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CARDOZO ARTS & ENTERTAINMENT LAW
JOURNAL SPRING SYMPOSIUM 2018

NEW YORK RIGHT OF PUBLICITY LAW: REIMAGINING
PRIVACY AND THE FIRST AMENDMENT IN THE DIGITAL AGE

FEBRUARY 22, 2018

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NATHAN SIEGEL^{*}
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PROF. JEREMY SHEFF: Thank you, Jennifer. As always, your expertise on this area of law is most welcome and deep and illuminating. Just to introduce the rest of the panel, my name is Jeremy Sheff. I teach at St. John's Law School, where I'm the Director of our own Intellectual Property Law Center. I've been asked to moderate the panel discussion portion of our evening to follow up on Jennifer's comments and to have some back and forth about the pending right of publicity bill in New York State.

As part of that, I'd like to introduce very briefly the other members of the panel. Sitting immediately to my left is Professor Mary LaFrance, currently on the faculty at the William S. Boyd School of

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Law in Las Vegas. Always good to see you, Mary.

To Mary's left we have Nathan Siegel. Nathan is a practicing attorney representing media clients in First Amendment and intellectual property cases in both trial and appellate courts.

To Nathan's left we have Nancy Wolff, partner at Cowan, DeBaets, Abrahams & Sheppard. Did I pronounce all of that right?

MS. NANCY E. WOLFF: Well enough.

PROF. SHEFF: Well enough. Close enough. She similarly represents clients in digital media licensing, publishing, as well as some litigation matters.

To Nancy's left is Prof. Justin Hughes, late of this very law school and now of Loyola of Los Angeles, where he is a colleague of Prof. Rothman's.

Finally to Justin's left, we have Kevin Goering, who is a litigator counseling clients in intellectual property, libel, privacy, publicity rights, and other related areas of law.

With those introductions out of the way, as you can see, we have a lot of expertise on this panel on the matters currently implicated by the bill pending in the New York Legislature.

The first thing I want to do I think is throw open to the panel kind of a general question and see if each of you could give a couple of minutes--and we'll try to keep it to a couple of minutes for this first question. I'm not shy about interrupting because I want to make sure that everybody has fair time. A couple of minutes on what you see as the most important issues either addressed by the bill or that worry you about the bill. That either you think it's important for the bill to pass because of these issues or important that it doesn't or important that it be changed in some way before passage.

Why don't we just go from stage right to stage left, from your left to your right? Mary, do you want to kick us off?

PROF. MARY LAFRANCE: Sure. This is one of those bills where the more I look it, the more stuff I see. I'm glad to hear there's a new version coming out in April and I hope some of the drafting issues will be addressed.

In addition to the basic policy questions like should this right be transferable, should it be descendible, if you are going to enact these protections, you need to do so in a way that clearly puts people on notice as to what is protected, what is allowed, what the right procedures are. I think the bill does some things well and some things not so well.

One thing that it does, is it addresses a choice of law problem that has been an issue for New York domiciliaries--in particular, deceased celebrities who were domiciled in New York at the time of their deaths. Typically the estates of such celebrities have had a hard time enforcing the deceased's right of publicity in jurisdictions outside of New York. For example, California, which has chosen to apply the law of the domicile to determine whether there is an enforceable postmortem right.

As a result, even though California law protects postmortem rights of individuals, it does not extend that protection to people domiciled in New York, since New York does not recognize postmortem rights. It does not extend its protections to people in the U.K. because the U.K. does not recognize a right of publicity.

If you do believe that postmortem rights ought to be protected for some period of time, this bill will enable the states or transferees of deceased celebrities to enforce their rights not only in New York, but also in other states where the rights might be infringed, such as California.

On the flip side, the New York bill does try to have its own choice of law provision, but it's incomplete. The bill says that it's not going to discriminate against out-of-state domiciliaries. But it only refers to deceased out-of-state domiciliaries. They will not be discriminated against based on whether they were domiciled at the time of death. It doesn't say anything about living celebrities who are bringing suits in California.

If you have, for example, Helen Mirren wanting to bring a right of publicity claim in New York, it's not clear whether she could invoke any rights under this bill since the United Kingdom does not recognize her right of publicity. I would like to see the bill clarify its provisions on choice of law.

PROF. SHEFF: Great. Nathan, do you want to chime in?

MR. NATHAN SIEGEL: Sure. Overall I think the bill is unnecessary because I think the public policy choice that New York's existing statute makes is basically right. At least I think in its original intent, which is that what we often call the right of publicity, although whether it's privacy, publicity, whatever, I think Jennifer put her finger on it.

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The core of what New York has protected is really dignitary interest in not having your name or identity used to sell commercial products that you don't necessarily want to be associated with. I think that's a legitimate interest in defining what is or isn't commercial use on the margins can sometimes be a little bit tricky. But fundamentally I think that's right.

Beyond that, I don't really think that the state or society in general has a compelling interest in protecting one's "face" for a whole bunch of different reasons. But a simple way that I like to look at it is if you think that fame per se is worth protecting, then Al Capone gets a lot more protection than most of the people in this room. But does that make sense in terms of what the state should be doing and enforcing an interest in statutory law?

I think the problem with the bill is that it starts with the opposite presumption, which is that everything about one's name, image and likeness is worth protecting, and then tries to carve out a whole bunch of statutory exemptions. Of course once you do that, that's very problematic and you're going to end up with a lot of fighting about what those exemptions mean.

As drafted, I think that the exemptions generally in the New York bill are better than in most states. They are fairly broad or at least as they were originally drafted. But again, I think it's unnecessary and it's going to lead to a lot of litigation around what those exemptions mean as opposed to simply the principle that we protect people from essentially being forcibly commercialized. But beyond that, I don't think we have a big interest in protecting them.

PROF. SHEFF: Nancy, your thoughts.

MS. WOLFF: I won't repeat what was just stated. I'm not sure what the need is. We've seemed to live since 1905 without a descensible right of publicity and I don't see a lot of unwarranted advertisements of dead people in New York.

But I think if they really intend to do this, they should just scrap this bill and start over. I feel very strongly that you should not replace section 50, 51 for the living. We've had a 100 years of case law that has for the most part really protected free speech. I think we have to remember that New York is really the center of the media and the publishing community.

We have to be very, very careful about crafting a law that now talks about a right of publicity that's transferable, is much more based on a California-style bill, and really replaces all the former years jurisprudence we have, laws that has allowed documentary films, books, articles, photographs to be sold, and enabled people to communicate in many different ways without worrying about violating New York Statue 50, 51. We understand what the right is. I feel also very strongly that it should not extend to anyone outside of New York. I don't think we should be a forum for foreigners shopping around when they don't have rights at home. I think the bill as drafted is so vague and broad that that it will have big impact on a lot of speech that has always been protected. If we have an avatar problem, I think that should be solved on its own because that's really not a right of publicity problem. But they've thrown things in like characteristics and gestures, which is really absurd. It's not going to help anyone. It's just going to cause a lot of litigation and people will not know when they can use something and when they can't.

PROF. SHEFF: Before we move on to Justin, I want to try to clarify a couple of terms that we here on the panel might all be familiar with, but others might not. It's been referred to under a couple of different names, the so-called reanimation problem or the digital avatar problem. This is the problem that has been making news lately of famous people's and sometimes not famous people's faces or likeness being digitally added to media in ways that are considerably more sophisticated than just putting someone's picture on a photo advertisement.

