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Death and Privacy in the Digital Age

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DEATH AND PRIVACY IN THE DIGITAL AGE*

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Americans store an overwhelming amount of sensitive, personal information online. In email accounts, social networking posts, blogs, shared pictures, and private documents, individuals store (perhaps unwittingly) the secrets and details of their lives in an unprecedented manner. During an individual's life, these accounts are seemingly under the direct control of an account holder. Privacy is occasionally threatened, but people continue to use online services and pour personal information into their online accounts.

When developers created these online services and platforms, it is unlikely that they gave much thought to what would happen to accounts when an account holder died. Yet, the treatment of these accounts after an account holder's death is an increasingly pressing issue in today's society as more and more Americans die with active, password-protected accounts in their name. In determining how these assets will be handled at an individual's death, powerful principles collide—including privacy, contract, property, and freedom of information.

This Article discusses how privacy interests are traditionally terminated at death and explores how they should be revived and reshaped in a digital future. It argues that to align posthumous privacy interests with the needs of a digital future, the law must ensure that succession principles apply to privacy as well as property rights, and that decedents' individual intent for the fate of digital assets is honored. The Article acknowledges that private contracts may be a sufficient tool to protect privacy after death in some instances, but argues that the lodestar in any discussion of posthumous privacy should be testamentary intent. In the absence of testamentary intent, state legislatures should enact default rules of digital asset succession that accord with the family-centered paradigm of inheritance.

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INTRODUCTION

Dying is a legally significant act. Death terminates marriages, terminates some contractual obligations, and initiates property transfers. A dead person cannot vote, run for office, marry, speak, enter contracts, or enforce any rights or privileges. A dead person's wishes respecting her property, however, are honored by succession law and American courts to an extraordinary degree. The question remains whether a person retains any control over her privacy interests after death.

The right to privacy for the living is one of the most contested rights in our nation, and the existence of privacy interests after death is still more muddled. The digital age prompts even more questions regarding privacy interests. Never has more information about our lives been produced and stored. In the past two years, we have accumulated more data than all prior human civilization.[1] Furthermore, our capacity to store data is growing at an exponential

1. Jonathan Shaw, *Why "Big Data" Is a Big Deal*, HARV. MAG., Mar.–Apr. 2014, at 30, http://harvardmagazine.com/2014/03/why-big-data-is-a-big-deal [http://perma.cc/4YPD-5ZHS (staff uploaded archive)] ("The data flow so fast that the total accumulation of the past two years—a zettabyte—dwarfs the prior record of human civilization.").

rate.[2] We have developed new ways to analyze this immense quantity of data by linking databases and improving algorithms.[3]

With this dramatic increase of personal data collection, scholars have begun to debate what must be done to ensure that this staggering quantity of data does not interfere with privacy interests during our lives.[4] In fact, an entirely new field of law has sprung up to address concerns about informational privacy during life.[5] Public surveys reveal that the majority of Internet users do not believe the law offers adequate safeguards to keep their online activity private.[6] Little thought or attention has been given to what happens to our privacy interests in our digital assets at death. This is particularly concerning because postmortem privacy may be just as important as privacy during life. Furthermore, the ability of individuals to control the dissemination of information about themselves after death accords with the testamentary principles we traditionally value.

"Digital assets" has a broad definition. For purposes of this Article, I use the term to refer to Internet accounts or services that

2. *Id.* (claiming that computing power doubles every eighteen months, while storage and computational capacity similarly experience "exponential growth").

3. *See id.* (discussing how algorithms and new ways of linking datasets generate more efficiency and create new insights).

4. *See generally* DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW (2003) (describing the history and development of information privacy law); Clark D. Asay, *Consumer Information Privacy and the Problem(s) of Third-Party Disclosures*, 11 NW. J. TECH. & INTELL. PROP. 321 (2013) (identifying certain harms that result in third-party disclosures); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998) (discussing the commercial exploitation of private information and proposing a statute to combat such invasions of privacy); Jessica Litman, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 1283 (2000) (analyzing the market for personal data and various models available to provide a remedy for the invasion of data privacy); Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033 (1999) (highlighting the vastness of private information made public and the failure of consumers to opt out); Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007 (2010) (encouraging a unitary tort for invasion of privacy that reflects the social welfare implications of the defendant's conduct).

