate tax "[t]o the extent of the interest therein of the decedent at the time of his death *which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate*," H.R. 16763, 64th Cong. § 202(a) (1916) (emphasis added), the qualifying language was eliminated by the Revenue Act of 1926, which stated simply that the tax is imposed "[t]o the extent of the interest therein of the decedent at the time of his death." Pub. L. No. 20, § 302(a), 44 Stat. (pt. 2) 9, 70 (1926). Section 2033 of the current Code does not include the deleted language, which indicates that Congress intended § 2033 to be construed broadly. *See* H.R. REP. NO. 69-1, § 302 (1925), *reprinted in* 1939-1 C.B. (pt. 2) 315, 325 (stating that the language was eliminated "[i]n the interest of certainty" so that "the gross estate shall include the entire interest of the decedent at the time of his death in all the property").

[250] *See* 26 U.S.C. § 2036(a) (describing gross estate as including "all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death").

[251] Estate of Frost v. Comm'r, No. 17333-89 1993, WL 75053, at *14 (T.C. Mar. 18, 1993) (holding that properties that spouse claimed as portions of her statutory elective share were subject to federal estate tax).

elect to take that property notwithstanding the decedent spouse's will.[252] In *Estate of Frost*, the decedent's widow exercised her statutory rights to take certain properties notwithstanding the provisions of her husband's will, but subsequently entered into a settlement agreement with the other devisees by which she gave up her rights to those properties.[253] The court held that the properties subject to the settlement did not qualify for the marital deduction, and that the "properties, as part of decedent's Estate, were plainly subject to Federal estate tax under section 2033."[254] The elective share limited the post-death control of the testator, but it did not take the properties out of his gross estate.[255]

For present purposes, what is most telling about the *Frost* case is that the Tax Court did not hold the assets in question to be part of the gross estate by reference to § 2034, the Code section that specifically includes a surviving spouse's interest "by virtue of a statute creating an estate in lieu of dower or curtesy."[256] Rather, the court invoked § 2033, the general provision governing property owned by the decedent at death.[257] In general, the forced nature of

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[252] *See* Turnipseed, *supra* note 32, at 739 (finding that although state elective-share statutes vary, one common provision guarantees one-third of decedent's estate for surviving spouse if decedent left surviving issue, or one-half if decedent left no surviving issue). In an effort to implement the so-called partnership theory of marriage, the 1990 Uniform Probate Code applies the elective share to the "augmented estate," which includes certain nonprobate transfers by the decedent, and awards the surviving spouse a percentage of the property that varies depending on the length of the marriage. *See* UNIF. PROBATE CODE §§ 2-202 to -213 (1990) (discussing elective share rules); Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 724 (1992) (stating that 1990 Uniform Probate Code aligned elective share with partnership theory of marriage); *see also* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.09 cmt. c, at 735 (2002) (explaining partnership theory of marriage, which presumes each spouse contributed equally to marriage). *But cf.* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1282–89 (criticizing partnership theory as inconsistent with goals of modern feminists).

[253] *Frost*, 1993 WL 75053, at *7–8.

[254] *Id.* at *14.

[255] *Id.*

[256] 26 U.S.C. § 2034 (2006). On the evolution of elective-share statutes from the common-law right of dower, see Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1684–86 (2003).

[257] *See also* Schroeder v. United States, 924 F.2d 1547, 1549 (10th Cir. 1991) (reporting executor's inclusion of spousal election share under § 2033). The legislative history suggests that § 2034 was introduced solely for clarification. Congress added the predecessor to § 2034 to the Code "for the purpose of making it clear that [dower and curtesy interests] are to be included," because "[t]he distinction between dower and curtesy interest and property passing

an inheritance right does not impact its transfer tax status under the Code.[258] Most states do not protect descendants from disinheritance, with the limited exception of Louisiana.[259] This, together with the marital deduction, may explain why courts and commentators have hitherto devoted little attention to the theoretical consequences of state forced-share statutes under § 2033. If forced-share statutes offered protection from federal estate taxation, one would expect to see taxpayers in Louisiana—where a limited forced share applies to some descendants—invoking that protection.[260] Gans, Crawford, and Blattmachr seem to concede that this does not occur.[261]

One factor that serves to distinguish an ordinary life estate from property subject to a statutory forced share at death is that a life tenant cannot, acting alone, transfer an interest in the property that

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to wife or husband by will or intestate succession is technical rather than real, at least in the consideration of the question as to whether they should be subject to estate tax." H.R. REP. NO. 767, 65th Cong., 2d Sess. 9 (1918), *in* 1939-1 C.B. (pt. 2) 86, 101. *But see* Gans et al., *Fundamentals*, *supra* note 39, at 52–53 (arguing that § 2034 would be "superfluous" if inclusion in gross estate did not require post-death control). *Estate of Johnson*, cited by Gans et al., *Fundamentals*, *supra* note 39, at 52 n.13, held that homestead rights were included under § 2034, but expressly declined to reach the question of whether they would also be included under § 2033. Estate of Johnson v. Comm'r, 718 F.2d 1303, 1312 (5th Cir. 1983).

[258] *See* I.R.S. Tech. Adv. Mem. 86-51-001 (Aug. 8, 1986) ("[H]omestead rights, being in the nature of a forced testamentary disposition, are no more subject to discounting than any other testamentary disposition, forced or unforced."); *cf.* Jackson v. United States, 376 U.S. 503, 505 (1964) (disallowing marital deduction for statutory "widow's allowance" payable to surviving spouse during settlement of husband's estate). The Supreme Court has clearly stated that limitations on testamentary succession with respect to certain assets do not deprive those assets of their property status. *See, e.g.*, Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) ("Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."); Mager v. Grima, 49 U.S. (8 How.) 490, 493–94 (1850) ("Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state.").