For example, Peter Cushing is in a *Star Wars* movie that was released decades after his death. To the entire world it looks like Peter Cushing. More recently we've seen on the deepfake subreddit the possibility of people putting their acquaintances or exes' faces into hard core pornography videos and doing the same with celebrities and so forth. This is a concern that goes under the name of reanimation or digital avatars or sometimes deepfakes and is an issue that the bill is reported to address, and one that I think Justin actually cares quite a bit about, so maybe I'll let him take it from here.

PROF. JUSTIN HUGHES: Thank you, Jeremy. It is too bad we don't have a new bill. Last week majority leader Joseph Morelle was meeting with the principal negotiators on this or the principal parties trying to negotiate this. I agree with everyone. We shouldn't focus too much on what's in the present bill.

Let me just address two things. The postmortem right. As Jennifer said, New York's law and many state laws are limited to advertising and trade use. Actually, in the case of motion pictures there is, I believe, lots of case law that says they are not in advertising or trade.

PROF. LAFRANCE: Not in New York.

PROF. HUGHES: The MPAA believes that.

PROF. LAFRANCE: Yes.

PROF. HUGHES: But if we're just talking about a postmortem right as to advertising and trade, I want everyone in the room to understand that ship has sailed as a policymaker. California has a postmortem right for 70 years. Pennsylvania has a postmortem right for 30 years. Texas, Indiana, Kentucky, Tennessee have postmortem rights. Two of your other neighbors, New Jersey and Connecticut, have courts saying that there is a common law postmortem right of publicity.

In terms of policymaking, that ship has sailed. You will not be able to do any kind of advertising nationwide that doesn't already take into account postmortem rights because of the number of significant state jurisdictions that already have them.

Let me talk about reanimation and digital avatars. As Jeremy said, that is, in these negotiations, very, very much a concern of the Screen Actors Guild. It should be, I believe, a concern for all of us. Jeremy mentioned Peter Cushing. How many people saw *Star Wars: Rogue One*? Well the Grand Moff Tarkin looked great. Didn't he? He looked as good as he looked in 1977. You ask yourself: what moisturizer has he been using? I want to get that.

He's been dead since 1994. It was a case of brilliant digital avatar work. In that particular case, Disney did the right thing and they got permission from his estate to do what they did. But this future of recreating actors with or without their permission and recreating them

and using them in subsequent productions and scanning them for one day and then using them for what would have normally been 3 weeks of shooting is a major concern of the Screen Actors Guild and one of their prime objectives in the negotiations happening in Albany.

If the point is protecting people from being forcibly commercialized--to use a colleague's phrase--that's exactly what we need to do in the case of the new technology. It's not enough to say we've had this law for 100 years; everything is fine. That would be like saying we've been burning coal for 300 years; everything's fine. It's not. Not with the emerging new technology.

It's not just a concern for actors. If a bill emerges that is just for actors, I think we all should be worried. Because the digital avatar problem is a problem of porn and revenge porn. It won't have to be that your ex convinced you have a camera in the room. It could be just that it's digitally altered and it's revenge porn against you, revenge porn starring you or starring your grandmother.

This world is a world that concerns all of us. Do you want to talk about a compelling state interest? I want you to imagine this. Think of the amount of interference in our democratic process we've already seen through the trolling that has happened in social media.

Now imagine a world in which our news anchors, George Stephanopoulos, Lester Holt, etc. are perfectly recreated to announce to you the latest study that has proven that gay people have genetic defects or that black people are less intelligent or that schools are safer if all school teachers are carrying assault rifles. That's the kind of fake news that we could be on the cusp of seeing.

To me, that's a very compelling state interest, to say all right, that kind of digital avatar creation does need to get shut down. I'm not even sure it can be done in this kind of bill, but yes, I think we would probably all agree that this reanimation digital avatar issue is a different sort of creature, even though it is kind of attached to the right of publicity discussion.

PROF. SHEFF: Thanks. For those of you who don't follow this issue and are interested in the digital avatar issue, there was a really good summary article on the law fair blog yesterday by Bobby Chesney and Daniel Citron [phonetic] talking about all of these issues in detail. If you want to see a demonstration of that work, there are videos of President Obama saying things that he never ever said that have been

generated as demonstrations of this kind of technology.

Justin's horror stories are not just that. This stuff is coming. One of the things I guess we'll continue to talk about is what we ought to do about it. Let's move on to Kevin.

MR. KEVIN R. GOERING: Thanks Jeremy. Thanks for having me. I think the first thing you have to understand about all of this legislation is how legislation gets made. A lot of times we talk about journalism, making sausage. You really like the end product, but you don't like to watch it being made.

These bills and the New York bill is a perfect example. I've been involved in one way or another for about 20 years opposing or supporting various attempts to change New York law. But you look at the other states, South Dakota, Alabama, Arkansas, Louisiana, Minnesota most recently. Why did Minnesota want to enact the law last year? It was called the Prince Act.

Why? Let me refer to Billy Graham. He lived in North Carolina. According to Professor Rothman's roadmap, which I consulted just before I came in here, the fact that he died in North Carolina yesterday means that today I can come out with Billy Graham ketchup and put his picture on the label and sell Billy Graham ketchup, which his estate may or may not have too much objection to. But Billy Graham sex toys? Maybe a bigger problem. Keep going. Can you put him in a video game? Maybe if it's transformative. The video game problem is a big problem.

That gets me to I want to limit myself to-- the two or three things about the statute in its present form. First on the issue of descendability, I think you have to talk about what's right and wrong. Every other state is going to have descendability. We're going to have descendability.

Then you have to talk about how we're going to do it, what kinds of exemptions we're going to have. How did these exemptions get in there? How did they get in those other statutes? I'll tell you how. The Motion Picture Association of America, which favors descendability. The MPAA wants a postmortem right and they want assignability. They want an exclusive right.

When you talk about having assignability and everything else and being able to give somebody an exclusive right, you can't give somebody an exclusive right to defame you. That's a personal right.

The right of privacy was like defamation—a personal right. But if it's a property right, you ought to be able to give an exclusive right to somebody. Michael Jordan got paid \$80 million by Nike to have the exclusive right to sell his shoe. Can he turn around and give that right to somebody else? Descendibility is part of transferability. You need a transferable, descendible right of publicity, I think.

The problem I have is with the breadth of the exemptions and trying to accommodate New York law, which has recognized in some cases that expressive works can infringe. Just 2 weeks ago, the New York Court of Appeals heard the first video game case under this statute in Albany. There were several judges who were pretty skeptical about dismissing that on a motion to dismiss. Lindsay Lohan is not a very deserving plaintiff you would think, but she's suing the makers of Grand Theft Auto. That case is pending.

Then you have the fantasy sports cases, which like the Keller and Hart [phonetic] cases involving video games, should you be able to use a living person or dead person's picture or likeness in a video game, is that different from the news? In that regard, this morning the FanDuel and Draft Kings case was argued in the 7th Circuit. Judge Easterbrook [phonetic] was presiding. That is an appeal from the dismissal under the Indiana statute of a challenge to the ability of FanDuel and Draft Kings, which are now merging, to use the likenesses of NCAA players without paying for them in daily fantasy sports games.