5. *See, e.g.*, *Course Information: Information Privacy Law*, VAND. L. SCH., http://law.vanderbilt.edu/courses/334 [http://perma.cc/AC5A-7L8Y]; *Fordham CLIP* (*Center on Law and Information Policy*), FORDHAM U. SCH. OF L., http://www.fordham.edu/info/20686/fordham_clip [http://perma.cc/F8KV-2D6Q]; *Information Privacy Law*, GEO. U. L. CTR., https://epic.org/misc/gulc/ [https://perma.cc/4WK7-7RK7]; *Information Privacy Law*, STAN. L. SCH. (Nov. 6, 2015, 1:17 PM), https://www.law.stanford.edu/courses/information-privacy-law [https://perma.cc/2GPE-489V].

6. Lee Rainie et al., *Anonymity, Privacy, and Security Online*, PEW RES. CTR. (Sept. 5, 2013), http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-online/ [http://perma.cc/Z5PQ-YGZD] ("86% of internet users have taken steps online to remove or mask their digital footprints. . . . 68% of internet users believe current laws are not good enough in protecting people's privacy online . . . .").

may hold sensitive, personal information at death such as email, social networking, pictures, blogs, and document storage sites. Digital privacy after death is an area of increasing concern because digital accounts store immense amounts of information about our lives—often, information that is deeply personal and perhaps not meant for public consumption at death.[7] This information is stored on third-party servers that an individual user can access through a password-protected site and is not under the direct and constant control of the account holder. When an individual dies, she leaves such password-protected sites full of personal information. Recognizing this fact, state legislatures, courts, and scholars are beginning to consider whether such assets are inheritable. So far, eight states have already passed legislation giving fiduciaries access to a decedent's digital accounts after death.[8] In addition, several states are considering similar legislation.[9] Meanwhile, many Internet companies are challenging such legislation, allegedly concerned that digital asset inheritance could negatively affect user privacy concerns.[10] With the advent and proliferation of digital asset accounts, the scope of privacy interests after death needs to be reconsidered.[11]

This Article explores how to reshape privacy interests in digital assets in a way that is legally and democratically sound. Part I explores posthumous privacy interests in general, explaining how

7. Anecdotally, we all may be able to think of an email in our inboxes right now that we would not want to be made public at our deaths.

8. CONN. GEN. STAT. ANN. § 45a-334a (West, Westlaw through 2015 Reg. Sess. & June Spec. Sess.); DEL. CODE ANN. tit. 12, § 5004 (LEXIS through 80 Del. Laws, ch. 194, 2016); IDAHO CODE § 15-3-715(28) (LEXIS though 2015 Reg. & First Extraordinary Sess.); IND. CODE § 29-1-13-1.1 (West, Westlaw through 2015 First Reg. Sess.); NEV. REV. STAT. ANN. § 143.188 (West, Westlaw through 2015 Reg. & Spec. Sess.); OKLA. STAT. ANN. tit. 58, § 269 (West, Westlaw through First 2015 Sess.); 33 R.I. GEN. LAWS § 33-27-3 (LEXIS through chs. 1 & 2, Jan. 2016 Sess.); VA. CODE ANN. § 64.2-110 (2012 & Supp. 2015).

9. Rachel Emma Silverman, *When You Die, Who Can Read Your Email?*, WALL ST. J. (Feb. 1, 2015, 11:00 PM), http://www.wsj.com/articles/when-you-die-who-can-read-your-email-1422849600?mod=e2fb [https://perma.cc/WEZ9-5XX2] (listing Florida, Indiana, Kentucky, Nebraska, New Mexico, North Dakota, Virginia, and Washington).

10. *Id.* (discussing some Internet firms' opposition to a Delaware law allowing executors to access digital media after the account holder dies).