[259] *See* Deborah A. Batts, *I Didn't Ask To Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1198 & n.3 (1990) (contrasting children's protection under intestacy law with limited protections against disinheritance); Tate, *supra* note 58, at 131–32, 137–40 (comparing American law on disinheritance with that of other nations).

[260] Tate, *supra* note 42, at 41.

[261] *See* Gans et al., *Fundamentals*, *supra* note 39, at 52–53 (distinguishing tax insignificance of Louisiana *legitime* as "based on a narrow regulatory exception to the pervasive general rule").

extends beyond his or her lifetime.[262] Gans, Crawford, and Blattmachr have not explained what restrictions, if any, they would impose on a celebrity's ability to transfer an interest in the celebrity's publicity rights *inter vivos*. If a forced-heirship regime lacked restrictions on the power of lifetime transfer, a celebrity would arguably have an interest analogous to a general *inter vivos* power of appointment. This would result in inclusion of publicity rights in the gross estate regardless of whether the power is exercised.[263] To avoid this result, the statute would need to nullify any transfer made by the celebrity to her creditors, among other potential transferees.[264] Although an individual may retain some transfer rights without being treated as the owner of the property for federal estate tax purposes,[265] Gans, Crawford, and Blattmachr do not spell out what lifetime powers a celebrity might retain with respect to his or her publicity rights under their hypothetical statute, except to say that the celebrity would be "precluded . . . from exercising post-death control."[266]

One purpose of recognizing an interest as property is to allow its transfer.[267] If the abolition of "post-death control" means limiting a

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[262] *See* 28 AM. JUR. 2D *Estates* § 64 (1966) (stating that transferee of life estate receives life estate *pur autre vie*, or "during the life of another").

[263] *See* 26 U.S.C. § 2041(a)(2) (2006) (stating that property is includible in gross estate when decedent "has at the time of his death a general power of appointment created after October 21, 1942 . . . whether or not on or before the date of the decedent's death . . . the power has been exercised"). One might also analogize the proposed arrangement to a buy-sell securities agreement in which the decedent retains the right to dispose of the underlying assets at a certain price during his lifetime. When lifetime control is retained, such agreements are disregarded for purposes of estate tax valuation. *See* Treas. Reg. § 20.2031-2(h) (as amended 1963) (noting the presumption that such agreements are not "bona fide business arrangement[s]" and therefore stated price will not be used for tax purpose unless presumption is rebutted); 4 JACOB RABKIN & MARK H. JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 52.13[9], at 52-127 to -128 (Supp. 2008) (listing Tax Court decisions that support the refusal to recognize such a contract for tax purposes); *see also* 26 U.S.C. § 2703(b) (specifying limited conditions under which agreements to acquire market property at less than fair market value may affect transfer tax valuation).

[264] *See, e.g.*, Jennings v. Smith, 161 F.2d 74, 77–78 (2d Cir. 1947) (holding that a decedent's power to withdraw principal from a trust did not result in the property's inclusion in his gross estate when decedent and his cotrustees were "governed by determinable standards").

[265] *See, e.g.*, 26 U.S.C. § 2041(b)(1)(A) (deeming powers that are "limited by an ascertainable standard relating to . . . health, education, support, or maintenance" not to be general powers of appointment).

[266] Gans et al., *Fundamentals*, *supra* note 39, at 50.

[267] *See, e.g.*, RESTATEMENT (FIRST) OF PROP. § 489 cmt. a (1944) ("The policy of the law has

celebrity's transferable right to a lifetime interest, this will make it difficult for the celebrity to exploit the rights commercially. Potential licensees may place a lower value on a celebrity's publicity rights if their licenses could be arbitrarily terminated by the celebrity's death.[268] Moreover, statutory limitations on the lifetime transfer of publicity rights, coupled with the abolition of testamentary freedom, might constitute a taking requiring just compensation under the U.S. Constitution in states recognizing postmortem rights.[269]

In support of their argument that a forced share for publicity rights would result in exclusion from the gross estate, Gans, Crawford, and Blattmachr point to a line of cases involving employee death benefits.[270] These cases involve contracts in which an employer promises to pay a benefit to the surviving spouse or children of an employee, such as the company president, in return for that employee's continued service to the company.[271] Although

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been, in general, in favor of a high degree of alienability of property interests."); Jessica Litman, *Information Privacy / Information Property*, 52 STAN. L. REV. 1283, 1295 (2000) ("The *raison d'être* of property is alienability . . . ."). For this reason, some have argued that publicity rights should be reachable as property in bankruptcy proceedings. *See* Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1327 (2002) (discussing creditors' interest in treating publicity rights as property).

[268] *See* Westfall & Landau, *supra* note 30, at 88 (discussing merits of various policy arguments favoring postmortem publicity rights).

[269] *See* Hodel v. Irving, 481 U.S. 704, 717–18 (1987) ("[C]omplete abolition of both the descent and devise of a particular class of property may be a taking . . . ."); Ronald Chester, *Is the Right to Devise Property Constitutionally Protected?—The Strange Case of* Hodel v. Irving, 24 SW. U. L. REV. 1195, 1208–09 (1995) (noting that, under recent Supreme Court jurisprudence, abolition of testamentary freedom may constitute taking when right of *inter vivos* transfer is restricted); *see also* Ascher, *supra* note 53, at 137 ("[T]he ability to make gifts seems such an important component of the bundle of sticks we call property that abolition of gifts is essentially unthinkable, and probably should be."); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 724 (2007) (noting that Takings Clause has historically been applied to intangible property rights such as patents); Tritt, *supra* note 66, at 132 ("[T]he Court has placed some doubts as to what remains of the unfettered historical right of individual states to limit testamentary freedom . . . ."). *Cf.* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."); *But see* Andrus v. Allard, 444 U.S. 51, 65 (1979) ("[T]he denial of one traditional property right does not always amount to a taking.").