It may be a close issue on which people can disagree, but it's something that this bill needs to recognize and not overrule or try to overrule those cases in New York, including a couple of docudrama cases—I know I'm out of time here, but we can get back to that in a second—should you be able to invent a biography about somebody that's not defamatory and pass it off as true. A lot of people will shake their heads. I can see some out there. But we can debate that and that's the *Porco* case and the *Spahn* case and *Time v. Hill*, the last two of which went to the United States Supreme Court.

PROF. SHEFF: Based on all of the comments that we've had so far--Jennifer, I'm going to give you a chance to jump back in, in just a second--I see a couple of sets of themes emerging. Some are kind of big picture policy themes. Should there be a postmortem right and how is that postmortem right going to interact in New York with postmortem rights elsewhere? How does what New York does interact with what other jurisdictions do? What are we supposed to do about reanimation or digital avatars? Big issues like that.

Then there are smaller issues that we think of typically when we think about IP issues, questions about how it's going to apply to this particularly industry. Do we need particular exceptions for this particular type of use? Are video games different from biopics, for example, that kind of a thing?

I want to try to get each of those two tracks going in our discussion, but I want to do it separately. Before I do that, I want to give Jennifer a chance to jump back into the conversation and reflect on some of the comments from the rest of the panel and see if that triggers any further comments from you on the New York bill.

PROF. ROTHMAN: One reaction I had is just to remind people of something I think Justin said, which was about who the principal parties are in the room revising the bill. None of us are in the room. The video game people are not in the room. No representatives of newspapers, of media, of the public, of social media. None of those people are in the room.

The people who are in the room are the Screen Actors Guild and the Motion Picture Association [of America]. Even if we think there needs to be changes, those are not the principal parties who we want to be the only ones writing a bill that's going to affect every person in this room. I think that should be concerning to all of us. I think we should have more voices.

I think what we've seen across the country--and we're seeing it replayed here in New York, and I think people need to remain vigilant about it--is that SAG is putting forward, often in the aftermath of the death of someone famous in the state, these bills. Then the Motion Picture Association comes in, opposes it until they get an exemption for the motion picture industry. Then the Motion Picture Association says okay, that's fine with us, less litigation for us, and leaves everyone else out to dry--the news industry, social media, the video game industry.

Also, as suggested and as the history tells us, Hollywood isn't that concerned about transferability because it can use it to its advantage in a variety of ways. But people who should be concerned about transferability are every other person in this room. Even SAG may be able to negotiate union contracts that would help people in some respects or certainly its most powerful members. But the rest of us will not [have the benefit of that]. We're going to talk about postmortem rights later, so I might save my comments on that for later.

PROF. SHEFF: That's fine because I think your last comment is actually a good jumping off point for the second track that I mentioned. That is: how do we think particular applications of right of publicity that would be expanded in some of the ways that the bill attacks would expand the right of publicity in New York? How do we think that that would be likely to affect particular industries of importance in New York?

We have attorneys on this panel who represent clients in some of those industries. I'm curious to hear what they think about particular concerns that their clients or the industries in which their clients work have about particular expansions of the right of publicity in this way, either with respect to the creation of postmortem right or with respect to the transferability of the rights or any of the other issues that we've identified as policy changes that are potentially in the offing. That's Kevin, Nancy and Nathan I think to start with.

MS. WOLFF: You want to pick one of us? Well, generally every June I have to run up to Albany because there is the day before the session ends for the summer, a right of publicity bill appears on the calendar that gives a retroactive 70-year postmortem right generally for whatever corporation has bought the alleged rights of Marilyn Monroe and sort of forgets about all the other industries that rely on content to tell stories, to talk about culture, to tell news.

The one industry I do a lot of work in is the image licensing industry. I don't think any legislators really understand how that industry works. I've had to run up to Massachusetts and was on the phone forever with Arkansas trying to explain how the industry works.

The one good thing about New York is it only applied to advertising and trade. You've had a lot of case law that talks about what is advertising and trade. It's very clear that you can license and sell something. Because you make money, that doesn't turn the use into advertising or trade. Photographers can do photo book of their work. That's expressive. Photographs are visual works and they don't need consent from the subjects. They can sell fine art prints. They don't need consent from the subjects.

The news media does not have a photographer in every location around the world. They rely on image aggregators getting images, AP/Reuters and many others to license images. Because they need to illustrate the stories. No one wants to look at a website, a newspaper or

magazine without pictures. They need the images to tell the story, to let people know what's going, and to inform everybody. That's an act of licensing.

We as an industry have had a number of cases in California and have brought claims[phonetic] because class action lawyers will look at an image library website and say just the act of displaying and licensing an image is a commercial use. The exemption under California law that says what's commercial or not lists things like news reporting and other things. But it never lists the fact that you can aggregate and license images to the news industry and others.

I've had to exhaust myself explaining that in order for the news industry to have those images, photographers need to take the pictures and then someone needs to help distribute them. Those kinds of layers are usually invisible to those legislators that are writing legislation. They're not going to understand that there are many licensing transactions involved when they read something or see a documentary film, so I've had to deal with that a lot.

PROF. SHEFF: Nathan, do you want to add your experience?

MR. SIEGEL: Sure. I think that the historical experience of California is a pretty good roadmap for this. Up until 1983 I think it was California had a law that in effect was pretty similar to New York's. The law that exists today in New York was basically a right that was a statutory right that was limited to advertising. The Legislature amended that law in I think it was '83.

I'm not actually sure this is what the legislature intended back then, but at least it was subsequently construed by the court to do what New York is talking about doing now, which is to create a broader right and then articulate a bunch of exemptions.

Prior to 1983, the right of publicity in California was not really that hotly a disputed issue because it was fairly clear where the limits were. Since 1983 it's been a floodgate of litigation that, to this day, is all over the map. Because once you get into what an exemption is, then you're going to have lots of litigation about what that is and—

PROF. SHEFF: I wonder if maybe you could give us a couple of examples of particular types of uses or particular industries where you would expect that kind of litigation that you don't get under a law of the type we have in New York currently.

MR. SIEGEL: Sure. A good example is certainly after the California law was changed--and they're still testing this to this day--people started challenging docudramas, biopics and movies. When you look at the exemptions, whether those were public matters related to public affairs or news or things like that, we're not so clear.

While I think that the New York bill has done a better job of trying to create broader exemptions that would address those things, those are examples of where, while this has been true to some degree, there's been much more litigation in California over sports. While sports broadcasts per se are exempt under the California statute, if Major League Baseball wants to put highlights of its games on its website, that leads to lawsuits.

I'm doing a case right now about the opening segment for the Super Bowl, which sort of paid tribute to Muhammad Ali. Muhammad Ali's estate is now suing. It's that kind of thing that I think has sort of become endemic to the system in California.

PROF. SHEFF: Kevin, you have any particular experience from your practice to add?

MR. GOERING: Absolutely. I spend a lot of time advising clients in the entertainment and media industry as to whether or not they need to worry about the right of publicity. I usually tell them they don't. But they see what they perceive as a floodgate of litigation across the country and they're all worried.

I advise fewer celebrities, but if I did, I would advise them that usually they don't have an actionable claim. Because if you look at the number of actual docudrama and biopic cases that have been brought, most of them are unsuccessful. There isn't a lot of money in all of this.

I don't agree that there's a floodgate of litigation even on the margins involving the right of publicity. However, whatever problem there is, it is a nationwide problem and it would be solved to some extent if we had a uniform law, if we had a federal law--which may or may not be constitutional under the commerce clause (I think it probably would be like the Lanham Act is)--or if there were a uniform law. The Uniform Law Commissioners are considering one of those right now, although that hasn't gotten very far.

Lastly, nobody's here to defend the interests of celebrities. Let's

take baseball/football players and the like. In the last 20 years, the sports industry has become a huge business. There are millions of people who are employed. There are hundreds of people who are employed because of each Michael Jordan. Each LeBron James has a whole industry surrounding him. Why? Because people are willing to pay for that, because the television rights are worth that.

We shouldn't say that, just because people make plenty of money, why do they need to worry about getting more? You see that in the case law. You see that even in society. They make enough money.

But we don't say that about CEOs of banks who just were reported to have made \$25 million each in the last year. We don't say you can just use their images and freeloader off of that. I think there are a lot of industries that are affected. I don't think this bill is going to change that much.

Lastly, I will say while I have the floor here that you might be able to solve a lot of these problems by taking out a lot of these exemptions and everything else and just saying that we will extend the existing sections 50 and 51 to dead people for 40 years and incorporate all of the existing jurisprudence in New York, which is actually pretty good to protect the media and the entertainment industry.

PROF. SHEFF: One of the points that Kevin you just raised calls back to a point that I think Mary made earlier about the kind of patchwork that we see across jurisdictions, particularly in terms of the existence of a postmortem right and how it depends on domicile or death. That plays into a point that I think Justin raised earlier: other jurisdictions have already established a postmortem right. In terms of industries that have to worry about this, they're already dealing with this problem.

I kind of wonder how those two points interact. On the one hand, we've got a patchwork of state laws that some states extend their postmortem rights. Other states don't. Industry has to deal with this presumably as if they always have to assume that there is a postmortem right unless they have proof to the contrary; they have to be prepared to deal with that.

Meanwhile, domiciliaries, heirs, trustees or estates have to kind of figure this out piece by piece. One possible response to that is Kevin's response. That is this is a mess. We should just have a uniform law that applies the same way everywhere. Are there other potential

responses that we could see emerging for that kind of tension across jurisdictions? I think maybe Justin and Mary can chime in on this.

PROF. HUGHES: I was just going to say except for whatever industry you would identify as the dead people's rights industry, no industry is going to be greatly affected by this or not. Let me promise you. I will be a huge amount of money that you cannot find a movie producer or film director who said, "Yeah, I cast based on whether there was a postmortem right in where she was domiciled." No one does that. That's just not part of the equation.

People in the film industry calculate on making their money in the first very narrow window. It's not going to affect—

PROF. SHEFF: [Interposing] What about the advertising industry? I'm kind of curious.

PROF. HUGHES: Well, this relates to an interesting argument about postmortem rights, one which kind of goes to the employment issue and is part of the debate up in Albany. My understanding is that one of the rebuttal arguments to a postmortem right is that rights for actors who are living makes sense because that's about jobs, but postmortem rights aren't about jobs because dead people can't work.

Well, if you have a choice between using a dead person for your advertisement or a living person and you don't have to pay for the dead person, then yes, the dead person might replace a living person, whether it is an advertisement or a film appearance.

But let me just add on the postmortem. It's off your question, Jeremy, but Jennifer was completely right. Once you've established postmortem, you've got to figure out sensible descendibility and the New York law doesn't seem at all sensible or it seems overly complex in that way. It seems like Texas law even reads more clearly than what the New York law was going to be.

But I also agree with an interesting point Jennifer made that however you do it, descendibility needs to be commercialization neutral. That is, the tax structure should not push people towards commercialization.

Last question. How many people have ever been to the Picasso Museum in Paris? Well, that is the result of French estate taxes. Because basically, the French government said you can either sell the

paintings and pay us in money or you can pay us in paintings. That was a nice way that French estate law was not pro-commercialization. It was just the opposite. I agree that you've got to figure out a way to make sure that if there's a descendible postmortem right, it will be commercialization neutral.

PROF. SHEFF: Mary, what about your views kind of on the interplay of different jurisdiction law on this, both with respect to the existence of postmortem right and with respect to any other issues that—

PROF. LAFRANCE: I think the differences between estates both with regard to postmortem rights, with regard to the scope of what is protected, what is considered to be an aspect of somebody's identity that is subject to protection, assignability, I think having such vast differences between the states and also between the U.S. and other countries does present a problem with respect to works that are going to be widely disseminated, such as video games, transmissions, broadcasts of various kinds, internet transmissions, publications that are going to cross jurisdictional boundaries.

The lack of a uniform law makes it very difficult for someone to undertake those cross-border activities when the rights of the persona are different in different jurisdictions. In effect, the most protective jurisdiction is when you dictate what the content of those cross-border publications or broadcasts are going to be because they will be subject to liability in whatever jurisdiction has the most protective laws.

Uniformity would be very helpful. Many people have proposed federalizing the right of publicity and I think there are some good arguments for that for the same reason that we federalized most of copyright and a great deal of trademark law. It does make sense to enable people to predict what liabilities they might face if they undertake a particular transaction, if they intend that transaction to cross borders.

PROF. SHEFF: Yes, please.

PROF. ROTHMAN: I used to be uncomfortable thinking about a federal right of publicity because I thought it would be more expansive. As much as I dislike the legislative process here in New York and in California, the thought of it being done at a federal level seems even more chilling and concerning.

I'm not convinced that it will happen because I don't know that congress can pass even the most basic gun control laws. I do think that consistency across states is important so at this point I've sort of switched. The situation is so desperate, with [so many] conflicting state laws, that at this point a federal law would be better, and it might be something that we could add into the Lanham Act, and then the rest could be covered by state privacy laws.

The privacy laws, which are adopted in more than 40 states, are virtually identical with very few variations. New York's is narrower than most, not covering false light and some other things. But the right of publicity wildly varies from state to state. Like Utah, which requires there to be a likelihood of confusion with regard to the use. And it doesn't have a postmortem right. [These variations] are difficult to navigate and content providers, and creators often have to conform with the most expansive laws that have the fewest speech protections.

With that said, I wanted to circle back to something that Justin said about--and a lot of what's driving the postmortem stuff—is this competitiveness with California. I love California, just to be clear. But it's not really a good reason to adopt a postmortem right. California, for example, just plucked out of almost thin air the copyright term for the duration of the postmortem right without even thinking about it. If we're going to pluck things out of thin air, why not patent law? That's 20 years. That might be more reasonable.

I don't think just copying a law that isn't great is wise. New York is such a large market that it will have a much greater impact than Arkansas. As we see, there is a lot of litigation around some of the free speech issues, so it's not just the scope of the underlying law [that matters]. It's how those states are going to interpret the speech protections. There's a lot of uncertainty in that regard.

New York being such a big market, I don't think we can use as an excuse, the argument that "Many other states have done something like this." [Just as saying that] many other states have bad laws that let you buy assault weapons," [is not a strong argument not to have an assault weapon ban.]