[270] *See* Gans et al., *Fundamentals*, *supra* note 39, at 51–52 (criticizing my interpretation of § 2033).

[271] *See, e.g.*, Kramer v. United States, 406 F.2d 1363, 1364–66 (Ct. Cl. 1969) (involving

Congress enacted a specific provision of the Code in 1954 to cover survivor's benefits due under annuity contracts, that provision does not cover payments that the decedent had no right to receive during life.[272] In various cases, the Service has tried different arguments in an effort to tax those payments, but has met limited success.[273]

In *Kramer v. United States* and *Estate of Wadewitz v. Commissioner*, two cases cited by Gans, Crawford, and Blattmachr,[274] the Service claimed that all payments due under the employment contracts should be included in the gross estate of each employee under § 2033. The courts rejected this argument on the ground that the employees had no survivable interest in their respective contracts that could pass by will or intestacy.[275] By contrast, in *Estate of DiMarco v. Commissioner*, the Service contended that the employee's participation in a benefits plan constituted a taxable gift to the surviving spouse.[276] This argument was also rejected, and the court held that the employee in question never had a transferable interest in the benefits plan.[277] In all of these cases, the beneficiary was designated by terms of the relevant employment contract or benefits plan, and the employee had no power to substitute a different individual to receive the benefits.[278] The Service was finally able to prevail in *Estate of Levin v.*

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contract by which employer promised to pay employee's spouse weekly compensation in event of employee's death); Estate of Wadewitz v. Comm'r, 39 T.C. 925, 926–30 (1963), *aff'd sub nom. In re* Wadewitz' Estate, 339 F.2d 980 (7th Cir. 1964) (involving contract in which employer was obligated to pay benefit to employee's wife and daughter in event of employee's death).

[272] 26 U.S.C. § 2039 (2006); *see* Silberman v. United States, 333 F. Supp. 1120, 1124 (W.D. Pa. 1971) (noting that "[a]n annuity or other payment must have been payable to the decedent or the decedent must have possessed the right to receive the same" in order for the interest to be included under § 2039). For an argument that § 2039 should be amended to cover "pure" death benefits, see Bruce Wolk, *The Pure Death Benefit: An Estate and Gift Tax Anomaly*, 66 MINN. L. REV. 229, 277–82 (1982).

[273] *See infra* notes 275–82 and accompanying text.

[274] Gans et al., *Fundamentals*, *supra* note 39, at 51–52.

[275] *See Kramer*, 406 F.2d at 1369–70 ("The decedent's interest in the employment contract ceased at his death."); *Wadewitz*, 39 T.C. at 930, 935 (holding that interest in contract could not pass by will or intestacy); *see also* Estate of Tully v. United States, 528 F.2d 1401, 1406–07 (Ct. Cl. 1976) (reaching same conclusion).

[276] 87 T.C. 653, 657–58 (1986) (discussing the Service's contentions).

[277] *See id.* at 661–62 (discussing bases for holding).

[278] *See, e.g.*, *Kramer*, 406 F.2d at 1369 (finding terminable interest in employment agreement); *DiMarco*, 87 T.C. at 655–56 (discussing limits of decedent's authority under agreement).

Commissioner by arguing that an employee had made a revocable transfer of a property interest under § 2038, but the employee in that case had indirect control over the annuity in question.[279]

Even after its losses in *Wadewitz* and *Kramer*, the Service did not entirely concede the inapplicability of § 2033 in the employee benefits context.[280] Employee benefits cases posed a special problem for the Service, however, because the employee typically did not have and could not transfer an ownership interest prior to his death in the assets used to pay the survivor.[281] For the same reason, the Service had difficulty levying estate taxes on wrongful death benefits, which are a postmortem obligation imposed on property that belonged to the tortfeasor before the injured party's death.[282] Because the decedent's death created the interests, and those interests belonged to another party until the moment of the decedent's death, courts were reluctant to find them covered by § 2033 of the code.[283]

In their original *Pocket Part* essay, Gans, Crawford, and Blattmachr compared postmortem publicity rights to wrongful death claims.[284] Their second essay, written in response to my critique of the first, places more emphasis on the supposed similarity of

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[279] 90 T.C. 723, 730–31 (1988), *aff'd*, 891 F.2d 281 (3d Cir. 1989) (finding that decedent retained power to amend or revoke annuity payable to his widow).

[280] *See, e.g.*, *Tully*, 528 F.2d at 1401, *action on dec.*, 1976-386 (Oct. 14, 1976) ("[S]ection 2033 should still be argued where the death benefit is a mere continuation of a payment that the decedent was receiving and would have received had he lived.").

[281] *See DiMarco*, 87 T.C. at 663–64 (concluding that decedent-employee never possessed a transferable interest in income benefits). A surviving spouse's lump-sum Social Security death payment poses a similar problem. *See* Rev. Rul. 67-277, 1967-2 C.B. 322, 323 (excluding such benefits from gross estate in part because "decedent had no property interest in the 'Federal Old Age and Survivors Insurance Trust Fund' from which the payment is made").