I [also note] Justin suggested that this bill is going to stop the reanimation of people like us. But the current draft only talks about professional performers, so it doesn't do that. Therefore, I feel the new—

PROF. HUGHES: That's not current.

PROF. ROTHMAN: Maybe it's been changed? He must have secret information, so we'll see.

PROF. HUGHES: You're speaking out of school.

PROF. ROTHMAN: No, no. I am speaking based on the original draft that's public as opposed to the one negotiated secretly.

PROF. SHEFF: We've got a couple of other panelists that want to chime in. Before we do--because I think it's going to move us off of this issue--I want to point out teaching trademark law as I do, there is a kind of right of publicity claim in Section 43 of the Lanham Act. It's just not as broad as most state right of publicity claims.

PROF. HUGHES: And in Section 2.

PROF. ROTHMAN: And in Section 2 [of the Lanham Act].

PROF. SHEFF: In Section 2, correct. To the extent that we're dealing with registered trademarks, that's right. But just in terms of a general false endorsement type of claim, you can bring those claims under the Lanham Act. It's just that it doesn't get you as much.

PROF. ROTHMAN: Yes, and that covers postmortem for the estate. Just circling back, to the postmortem right. When we think about what to adopt, we really need to understand why we want it and what we want it to cover and who we want it to cover, keeping in mind things like trademark and false endorsement law, which will protect most of those with commercially-valuable rights after death.

PROF. SHEFF: I have Justin and Nancy.

PROF. HUGHES: All I was going to say is--and this is to AELJ'ers who might want to write a note on this because before Chris, I was the AELJ faculty advisor for years and years, so I saw many bad note topics. Just because there is enormous inconsistency amongst the states, do not believe for a moment that that is impetus for federal legislation. Because what you should be seeing is they've been living with the inconsistency. The industries are living with the inconsistency. They've been living with it for decades.

To give you a counter example, 2 years ago a "huge" market,

Vermont, passed a GMO labeling law that immediately triggered federal legislation because any food processor said, "I can't deal with having to label things differently for Vermont -- and Connecticut and Maine are coming next with state laws." Those are pretty small markets, but that's the example of the kind of thing where you can see inconsistency amongst the states immediately triggers a response from Washington. The fact that everybody's lived with this for decades and decades means it's fine from the D.C. perspective.

PROF. SHEFF: Nancy and then Kevin.

MS. WOLFF: One point. I just want to remind everyone that this bill applies to a lot more than the movie and motion picture industry. I think it's not how many lawsuits are brought under right of publicity bills, but it's how many projects that don't happen, how many things don't get started. That's what I see because there's a lot of innovation that doesn't happen because of the massive amount of unknown and whether you have to clear rights, which basically means you can't do something.

I think we do have to worry about the future in terms of revenge porn, but we have to worry about the future in the way our children are going to learn things. If you have exemptions that say a play, a book or a movie is good, but a video game is bad, how are kids going to learn who have grown up on gaming, and the way they're educated? How are you going to show culture and history without using images and videos?

If you look at all those new types of works and you say there's a recognizable person depicted, you are not going to have any content. That's what I personally see in my practice. There is a huge chilling effect because people are coming up with innovative ways to educate and coming up with ways to teach history using a lot of video and footage and images and it really makes it very difficult when you have a bill that's going to have very precise 1980 California terms of what types of products are good and what's bad.

PROF. SHEFF: That might be a segue into a discussion of the digital avatar point, which I do want to get to, but before we do, I want to give Kevin an opportunity to add his point.

MR. GOERING: This'll be a good segue because you mentioned, Jeremy, advertisers. We haven't talked about native advertising, virtual reality, and whether or not uses of images and things in that realm—

PROF. SHEFF: You want to give a definition of native advertising?

MR. GOERING: Native advertising is when you associate a celebrity or somebody with a particular product with content and you don't disclose to the world that that's what you're doing. You hide advertising, etc. In the digital world, that's a real problem.

But what I was going to say is one other thing. When we're looking for uniformity, yes, right now we have this very uncertain world. We haven't talked about preemption. I mean copyright preemption (thanks to Nathan and his law firm and some other people) have really thrown another wrench into this with the *Dryer* case and *Marshall v. ESPN*. That was Nathan's case, and the *Maloney* case, which was his partner's case out in California on the still images of NCAA players. I think that law is all messed up.

We weren't going to get into that, but I would say this. It'd be nice if the Supreme Court took a video game case or took a docudrama case or something like that. They've heard one right of publicity case and Nathan will tell you it wasn't even a right of publicity case. That was the case of the human cannonball, Hugo Zacchini in 1977.

It's been 40 years. There's no case right now in any circuit where there's a circuit split that's poised to go up there. The last 5 or 6 petitions have been denied, so we have no hope of this Supreme Court, which may or may not be a position to give us a definitive answer on much of anything anyway, a definitive answer on the right of publicity.

PROF. SHEFF: All right, let's turn then. I mean it's a bit of a rough pivot, but that's okay because we'll leave some time for audience questions and comments. Let's turn to the reanimation or digital avatar problem.

The sense that I've gotten from the panel, I don't think anybody disagrees that this is a problem, that this is a potential problem at least in some contexts. You do? You think it's great.

MR. SIEGAL: Yes, actually. Yes.

PROF. SHEFF: I'm going to ask you for that contrarian take first. Then after we get that take, I'm going to ask the question that I think has been percolating through some of the comments from the panel and from Jennifer. Is it a right of publicity fix or is there some other kind of

legislative fix or even just a judicial fix as a matter of some other body of common law doctrine that gets us to a place where we don't have to be as concerned that these types of scary uses of people's identities in what looked to all the world of genuine videos of them doing things that they didn't in fact do might come to pass. Go ahead.

MR. SIEGAL: Let's start with Jennifer's point about the Kodak camera. Right? The reality is there's a history in this. Every time there's a new technology, people say, "My God, there's a new technology. This technology is scary. Let's ban it from the perspective of something like publicity right laws."

When motion pictures came out, people made that argument. The irony is people would sue the Peter Cushings of the world for playing real people in biopics because that was terribly scary and offensive, etc.

Animation is a beautiful thing. It's been around for a long time. It's a beautiful art form. Digital avatarism is an even more beautiful art form in some way and it's just a different type of animation. There's nothing wrong with animation or with creating digital avatars. There is nothing wrong.

For example, take a movie like *The Social Network*. If somebody wants to make an animated version of *The Social Network* or if somebody wants to make a movie about the creation of Facebook using digital avatars, there's nothing wrong with that. There's no difference between that and hiring actors to resemble the original people. It's the same thing and it's a beautiful form of art.

It's important when we sort of sling these words around as scary terms to recognize they're not scary in and of themselves. They're just forms of art. Can they be misused? Yes. I think there are really two things that people are talking about here, and none of them really have anything to do with the right of publicity.

If there's ever an example of the tail wagging the dog, it's this, trying to create a whole right of publicity to deal with everybody's use of a name likeness and every possible permutation because we're worried about a couple of digitization issues.

The first problem that Justin is talking about is probably not something that anybody disagrees with. Somebody shouldn't be able to make the next version of *Mission Impossible* by digitizing Tom Cruise, rather than hiring Tom Cruise. But why shouldn't they be able to do

that? The reason they shouldn't be able to do that really has nothing to do with the right of publicity. It's essentially stealing the fruits of his labor.

The law has lots of mechanisms to punish stealing the fruits of and preventing labor. I think, essentially, it's an unfair competition issue in that the rubric of laws that already exist to address unfair competition could address that issue. You don't need to create glucose statute to address that issue. That's a legitimate issue and it could and should be addressed by applying existing law to new types of technology.

The second issue that everybody has talked about, whether it's revenge porn or putting people's images on pornography, etc., all of those are really species of falsely representing people in some way, one way or another, and there are lots of mechanisms that the law currently has to address falsity.

In fact, if there's one thing that the right of publicity itself inherently doesn't really have anything to do with, it's falsity and misrepresentation. You can sue people for false light. You can sue people for defaming you. You can sue people for falsely depicting somebody in any variety of ways. Again, I think the law already has lots of mechanisms for dealing with falsely implying that is somebody's nude body because you put their face on them. You don't need a right of publicity to do that.

I think the problem is you start to challenge all the legitimate uses of animation and digital avatars, etc., in order to solve that problem. Is it a problem? Absolutely. But are there other ways of dealing with it? Yes, and I think it probably is better dealt with on sort of a case-by-case basis as the law evolves, rather than trying to create a statute that's very difficult to define the problem you're talking about.

PROF. SHEFF: I'm going to solicit other people's views on the general point that maybe there are other bodies of law that can address the uses of digital avatar technology that we find particularly troubling and whether those other bodies of law might be preferable to trying to regulate the uses of that technology through the right of publicity.

One thing I do want to push back on is the suggestion that right of publicity doesn't have anything to do with falsity just because it has to do with consent and there's a kind of implied claim in most right of publicity cases that by using my name, image, likeness what have you in a commercial context, you are implying that I endorsed your product

when I in fact did not.

As the right of publicity has expanded to other contexts, that kind of implied falsity, kind of diminishes a little bit. But I still think it's there.

MR. SIEGEL: Actually, I think that's the difference between the Lanham Act and right of publicity. To bring a statutory right of publicity claim does not require any showing of falsity.

PROF. SHEFF: No, it requires a showing of a lack of consent is my point.

MR. SIEGEL: Correct.

PROF. SHEFF: To the extent that we think the consent is an element of most commercial uses of likeness, which may be false, increasingly may be false. But to the extent that we think that that's true, there's kind of an implied falsity to that use. But I don't think it's a major point. I think it's a more subtle point.

PROF. LAFRANCE: Well, in New York it matters quite a bit, though in terms of the notion of the First Amendment of newsworthiness defenses because there's a whole line of cases, one prominent recent case, *Porco*, which suggests that if the use is a right of publicity violation--and that case was in a lifetime docudrama--but if the portrayal is false, then you lose the newsworthiness defense.

It sort of sneaks back in that consideration as part of the evaluation, not of the *prima facie* case, but one of the primary defenses.

PROF. SHEFF: Other viewpoints on the, "Is right of publicity the right tool for this job" question?

MR. GOERING: In terms of reanimation and digital avatars, I certainly agree that in some cases defamation and false light/invasion of privacy would provide good claims for the aggrieved parties where the use of the animated image does cause harm to the person's reputation or causes injury to their feelings or embarrassment.

But I think to suggest that other cases could be also addressed without a right of publicity, I'm somewhat more doubtful of that claim based on unfair competition law as it is usually premised on some sort of likelihood of confusion.

I think there are going to be a lot of instances of reanimation or digital avatars where the consumer who's viewing the work is not the least bit confused. They know perfectly well this is not the actual performer. They know that the performer is deceased or the performer did not participate. They know that this is simply an animation of the performer's likeness.

So much of our unfair competition law requires some showing of likelihood of confusion, that I think some of these cases could not be resolved under unfair competition principles. Plus, many courts still believe that disclaimers are effective, although many courts believe they're not effective. But for at least some courts, a disclaimer saying that this particular person did not participate in this film could persuade some courts that it is not actionable as unfair competition.

Less frequently utilized unfair competition doctrines like misappropriation, to me misappropriation is awfully close to a claim of right of publicity. If you say that the reanimation or digitization of a performer is actionable under misappropriation doctrine I think is basically saying the same thing as saying that it's actionable under the right of publicity. But there's not as much case law on misappropriation in the absence of unfair competition.

I think the *Zacchini* case, the human cannonball case, could be viewed as a misappropriation case, so falling under the broad umbrella of unfair competition, but without a likelihood of confusion. But it can also be viewed as a right of publicity case. Even if the court did not use those words, I think the principles that it was applying could very well be perceived as right of publicity principles.

PROF. SHEFF: Jennifer, go ahead.

PROF. ROTHMAN: I think a lot of this has to do with the scope of the right of publicity in a particular state. Here in New York where there's some uncertainty about the scope of what we mean by "trade purposes", there's conflicting law about whether it applies to expressive works like movies and video games, though it seems like it does in New York, but doesn't in every state.

When you talk about reanimation, if our primary example is reanimating someone in a movie, then it matters what the state law is and whether it covers movies at all. Because some states limit right of publicity to uses in advertising and on products, so it wouldn't cover

movies at all. If we think about revenge porn or the deepfakes example, if those aren't commercialized in some way, they're just out in the web not for profit, then they may not fall within the scope of a right of publicity law either.

We need to think a little bit about the scope of the laws and what we're trying to address. If we're trying to address substitution of actors' services, we need to think a little bit more deeply about that because we substitute for actors' services all the time by recasting a role, or making an animated picture instead of a live action one, or doing a reality television series instead of scripted series. There are lots of ways in which we substitute for actors.

If the real concern is that we're taking particular people like Tom Cruise, which is what the 9th Circuit used as its example [in oral arguments for *Keller v. Electronic Arts*]-that's why we all fixate on Tom Cruise. If we reanimate Tom Cruise, then there's also a dignitary component of that, that we're sort of treating him like a puppet that we can just reanimate for our own purposes. That [reanimation] also raises some copyright conflicts.

If we're concerned about revenge porn or deep fakes, that's also really about taking someone and not just putting them in a false light, but in a way that would be really quite harmful to them personally. It is possible that we might want individual laws to address some of these things, rather than complicating or overlapping it on the right of publicity. There is in fact a current trend for states to adopt separate revenge porn statutes, and I think Oklahoma just passed one on catfishing also.

I'm not necessarily a fan of these piecemeal things. We may be able to craft something that covers it all. But again, we need to think about why [we want or need such laws] and the scope [of such laws].

PROF. SHEFF: I have Justin and then Nancy. Go ahead. Then I'd like to open the floor to questions.

PROF. HUGHES: I agree with Jennifer on a lot of what she just said. I think we're more likely to see a freestanding effort to address digital avatars and what I said to you about nothing will happen in Washington, nothing will happen in Washington on general right of publicity. I think it's a real wild card right now if you spend a lot of time in D.C. on digital avatars. Because it connects to fake news and because it connects to fake news in social media, all bets are off.

But having said that, even if there is a federal law, don't expect it to preempt anything because it will be more likely to be like the Defend Trade Secrets Act (DTSA) where it's just a federal cause of action. To address the point that we already have sufficient number of causes of action, we lawyers are good at that kind of analysis. It is true that we live in a society that often has multiplies causes of action for each wrong.