[282] *See* Conn. Bank & Trust Co. v. United States, 465 F.2d 760, 763 (2d Cir. 1972) (excluding wrongful death benefits from gross estate).

[283] *See* 5 BITTKER & LOKKEN, *supra* note 238, ¶ 125-6, at 125-13 ("[Section] 2033 seems to cover only property in which the decedent had some interest while living."); *cf.* Rev. Rul. 82-5, 1982-1 C.B. 131, 131 ("Survivors' loss benefits paid under a no-fault automobile insurance policy are not property in which the decedent had an interest at death."). As a policy matter, it may be difficult to justify the exclusion of either wrongful death claims determined on the basis of the decedent's wages or employee death benefits from the transfer tax base. *See* Harry L. Gutman, *A Comment on the ABA Tax Section Task Force Report on Transfer Tax Restructuring*, 41 TAX LAW. 653, 663 (1988) (arguing that no "serious" policy argument can be made for such exclusions).

[284] *See* Gans et al., *Postmortem Rights*, *supra* note 39, at 207–08 ("An unrestricted postmortem publicity right that survives a decedent's death likely will receive estate tax treatment similar to certain tort claims that survive a decedent's death.").

postmortem publicity rights to employee death benefits.[285] Absent further elaboration, both analogies share the same flaw: publicity rights are owned by the decedent at death, not by a third party such as a tortfeasor or employer. The result might be different if state law reduced a celebrity's lifetime interest in his or her publicity rights to something less than ownership, but Gans, Crawford, and Blattmachr have not yet specified to what extent, if at all, they are willing to eviscerate a celebrity's *inter vivos* right of publicity.[286] Moreover, Congress has the power not only to tax the transfer of property at death, but also the creation at death of new legal privileges incident to property.[287] Even if state law drastically limits

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[285] *See* Gans et al., *Fundamentals*, *supra* note 39, at 50–52 (discussing *Kramer* and *Wadewitz*). Gans, Crawford, and Blattmachr point to Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, 68 TAX NOTES 95, 95 (1995), *available at* http://ssrn.com/abstract=1426629, as evidence that "[o]thers have recognized that publicity rights cannot be included in a decedent's estate, absent post-death control." Gans et al., *Fundamentals*, *supra* note 39, at 50 n.3. The quoted passage in Caron's article, however, states merely that inclusion in the gross estate depends on the right of publicity being "a property interest recognized under the applicable state law and *descendible* to the decedent's heirs." Caron, *supra*, at 95 (emphasis added). The dispute between Gans, Crawford, and Blattmachr and myself concerns whether publicity rights should be *devisable*, not on whether they are *descendible*. Under the proposal of Gans, Crawford, and Blattmachr, the right of publicity would pass to the specified statutory heirs unless the celebrity destroyed it *inter vivos*. Gans et al., *Postmortem Rights*, *supra* note 39, at 208–09. Thus, the right would be "capable of passing by descent or being inherited," which is the definition of "descendible." BLACK'S LAW DICTIONARY 510 (9th ed. 2009). Nevertheless, Gans, Crawford, and Blattmachr cite Caron's article to support the proposition that "Professor Tate's analysis misconstrues fundamental estate tax principles and misunderstands the precedents on which he relies." Gans et al., *Fundamentals*, *supra* note 39, at 50 & n.3.

[286] Gans, Crawford, and Blattmachr do suggest that the celebrity might be given the power to destroy the publicity rights *inter vivos*, thus preempting the forced share. *See supra* notes 39–41 and accompanying text. As I have argued previously, a celebrity who failed to exercise that right would effectively make a devise to the statutory heirs, which would certainly be taxable. Tate, *supra* note 42, at 41. Individuals do not have a right to renounce an interest in property without tax consequences. *See* Jewett v. Comm'r, 455 U.S. 305, 317 (1982) (rejecting argument that taxpayer had right to renounce property interest without tax consequences); *see also* Ordway v. United States, 908 F.2d 890, 894–95 & n.8 (11th Cir. 1990) (noting that Congress and the Service have specified that only qualified disclaimers of property may escape taxation); *cf.* Drye v. United States, 528 U.S. 49, 60–61 (1999) (holding that federal tax lien may attach to interest disclaimed by insolvent heir because "[h]e determines who will receive the property—himself if he does not disclaim, a known other if he does"); Estate of Buckwalter v. Comm'r, 46 T.C. 805, 815–17 (1966) (treating cancellation by will of debt owed to decedent as equivalent to devise to debtor). For the reasons discussed in this subpart, publicity rights owned by a celebrity at death would be taxable even in the absence of such a power to destroy.

[287] As the Supreme Court has stated,

the celebrity's lifetime interest, it is ultimately up to Congress to determine whether a forced-share statute would result in the exclusion of postmortem publicity rights from the gross estate.[288] The next subpart will accordingly consider whether such an exclusion would be justified on policy grounds.

B. TAX POLICY AND FORCED HEIRSHIP

Modern scholars generally agree that the federal estate tax, to the extent that it can be justified, should be designed to serve some normative policy goal or goals.[289] Although many such goals have been proposed, five are of particular importance: (1) supporting the progressive nature of the income tax; (2) "backstopping" the income tax system to ensure that certain income does not escape taxation; (3) preventing dynastic accumulation of wealth over multiple generations; (4) promoting equality of opportunity among the citizenry; and (5) recognizing the role of the state as a "silent partner" in the accumulation of wealth.[290]

> It is enough that death brings about changes in the legal and economic relationships to the property taxed, and the earlier certainty that those changes would occur does not impair the legislative power to recognize them, and to levy a tax on the happening of the event which was their generating source.