One real socially-valuable reason to have a discreet law in this is to send a message to the community of people who might engage in this. There is a specific law exactly about what you do. We lawyers can say that's clearly an unfair competition claim. But that is not going to get through the geekosphere. The geekosphere will not understand. Yeah, yea, there's false light and unfair competition. I better not do that. It's much easier to say here's the law that says you won't do that.

PROF. SHEFF: Nancy, go ahead.

MS. WOLFF: I'll just be brief. If we are concerned with replicas, we have to be very careful that it's a separate part of the Act. Because what's important that we have exemptions for what sometimes are called works that are expressive, which are movies, films, documentaries and docudramas. Often you'll need to replicate someone. You have to make sure we have parody or Saturday Night Live might not be able to replicate some of the people that they do all the time.

I think if it's crafted, it's going to have its own exemptions and carve-outs to make sure. They're trying to protect avatars in works that are typically outside of what would be caught up in a right of publicity bill because those works would have first amendment free speech protection.

PROF. SHEFF: Kevin—

MR. GOERING: I just want to say two things. One is I'm on the board of the Volunteer Lawyers for the Arts and we haven't talked about poor artists and what they face with the right of publicity and the ability to do their work. Nancy represents a lot of those people too. That's another constituency.

The other thing is that the right of publicity was around for the last 100 years or 50 years or however long because it fills in a lot of gaps in

these other causes of action.

PROF. SHEFF: With that, I would like to open the floor to questions from the audience to the extent that anybody has any comments or questions based on the discussion thus far. Would you like to address a question to a particular member of the panel? Otherwise, I'm sure we can keep talking, but we'd love to hear from you. Anyone? Yes.

FEMALE VOICE: [off mic] I have a question in terms of reality television. What about ones that are not voluntary - - . I'm talking about how commercialization that could be very difficult to define - - when we're talking about - - . How does that or doesn't it apply or what could apply - - a reality show?

PROF. SHEFF: I'm going to repeat the question for the benefit of the transcript because I don't know if whatever mics are in this room for the stenographers are going to pick that up. The question generally is: how would the right of publicity apply in the context of reality shows? For example, that depict real-life people engaged in unsavory behavior like Cops, for example. How does it apply to those kinds of contexts and it is more like, for example, the context where people would be involved in reality shows by their own volition, for example? Who wants to field that one? Maybe one of the litigators who deals with these matters.

MR. GOERING: We have a good test in New York for that called the substantial relationship test. If the person is in there and has no relationship really to the theme of the show and everything else, that's one thing. Now if somebody just happens to be involved as a cop or whatever and it's a reality TV show, I think it's protected like any other first amendment protected activity.

But there's a case sitting out there called Nivas [phonetic] against Home Box Office that involved a passerby up in my neighborhood who just happened to be walking by during a filming of a documentary reality TV show about a bail bondsman who was included and sued. Her case was not dismissed and that was affirmed by the Appellate Division. That's a problematic case for the movie industry.

PROF. SHEFF: Prof. Buccafusco.

PROF. BUCCAFUSCO: I'm a law professor and so I'm going to ask a law question. Irrespective of what you think about the ultimate

shape of the field, should you prefer the bill in its activity written more in terms of rules or in terms of statements? Do we want to have more precise language that exempts particular sense of behaviors, it does so at the level of legislative prediction, or would we rather dump these sorts of things into courts and say have at it with some kinds of guidance say where [foreground noise].

PROF. SHEFF: I'm curious for a litigator's take on this. One's pecuniary and non-pecuniary interests in one's profession might be at odds here. Go ahead.

MS. WOLFF: One problem is that if it's done in a way that eliminates the last 115 years of cases law and conduct we know is right and wrong, and where the lines are drawn from the cases, that will be a problem. I think a lot of industries like clarity because there are not that many people that can afford to litigate. What happens with vague laws? You worry about: is this gesture protected or is this considered persona? Can I take a photograph at an event where celebrities come but if it's a nonprofit and if I sell it, is it now going to be a violation of the law in the way the bill was written last June?

You're just going to prevent many uses of content or what's called the chilling effect on so much activity. I deal with copyright issues a lot and I deal with fair use. I can tell you most people don't understand it. I spend hours on the phone with documentary filmmakers and people trying to do things for film.

I mean California's publicity bill is the worst. Under the their right of publicity case law, they grabbed the word "transformative," from copyright, the word that no judge in copyright can understand, and applied it to whether a commercial use that requires consent. I get arguments under California law that a photograph of someone is a commercial use because it's a likeness that's realistic. It's not transformative enough. So if I took a blurry picture; maybe it'd be transformative? The term transformative just doesn't belong there at all. I don't think I want to trust the courts.

PROF. SHEFF: That's one vote for rules over standards. Others who want to chime in?

PROF. LAFRANCE: Why do we have to choose? We could have both is probably the best option, that we'd have specific exemptions so there's some clarity, but also room for additional uses that would also be protected. Some have been drafted that way.

PROF. HUGHES: I'm not going to answer directly, sorry. My only observation is any new rule always suffers from vagueness. When you are working with people on new legislation, any time they don't like a new rule, they attack it as vague. It's kind of the same. Any new rule always is always attacked the same way as a standard is attacked.

PROF. SHEFF: Other questions, comments from the audience?
Prof. Wu.

PROF. WU: It's sort of been mentioned, but I'm just curious whether anybody thinks that this opportunity to change New York law would be an opportunity to change something about the [off mic] - - rule. This is the idea--for the rest of the folks in the room, Michael Arrington had his photograph taken and used in a New York Times article. His only connection to the article was that he was a young African American man in an article that was about young African American men.

But otherwise, he didn't particularly agree with the article, to be interviewed for the article. Nothing about him was in any other sense connected to the article. He brought a right of publicity lawsuit in New York and lost with the ruling being that simply because he was a young African American man, that was enough for there to be a substantial relationship to be counted with the article and therefore he has no claim.

If we want to try to think about ways in which maybe we ought to be more protected as just random individuals walking down the street, would anyone thing that we ought to change the result in that case?

MS. WOLFF: No.

MR. SIEGEL: No.

[Crosstalk]

PROF. HUGHES: Why couldn't the New York Times have gotten a relevant photo? Can you explain to me why a newspaper as big and organized as the New York Times couldn't get a relevant photo?

MR. SIEGEL: The problem is: how do you define a relevant photo?

PROF. HUGHES: I can define a totally irrelevant photo. How

about that? A relevant photo is African American young gentleman who consents at least.

PROF. LAFRANCE: For a news story? Why do you need consent? That's protected by the First Amendment. I mean if there's a relationship between the picture and what is illustrated, it's protected by the First Amendment. Otherwise, you're really going to start chilling—

[Crosstalk]

MR. GOERING: Arrington is one thing, but the two subsequent Court of Appeals cases after that. *Finger v. Omni* and *Messinger* are even more dramatic. Should they be able to use the picture of a big family to illustrate an article on caffeine and its effect on fertility?

PROF. LAFRANCE: That's the basis of the stock photo industry, so I would say yes.

MR. GOERING: Well, and I think if you ask most people, they would say no, you shouldn't be able to do that without their permission. If you ask most people.