Fernandez v. Wiener, 326 U.S. 340, 356–57 (1945).

[288] *See, e.g.*, Morgan v. Comm'r, 309 U.S. 78, 80–81 (1940) (noting that, although "[s]tate law creates legal interests and rights," federal law determines what state property interests will be taxed under the Code).

[289] *See* Fleischer, *supra* note 76, at 267–68 & n.14 (citing relevant literature); *see also* M.C. Mirow & Bruce A. McGovern, *An Obituary of the Federal Estate Tax*, 43 ARIZ. L. REV. 625, 627 (2001) (noting that support for tax has historically crossed class lines). This does not necessarily mean that the present system of federal transfer taxes is particularly well-designed to serve those goals. *See, e.g.*, Lily L. Batchelder, *What Should Society Expect from Heirs? A Proposal for a Comprehensive Inheritance Tax* 3–7 (N.Y.U. Ctr. for Law, Econ., & Org., Working Paper No. 08-42, 2008), *available at* http://ssrn.com/abstract=1274466 (advocating replacement of current estate tax regime with comprehensive inheritance tax); Karen C. Burke & Grayson M.P. McCouch, *Turning Slogans into Tax Policy*, 27 VA. TAX REV. 747, 780 (2008) (arguing that the Bush Administration produced "hopelessly complex and inherently unstable" transfer tax legislation); William G. Gale & Joel Slemrod, *Overview*, *in* RETHINKING ESTATE AND GIFT TAXATION 1, 55–58 (William G. Gale et al. eds., 2001) (noting criticism of current scheme).

[290] *See* Fleischer, *supra* note 76, at 268 (listing social goals of estate tax); *see also* PENNELL, *supra* note 54, at 11 (discussing "silent partner" justification).

This subpart argues that shielding postmortem publicity rights from federal transfer taxation on the basis of a state forced-share statute, as Gans, Crawford, and Blattmachr envision, would further none of these fundamental policy goals and would directly conflict with at least some of them. My aim is not to evaluate the different arguments made in defense of the federal estate tax, but merely to show that none of those arguments justifies excluding property, especially postmortem publicity rights, from the gross estate on the basis of a state forced-share statute.

Two of the key policy goals identified for the federal estate tax focus on its interaction with the income tax—supporting the progressive nature of the income tax and "backstopping" the income tax system.[291] For most of the twentieth century, progressive taxation, in which those with a greater ability to pay are asked to pay more, was a cornerstone of American tax policy.[292] Although the concept of progressive taxation has its critics as well as its defenders, its historical centrality to the federal income tax cannot be denied.[293] Michael Graetz accordingly argues that the estate tax helps to preserve the income tax's progressivity, because an income tax alone, given political constraints, cannot "sufficiently tax the underlying wealth that generated the income."[294] Along similar lines, Harry Gutman contends that the estate tax serves as a "backstop" to the income tax, in that it taxes unrealized appreciation of property held until the decedent's death, which otherwise would escape taxation.[295] These scholars accordingly defend the estate tax as one component of the broader federal taxation scheme—a

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[291] *See supra* note 290 and accompanying text.

[292] *See* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 267 (2005) (calling progressive taxation fundamental to American policy).

[293] For a famous critique of progressive taxation, see Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 417–19 (1952). Blum and Kalvin nonetheless acknowledge the concept as "one of the central ideas of modern democratic capitalism." *Id.* For one response, see Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1966–67 (1987) (arguing that progressivity is necessary if the policy goal of taxation is "to maximize individual welfare").

[294] *See* Graetz, *supra* note 50, at 273.

[295] *See* Gutman, *supra* note 51, at 1191–92 (explaining "backstop" mechanism).

component that plays an important role in that scheme even if it lacks an independent justification.

If the primary role of the estate tax is to safeguard the progressivity of the income tax or prevent avoidance of income tax rules, or both, it is unclear how excluding publicity rights from the gross estate on the basis of a state forced-share statute would serve either of those goals. Celebrity entertainers, particularly those who are likely to have valuable publicity rights, can earn tens or even hundreds of millions of dollars each year.[296] If the goal of estate taxation is to make the overall tax system more progressive, then the estates of wealthy celebrities ought to pay a higher, not lower, tax. Moreover, if a celebrity carefully safeguards his or her publicity right during life, the right could appreciate in value and that appreciation will remain untaxed during the celebrity's lifetime.[297] Creating a special exclusion for a celebrity's right of publicity would seem to frustrate the goal of backstopping the income tax. In any event, Gans, Crawford, and Blattmachr do not assert that their proposed exclusion of postmortem publicity rights from the gross estate at death would be consistent with the policy goals underlying the overall federal taxation scheme.

Apart from global concerns involving other elements of the tax system, scholars have articulated more specific policy goals for the estate tax that would be frustrated by the hypothetical statute conceived by Gans, Crawford, and Blattmachr. One of the oldest justifications for imposing limitations on the transmission of property at death is that doing so prevents undue concentrations of wealth within families, and such dynastic concentrations are detrimental to economic growth and the political process.[298]

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[296] *See The Celebrity 100*, FORBES, June 3, 2009, http://www.forbes.com (in the search bar, search "The Celebrity 100"; click on the first article) (providing annual income estimates for 100 celebrities).

[297] *See* Madoff, *supra* note 75, at 760–61 (explaining how J.D. Salinger's postmortem publicity rights may be worth more than those of other celebrities in light of his refusal to exploit them *inter vivos*).

[298] *See* Repetti, *supra* note 52, at 825–36, 851–52 (arguing that historical and modern criticisms of wealth concentration justify federal estate tax). For relevant historical arguments, see, for example, THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 1, 73 (Andrew A. Lipscomb & Albert Ellery Bregh eds., 1904), who advocated the repeal of "the laws of entail" in order to "prevent the accumulation and perpetuation of wealth, in select families"; THOMAS PAINE, THE RIGHTS OF MAN 221 (Alfred A.

Scholars have also promoted wealth transfer taxation on the ground that, by reducing the advantages of inherited wealth, it will promote equality of opportunity.[299] Even if the estate tax is unnecessary to support policy goals relating to the income tax, it may play an independent role in ensuring a fair, democratic society.

These specific rationales for the estate tax counsel against the exclusion of assets from the gross estate on the basis of a state forced-share statute. A statute providing that certain relatives of the decedent inherit regardless of the decedent's last wishes obviously has the potential to limit equality of opportunity. Mark Ascher has criticized the current scheme of voluntary testation on the ground that "[c]hildren lucky enough to have been raised, acculturated, and educated by wealthy parents need not be allowed the additional good fortune of inheriting their parents' property."[300] Under the current scheme, at least the testator has the power to prevent this apparent windfall. A forced-heirship statute of the sort envisioned by Gans, Crawford, and Blattmachr would exacerbate the problem by limiting even the testator's ability to interfere with the children's good fortune. A tax designed to promote equality of opportunity or prevent dynastic accumulation of wealth should not encourage states to adopt forced-heirship statutes.

Knopf 1994) (1791–1792), who proposed a progressive estate tax "to extirpate the overgrown influence arising from the unnatural law of primogeniture"; and ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 30 (Henry Reeve trans., New York, Craighead & Allen 1838), who noted that the abolition of primogeniture grinds "the bulwarks of the influence of wealth . . . down to the fine and shifting sand which is the basis of democracy." For a modern philosophical perspective, see, for example, JOHN RAWLS, A THEORY OF JUSTICE 277 (1971) (arguing that the purpose of inheritance and gift taxes "is not to raise revenue (release resources to government) but gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity"). Similar concerns motivated opposition to monopolistic practices during the Progressive Era. *See* RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 205–06 (1966) (considering opposition to monopoly in context of Sherman Act).

[299] *See* Alstott, *supra* note 53, at 470–71 (calling equality of opportunity a "bedrock" principle of inheritance taxation); Ascher, *supra* note 53, at 73 (favoring equality of opportunity over freedom of testation); *see also* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 207 (1980) (advocating tax regime in which "seniors may not deprive their juniors of their prima facie right to a starting point of undominated equality").

[300] Ascher, *supra* note 53, at 74. On the significant role played by human capital in the modern transmission of family wealth, see John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 729–39 (1988).

In addition to concerns about dynastic wealth and equality of opportunity, estate taxation has been justified as a way of compensating the state for its role as a "silent partner" in the accumulation of the decedent's wealth.[301] According to this view, great wealth cannot be accumulated without an economic system that promotes (or at least tolerates) wealth creation, and that system may reasonably expect a return on its contribution.[302] Given that fame derives from public enthusiasm, this argument is particularly potent with regard to publicity rights.[303] Why should society not be entitled to share in the revenue stream produced by postmortem publicity rights, when public acclaim is the source of that revenue?

The silence of Gans, Crawford, and Blattmachr on this point suggests an additional problem with their hypothetical statute: they offer no basis for distinguishing postmortem publicity rights from other property that might be the subject of a forced share. If freedom of testation were made a prerequisite to inclusion of property in the gross estate under § 2033, then states could preempt federal estate taxation not only for postmortem publicity rights, but for any assets, simply by extending the forced share to cover those assets. To avoid this result, the federal exception would need to be limited to postmortem publicity rights. Gans, Crawford, and Blattmachr, however, do not suggest that state forced-share statutes would have a special tax-related significance for that particular category of property, as opposed to other illiquid assets.

Even if the exception is limited to postmortem publicity rights, the approach of Gans, Crawford, and Blattmachr could lead to inconsistent federal estate tax results depending on the decedent's domicile. If there is some good reason for excluding postmortem publicity rights from the gross estate, it would seem much simpler to exclude them outright, rather than to make the exclusion dependent on a state's adoption of a forced share. Gans, Crawford,

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[301] *See* PENNELL, *supra* note 54, at 11 (discussing "silent partner" theory).

[302] For an early statement of the theory, see E.J. James, *The State as an Economic Factor*, *in* SCIENCE ECONOMIC DISCUSSION 24, 32 (New York, the Science Co. 1886). The argument, however, might justify taxation of income rather than, or in addition to, wealth. *See* Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 362–66 (2000) (arguing that wealth should not be subject to a greater tax burden solely because it is acquired through deferred consumption).

[303] *See supra* text accompanying notes 137–42.

and Blattmachr do not argue that a more complex scheme would be preferable as a policy matter.

C. VALUATION

In their original Pocket Part essay, Gans, Crawford, and Blattmachr argue that publicity rights may pose a liquidity problem when a celebrity's estate lacks other, more easily marketable assets with which to pay the tax.[304] Part of the problem is that it is difficult to assign an objective value to publicity rights. The Service may conclude that the rights are worth more than they actually are or may force the devisees or heirs to sell rights that the celebrity did not wish to be exploited in order to pay the tax. Under the Treasury Regulations, the Service levies tax on assets of the estate at their "fair market value," defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[305] This definition, however, fails to provide useful guidance in valuing particular types of assets, especially those that are extremely personal.[306] While publicity rights fall into this category, they are not unique in this respect, because many other assets that are notoriously difficult to value may nonetheless be included in the gross estate under § 2033.[307]

In a 1998 article, Ray Madoff described one type of valuation problem that may occur with respect to the taxation of postmortem publicity rights.[308] Suppose that a celebrity, such as novelist J.D. Salinger, maintained a secluded existence during his lifetime and did little to exploit his right of publicity. Suppose further that when that celebrity dies, his family believes that it would be offensive to the celebrity's memory to license his name or likeness for commercial use. Under current law, the family's wishes would not

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[304] *See* Gans et al., *Postmortem Rights*, *supra* note 39, at 206–07 (discussing valuation and liquidity concerns associated with publicity rights).