PROF. HUGHES: In the stock photo industry you do have consent of the subjects—

MR. GOERING: They didn't in that one.

PROF. LAFRANCE: Not necessarily.

PROF. HUGHES: Well, okay.

MR. GOERING: They did not in that one.

PROF. HUGHES: Fair enough.

MR. GOERING: In *Messinger* they didn't get a release because she was underage. But my point is I'm not sure those cases would be decided that way today. If you heard the appeal of the *Gravano* and *Lohan* cases 2 weeks ago in the Court of Appeals, you would question whether or not this Court of Appeals would decide that case the same way.

PROF. SHEFF: Before we move off the Arrington case, I simply have to note because I think it's relevant to one's views on the case that

there are no people of color on this panel. To the extent that both the decision-making at the New York Times and in the courts of the State of New York, is decision-making by people—

PROF. SHEFF: Let me finish. To the extent that the Arrington is relevant to his article because he's a young black man and this article is about young black men; I'm sorry, there's a bit a reductionism there, racial reductionism there that I think we ought to take into account that maybe isn't represented on this panel.

MR. SIEGEL: I actually don't think that's true at all.

PROF. SHEFF: Fine.

MR. SIEGEL: I mean I think if you wanted to do an article, there are gazillions of Arrington cases about all manner of people. There's the *Hallow v. New York Post* case, which is a case about Hedda Nussbaum being photographed at a mental health facility and somebody else who was incidentally in the background being captured brought a 50, 51 claim and lost.

The reason that I think it has nothing to do with race is that If I want to do a story about excess in the suburbs in Westchester, I should be able to show a picture of something in the suburbs in Westchester and I shouldn't have to condition my ability to do that on finding somebody who's willing to pose for that picture. That is the essence of news. The essence of news is that we give news people latitude to illustrate both with words and with pictures what they're trying to talk about, even recognizing that that is going to offend some people and that as long as it's not false, we give the news media the latitude to do it.

It doesn't matter whether it's a story about African Americans or whether it's the *Messinger* case about a family or whether it's Hedda Nussbaum in a mental health facility. It's the same principle that applies across the board. That's the answer to the question of why the New York Times shouldn't have to condition their ability to report on that by finding someone who's willing to pose for the picture.

PROF. SHEFF: Were there other comments on this point?

MS. WOLFF: Just one that you have to remember the First Amendment protects not things that are just high news, but it's news and culture and sports and entertainment, what society is made of. You

can't tell these stories without showing pictures. Once you ask someone permission in a pose, in a way it becomes fake news by doing that.

PROF. SHEFF: I guess I'll throw out a hypothetical that I've just come up with on the top of my head out here to maybe drive home the point and ask for people's reactions about it. Let's say there was a news article that contained factual information and accurate information about high levels of drug and alcohol abuse in the legal profession.

To illustrate that article, your photo was included without your consent. What would your reaction be? You're a lawyer. Right? That's what the article is about. Should you have a right of publicity claim?

MR. SIEGEL: No, I shouldn't have a right of publicity claim. The question would be--which is the question in all these cases--whether I have a defamation claim because the article implies by including my picture that I was engaging in drugs. But there's nothing with them. If they want to do a story about lawyers and take my picture simply because I'm a lawyer, that's fine. I don't think I should have a right of publicity claim.

That is the underlying issue in all of these cases. The reason these cases became 50, 51 cases was because there wasn't a sufficient underlying indicia of a false statement being made about the person that would have given rise to a defamation claim or in many cases a false light claim.

MR. GOERING: Can I put you in a video game, Nathan, as one of the five best lawyers and let you compete against me without your consent? A realistic avatar of Nathan Siegel in a video game.

PROF. HUGHES: It's a program that you—

MR. GOERING: They charge millions of dollars for this because all of the Cardozo law students want to play it.

PROF. HUGHES: And it's programmed that you lose.

MR. SIEGEL: I would be honored to be included in a video game with you, Kevin. I realize this is something that people hotly disagree about and I think that there are reasonable arguments on both sides. I personally would have no problem with that. I think that people should

be able to, just like I think that people should be able, as they do, to create video games that simulate presidential debates without getting the permission of each one of the candidates. I think they should be able to create a video game that simulates legal arguments by using real lawyers.

PROF. SHEFF: Other questions, comments? Yes.

MALE VOICE: As far as looking at postmortem descendibility of rights, what [off mic] - - looking forward to New York State on claims funds law, typically along the - - line, the last person who - - is a first cut. How would putting away any possible form or - - New York State law, how could you mold this differently that someone beyond a first cousin could take postmortem rights. Then it also brings up the issue of theoretically after - - out, - - to the state?

PROF. SHEFF: Let's brush off our trust and estates law here. Should right of publicity be, for example, descendible but not devisable? Should they be subject to particular rules that are narrower than the general rules of estate succession? Should they be devisable but not descendible? What should the rules be and why?

PROF. HUGHES: I'm sure Jennifer has lots of thoughts on that.

PROF. ROTHMAN: I think that it should not be descendible or devisable to corporations. I think it should only be real people and relatives. But I am hesitant because I'm very sympathetic to some of the literature criticizing the over-focus on familial relationships. Many people have relationships who are not married or don't have children, but have very close other people who they might like to vest things in. I'm a little concerned about some of the implications to limiting it to people with whom you have legal status.

It may be that we would allow you to devise it to some designated human being even if it's not your legal spouse, for example, or a blood-relative.

PROF. SHEFF: Justin and then Nancy?

PROF. HUGHES: I think the more interesting question is whether the rights are extinguished or whether they should go to the state. My inclination is that they're extinguished at some point. I might even say if I were poobah of all this that they're extinguished if they are not in a will bequeathed to someone; if they're not bequeathed, they just

dissipate.

But there are counter examples. The French state exercises more rights on behalf of people. Maybe this would be a way to fill the coffers of the school funds with right of publicity funds from deceased people who didn't handle their trust very well.

PROF. SHEFF: I like that suggestion though, that if there's no will which shows the intent of the deceased and what they wanted to do, that it should just dissipate.

PROF. HUGHES: Yeah, maybe they didn't care enough.

PROF. SHEFF: Devisable but not descendible. Nancy?

MS. WOLFF: I think the other point is if it is descendible, that there has to be some certainty. I do like the idea of a registry. Because how can you negotiate for rights if there could be seven different heirs that could have one piece and one wants to do it and one doesn't. I mean there has to be a way if you're going to create a law just for the dead and not for the living. Keep Section 50/51 for the living and if you had something for the dead, that it has to be done, since it's now a commercial right, where you have a registry. If someone doesn't sign up within a certain amount of time, the rights are gone and then you know if you've made an agreement with whoever is designated or has 51% or whatever, that you're not going to get sued from someone else.

PROF. SHEFF: The rights that might be held by multiple parties within an interest in the postmortem right of a single individual could--I mean we could have a class on that. That would be a fun and hypothetical for my property law class. Should they be held as tenants in common or as joint tenants? Can you bring a partition action? Those kinds of issues start to get really hairy once we're in that world.

But I think we're about out of time. If there are no further questions, I think maybe the best thing to do is to invite everybody here in the audience to join me in thanking both the AELJ for convening this event and to our panelists for participating.