[305] Treas. Reg. § 20.2031-1(b) (as amended in 2000).

[306] *See* Madoff, *supra* note 75, at 761–64 (noting that "one-size-fits-all" approach of estate tax system "can produce problematic results with respect to publicity rights").

[307] 5 BITTKER & LOKKEN, *supra* note 238, ¶ 125.7, at 125-18 (mentioning "real estate, works of art, options, stock of family corporations, and business goodwill" as examples).

[308] *See generally* Madoff, *supra* note 75.

affect the valuation of the property for purposes of the estate tax because a hypothetical buyer might be willing to pay a great deal to make use of the celebrity's image.[309] This could lead to a nightmare scenario described by Gans, Crawford, and Blattmachr in which the celebrity's heirs are forced to exploit the postmortem rights of publicity against their will merely to pay the tax.[310] Doing so would deprive celebrities like Salinger of their privacy.[311]

In addition to the problem identified by Madoff, however, there is also a second difficulty with valuing publicity rights. Celebrities like John Lennon, Marilyn Monroe, and Elvis Presley, whose publicity rights continue to produce significant revenue decades after their passing, are likely to be atypical. Although it is not possible to say for certain, one suspects that few consumers will be interested in purchasing merchandise emblazoned with the name or image of Anna Nicole Smith thirty or forty years hence. The case of James Brown, whose estate has apparently faced financial difficulties in the immediate aftermath of his death,[312] shows that even a bona fide entertainment icon may not be a reliable source of posthumous revenue. Moreover, if the publicity rights are devised outright to the surviving spouse, they will be exempt from estate tax until the spouse's death because of the marital deduction.[313] Thus, even if heirs or devisees are willing to exploit a deceased celebrity's publicity rights, the rights may be worth very little by the surviving spouse's death.

Despite the likelihood that publicity rights will retain value after death only in rare cases, the Service may claim that the publicity rights are of great value based on the celebrity's lifetime fame. Under current law, the taxpayer generally has the burden of proof in valuation disputes, and the Service's determination of a deficiency

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[309] *Id.* at 760–62, 780–82 ("[U]nder the basic estate tax rules, it is irrelevant whether there is any plan to realize the market value of the asset.").

[310] *See* Gans et al., *Postmortem Rights*, *supra* note 39, at 207 ("The estate tax inclusion of a decedent's postmortem publicity rights could result in an estate tax liquidity problem . . . .").

[311] Rules preventing testators from ordering the destruction of certain property also implicate the testator's privacy and raise similar tax concerns. *See* Hirsch, *supra* note 153, at 76–77 & n.157 (discussing author Jacqueline Susann, who requested by will that her diary be destroyed, only to have the Service later value it at $3.8 million).

[312] *See* Segal, *supra* note 4 (discussing Brown's financial state at his death).

[313] *See* 26 U.S.C. § 2056(a) (2006) (allowing tax deduction for property passing to surviving spouse).

is presumed correct.[314] In 1998, Congress amended the Code to shift the burden to the Service in certain situations, such as where the taxpayer introduces "credible evidence" and satisfies several procedural requirements, or when the Service uses "statistical information on unrelated taxpayers" to reconstruct a particular item of taxpayer income.[315] Congress enacted these provisions to "help taxpayers" who would otherwise be "forced to settle with the IRS because the taxpayer carries that burden of proof."[316] Although opinions differ on the degree to which the new provisions will be helpful to taxpayers, these measures show that Congress is capable of responding to fairness concerns relating to valuation.[317]

Congress could address the difficulty of valuing postmortem publicity rights in various ways. Perhaps the simplest solution would be for Congress to declare the value of postmortem publicity rights to be zero for tax purposes, eliminating the valuation problem entirely. Because the estates of at least a few deceased celebrities produce millions of dollars in annual revenue from their publicity rights,[318] however, valuing these rights at zero would not likely be consistent with the goals underlying the federal transfer tax system.[319] Rather than setting the valuation at zero, therefore, Congress could exempt publicity rights from transfer taxation up to a certain dollar amount, so that only unusually valuable rights are taxed. Alternatively, a statute might shift the burden to the Service to establish the value of the rights, as § 7491 of the Code currently does for income determinations based on statistical evidence about

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[314] *See* TAX CT. R. 142(a) (placing burden of proof on petitioner unless stated otherwise); Welch v. Helvering, 290 U.S. 111, 115 (1933) ("[Commissioner's] ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong."); 2 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 115.4.2, at S115-33 (Supp. 2009).

[315] 26 U.S.C. § 7491; *see also* 2 BITTKER & LOKKEN, *supra* note 314, ¶ 115.4.2, at S115-36 to -39 (describing specific conditions under which burden shifts to Service).

[316] 144 CONG. REC. H3936 (daily ed. May 22, 1998) (statement of Rep. Portman).

[317] *Compare* Jerry A. Kasner, *Why Burden-of-Proof Rules Will Affect Valuation Issues*, TAX NOTES, Oct. 12, 1998, at 239 ("[T]he shift of the burden-of-proof rules . . . will have a huge impact on estate and gift tax valuation issues."), *with* Nathan E. Clukey, *Examining the Limited Benefits of the Burden of Proof Shift*, TAX NOTES, Feb. 1, 1999, at 683 ("[T]he new provision's most significant effect, at least initially, will be on settlement.").

[318] *See* sources cited *supra* note 23.

[319] See *supra* note 290 and accompanying text for discussion of five important goals underlying the federal estate tax.

other taxpayers.[320] This would not address Madoff's concern regarding families who prefer not to exploit the deceased celebrity's image, but it might discourage the Service from making exaggerated claims when a minor celebrity dies.[321] As Madoff suggests, moreover, Congress could deal with the former problem by allowing heirs or devisees to set a lower value for a deceased celebrity's publicity rights if they agree not to exploit them in excess of that value.[322] Any breach of that agreement could be covered through a recapture tax.[323] Congress could also permit deferral of estate tax payments with regard to postmortem publicity rights.[324]

In short, there are various ways in which Congress might amend the Code to offer greater protection for heirs and devisees of celebrities with regard to the taxation of postmortem publicity rights. It is not clear, however, that this would necessarily be good policy. Congress has provided for an unlimited deduction from the estate tax for charitable bequests, and some type of charitable deduction may be justifiable under any of the main policy goals articulated for the estate tax.[325] Charitable donations benefit society in many ways and have played a central historical role in this country's development.[326] If the Code assigned a lower value to publicity rights for tax purposes than their true worth, or if an

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[320] *See supra* note 315 and accompanying text.

[321] It is not clear, however, that shifting the burden of proof has much of an impact in actual tax litigation. *See* Janene R. Finley & Allan Karnes, *An Empirical Study of the Change in the Burden of Proof in the United States Tax Court*, 6 PITT. TAX REV. 61, 81 (2008) (comparing the seven years before and after the 1998 burden-shifting statute and finding that "individual taxpayers were not helped by the change in the burden of proof in cases before the Tax Court").

[322] Madoff, *supra* note 75, at 808–09.

[323] *See id.* (explaining that heirs who later decide to exploit publicity rights would be "subject to a recapture tax").

[324] The Code currently does this for certain reversionary or remainder interests and interests in closely held businesses. *See* 26 U.S.C. § 6163 (2006) (permitting postponement of tax payments attributable to reversionary or remainder interests); *id.* § 6166 (allowing deferral where estate consists largely of interest in closely held business).

[325] *See id.* § 2055 (allowing tax deductions for all charitable bequests); Fleischer, *supra* note 76, at 263–69 ("[W]hile the case for some type of charitable deduction is strong, the case for an unlimited deduction is weak."); *cf.* Ray D. Madoff, *Dog Eat Your Taxes?*, N.Y. TIMES, July 9, 2008, at A23 (advocating dollar amount or percentage limit on estate-tax charitable deduction).

[326] *See* Nguyen & Maine, *supra* note 76, at 1726–30 ("[C]haritable giving has been central to the United States and its national character for centuries.").

onerous standard of proof led the Service to undervalue publicity rights, celebrities like James Brown and Paul Newman might have had less of an incentive to give their publicity rights to charity.[327]

Thanks to the estate tax deduction, charitable gifts of publicity rights greatly reduce the problem of valuation and accordingly mitigate the threat of a tax on phantom assets. In light of doubts concerning the wisdom of recognizing postmortem publicity rights,[328] using the Code to encourage the transfer of those rights to charitable organizations when the testator's children intend to exploit them may be a wise strategy. In any case, it is not self-evident that publicity rights require special tax treatment in comparison to other assets that may be difficult to value.[329] Congress may prefer to reassess the transfer tax system's valuation rules as a whole instead of focusing on one isolated problem that affects only a small group of taxpayers.[330]

V. CONCLUSION

Scholars have long debated the wisdom of respecting the wishes of deceased persons with respect to the disposition of their property. Because publicity rights are of relatively new vintage, it is not frivolous to ask whether the usual preference for freedom of testation should apply to this category of property. This Article has accordingly considered two historical deviations from the default rules of inheritance in the United States in order to evaluate whether a similar departure would be justified for postmortem

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[327] This assumes that some celebrities would prefer to devise their publicity rights to individuals, but opt instead for charitable devises to avoid federal estate tax. If this assumption is correct, any reduction in the tax on noncharitable devises caused by undervaluation could also lessen the relative incentive effect of the charitable deduction. On the other hand, if celebrities are indifferent between charitable and noncharitable devises, or if they prefer to devise their publicity rights to charity, undervaluing the publicity rights for tax purposes may not interfere with the charitable incentive effect at all.

[328] *See supra* Part II.

[329] *See supra* note 307 and accompanying text; *cf.* Madoff, *supra* note 75, at 803–05 (noting that "[c]elebrities are not the only people likely to have a valuable asset that they do not want to treat as a marketable commodity," and that a possible future market in body parts may raise similar concerns).

[330] *See* Madoff, *supra* note 75, at 807 (advocating "a more nuanced approach to wealth" in transfer taxation because "[t]he problem raised by personal property is a complex one and is not likely to be solved by any quick fix").

rights of publicity. My conclusion is that no departure is warranted. In any event, it would be surreal to suggest that a hypothetical state forced-share statute for publicity rights might justify the exclusion of those rights from federal estate tax. If tied to forced heirship, such a benefit would run counter to all the usual policy arguments in favor of federal transfer taxation. Nothing compels the federal government to bestow special favor on those who profit from immortal fame.