11. Over eighty-five percent of American adults use the Internet in some way. Kathryn Zickuhr, *Who's Not Online and Why*, PEW RES. CTR. (Sept. 25, 2013), http://www.pewinternet.org/Reports/2013/Non-internet-users.aspx [https://perma.cc/KP3X-Y5ZU]. Almost ninety-five percent of teenagers access the Internet regularly. *Internet User Demographics*, PEW RES. CTR., http://www.pewinternet.org/data-trend/teens/internet-user-demographics/ [https://perma.cc/HE4L-3J6Y]. These numbers demonstrate that the vast majority of Americans, young and old, are creating digital assets and leaving a trail of personal information online.

common law, constitutional and statutory law, and our testamentary structures do not attempt to protect a decedent's privacy interests. This Part further explores the theoretical underpinnings that justify the law's approach to posthumous privacy.

Part II applies the justifications for privacy protections identified in Part I to digital assets, arguing that posthumous privacy must be reshaped in order to accommodate a future where digital assets become even more prevalent. Part II argues that posthumous privacy depends on control, and the best way to reshape privacy interests is to treat them as a key part of estate planning procedures. The law protects decedents' interests in significant ways, primarily through the American succession system, which strives to effect a decedent's desires concerning his property and remains—in fact, his interests often override the interests of a living person who may want to do something else with the property.[12] In light of the advent and proliferation of vast quantities of digital assets, Part II argues that succession principles should also be used to protect personal secrets and privacy interests after death. Part II also explores the use of private contracts to protect posthumous privacy and argues that private contracts have gone too far in protecting digital asset privacy by ignoring individual, testamentary intent. This Part concludes that any default rules regarding termination of accounts at death should be legislatively determined in a democratic system.

Part III explores how digital asset accounts should be treated if an individual has not made her intent known. Succession principles should apply, and living family members should have a claim in controlling or accessing a decedent's digital assets. This Part examines legal doctrines that protect or favor family interests after an individual has died, namely the doctrines of "familial privacy," publicity, and copyright. Part III concludes by supporting Part II's advocacy for legislation that would establish a default rule allowing a decedent's surviving family members to protect the decedent's digital accounts from being controlled by third parties or publicly disseminated.

The law of privacy and succession must be equipped for our impending digital future.[13] Ultimately, this Article concludes that

12. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 1–4 (9th ed. 2013).

13. Most Americans already keep vast amounts of private information, correspondence, and pictures in digital accounts stored on third-party servers. As mentioned earlier, over eighty-five percent of American adults use the Internet in some way. Zickuhr, *supra* note 11.

digital asset privacy will best be protected by acknowledging the importance of posthumous privacy in a digital age, honoring individual choice, and establishing a default rule that accords with a family-centered paradigm.

I. THE LACK OF POSTHUMOUS PRIVACY

Privacy is a relatively modern legal construct, born out of concerns about technological developments in the nineteenth century.[14] In 1890, Samuel Warren and Louis Brandeis wrote a seminal article voicing concerns about the toll of modern life on privacy.[15] They pointed to "instantaneous photographs," "numerous mechanical devises," and the development of the "newspaper enterprise" as threats to the "sacred precincts of private and domestic life."[16] These advancements in society threatened the "right to be let alone,"[17] and Warren and Brandeis called on the common law to protect the right to privacy and thereby avoid the "evil[s]" of gossip and the press.[18] Over one hundred years later, the law of privacy is still developing as technological advancements continue to erode traditional concepts of privacy.[19] Digital assets have produced the

14. Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1128 (2002) ("It is a historical commonplace that 'privacy' is a modern invention. Medieval people had no such concept. . . . Privacy, as idea and reality, is the creation of modern bourgeois society. It was above all a creation of the nineteenth century.").

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

16. *Id.* at 195.

17. *Id.*

18. *Id.* at 196.

19. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949 (2012) (holding that attaching a GPS to a suspect's vehicle and then monitoring the vehicle's location constituted a search under the Fourth Amendment); Kyllo v. United States, 533 U.S. 27, 34–35 (2001) (holding that the warrantless use of heat sensors on a home was a search subject to Fourth Amendment scrutiny); United States v. Caraballo, 963 F. Supp. 2d 341, 360 (D. Vt. 2013) (holding that no reasonable expectation of privacy existed in real-time cell phone location information, which justified police tracking a convicted felon's cell phone on suspicion of drug trafficking and murder); United States v. Alabi, 943 F. Supp. 2d 1201, 1273–74 (D.N.M. 2013) (holding that scanning a defendant's magnetic credit and debit card strips when the cards were already possessed by law enforcement was not a search subject to Fourth Amendment scrutiny, as the credit and debit card information was "not a constitutionally protected area"); DeVittorio v. Hall, 589 F. Supp. 2d 247, 256–57 (S.D.N.Y. 2008) (holding that a hidden video camera placed in a police locker room was not a search because there was no reasonable expectation of privacy), *aff'd*, 347 F. App'x 650 (2d Cir. 2009); State v. Costin, 720 A.2d 866, 868–69 (Vt. 1998) (holding that a warrantless video camera activated by a motion sensor and containing video of a suspect cultivating marijuana in their own yard was not a search under chapter 1, article 11 of the

greatest amount of private individual information the world has ever seen,[20] and we are still struggling to determine whether and to what extent the law should protect the privacy of these accounts—both in life and after death.

Privacy is a loaded term with many different definitions and methods of enforcement.[21] Protecting privacy after death would require courts to enforce the testamentary intent of an individual concerning the information stored in her digital accounts after her death.[22] When concerned with privacy interests after death, the most significant consideration is the degree of posthumous control that decedents should exert in the name of privacy. Currently, no such protections are in place. The common law majority view is that a decedent's estate may not bring an action to protect the decedent's privacy.[23] When it comes to an individual's reputation, constitutional privacy interest, or information gleaned from her testamentary estate, the law does not honor a decedent's interest in controlling the dissemination of private or false information about herself after her death. This Part proceeds by analyzing how common law, constitutional and statutory law, and existing testamentary structures are inadequate mechanisms to protect posthumous privacy in today's digital age.

A. Reputational Privacy

Traditionally, tort law provides one of the main avenues for controlling private information and protecting one's reputation during life. The common law has long recognized that privacy

Vermont Constitution, which offers broader protection to privately owned lands outside the curtilage of the home than does the Fourth Amendment to the U.S. Constitution).

20. Shaw, *supra* note 1.

21. *See* Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 458 (1995) ("Privacy is a chameleon-like word, used denotatively to designate a range of wildly disparate interests—from confidentiality of personal information to reproductive autonomy—and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name.").

22. *See* ADAM CARLYLE BRECKENRIDGE, THE RIGHT TO PRIVACY 1 (1970); Randall P. Bezanson, The Right to Privacy *Revisited: Privacy, News, and Social Change, 1810–1990*, 80 CALIF. L. REV. 1133, 1174 (1992) ("[T]he ability to enforce the privacy of any item of information should depend on the intention and conduct of the individual . . . ."); Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968) ("Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.").

23. *See* Justice v. Belo Broad. Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979) (listing cases); Flynn v. Higham, 197 Cal. Rptr. 145, 149 (Cal. Ct. App. 1983) (listing cases); *infra* Section I.A.

encompasses the ability of an individual to control information about himself,[24] and tort law attempts to secure that right of privacy by punishing those who intrude into another's life. It does so using a variety of causes of action. Although some torts offer minimal privacy protection,[25] none of these claims can be brought on behalf of a decedent's estate. This Section analyzes how tort law fails to protect posthumous privacy.

1. Posthumous Privacy Torts

Although privacy concerns can be traced back to Samuel Warren and Louis Brandeis's 1890 article, privacy torts did not gain traction until William Prosser categorized the "right to privacy" into four distinct torts, thereby creating a workable framework for courts and legislatures to implement.[26] Prosser suggested the following four torts,[27] later accepted into the Restatement (Second) of Torts: (1) intrusion upon a plaintiff's solitude or into his private affairs,[28] (2) public disclosure of embarrassing private facts,[29] (3) information that places a plaintiff in a false light in the public eye,[30] and (4) appropriation of a plaintiff's name or likeness.[31] These torts protect an individual's power to control information about herself and her ability to limit others in disclosing information in the public domain.[32]

24. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.").

25. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (describing four privacy torts).

26. *See* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1888 (2010) (noting that Prosser's division of privacy law into four distinct torts made him the "law's chief architect").

27. Prosser, *supra* note 25, at 389.

28. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

29. § 652D.

30. § 652E.

31. § 652C.

32. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989) ("[T]he concept of privacy is employed to govern the conduct of other individuals who intrude in various ways upon one's life. Privacy in these contexts can be generally understood in its familiar informational sense; it limits the ability of others to gain, disseminate, or use information about oneself.").

State courts began to recognize tort causes of action for the invasion of the right of privacy at the turn of the century.[33] Their impact on protecting privacy during life is debated, with some scholars arguing that torts have been ineffective at remedying invasions of privacy.[34] No matter their degree of effectiveness, privacy torts are generally available to protect privacy during life;[35] however, the majority of courts do not allow this right to extend beyond death.[36]

Courts have based their refusal to extend privacy rights beyond death on the common law notion that personal rights die with the

33. *See, e.g.*, Reed v. Real Detective Publ'g Co., 162 P.2d 133, 137–38 (Ariz. 1945); Melvin v. Reid, 297 P. 91, 92 (Cal. Dist. Ct. App. 1931); Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 72 (Ga. 1905) ("The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition."); De May v. Roberts, 9 N.W. 146, 148–49 (Mich. 1881) (recognizing the plaintiff's right to privacy); Munden v. Harris, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911); Schuyler v. Curtis, 15 N.Y.S. 787, 788 (N.Y. Sup. Ct. 1891) (recognizing the "gradual extension" of the right to privacy as a means of redressing injuries to individual rights).

34. *See* Friedman, *supra* note 14, at 1125 ("In hindsight, it looks as if the Warren and Brandeis *idea* of privacy . . . never got much past the starting post; and is now effectively dead."); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1204 (2004) (asserting that "it is generally conceded that [the privacy torts conceptualized by Warren and Brandeis] amount[] to little in American practice today"); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983) (arguing that one common law privacy tort did not "become a usable and effective means of redress for plaintiffs").

35. DAVID A. ELDER, PRIVACY TORTS §§ 2:1, 3:1, 4:1 (2015); *see, e.g.*, Minnifield v. Ashcraft, 903 So. 2d 818, 820, 827 (Ala. Civ. App. 2004) (noting that a tattoo company invaded the privacy of a client by submitting a photo of her upper breast in a national tattoo magazine without her consent); Ozer v. Borquez, 940 P.2d 371, 373–74, 379 (Colo. 1997) (upholding an invasion of privacy tort where an associate disclosed allegedly confidential information that another lawyer was homosexual and needed to have a HIV test, resulting in his termination); *In re* Marriage of Tigges, 758 N.W.2d 824, 830 (Iowa 2008) (holding that a husband's secret videotaping of his wife in her room constituted an invasion of privacy); Welling v. Weinfeld, 866 N.E.2d 1051, 1052–53, 1058–59 (Ohio 2007) (recognizing the false light privacy tort when neighbors distributed a handbill seeking a reward for information relating to property damage); Staruski v. Cont'l Tel. Co. of Vt., 581 A.2d 266, 273 (Vt. 1990) (holding that an employer running an advertisement with an employee's name and photograph without the employee's consent constituted an invasion of privacy); *cf.* Florida v. Jardines, 133 S. Ct. 1409, 1414–15, 1417–18 (2013) (holding that a law enforcement dog sniffing the front porch of an alleged marijuana producer was an invasion of privacy interests, therefore leading to suppression of evidence under the Fourth Amendment).

36. *See* Justice v. Belo Broad. Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979) (listing cases); Flynn v. Higham, 197 Cal. Rptr. 145, 149 (Cal. Ct. App. 1983) ("Further, the right does not survive but dies with the person."). There are a few cases where a privacy claim has survived death, but these are minority decisions. *See, e.g.*, *Real Detective Publ'g Co.*, 162 P.2d at 139 (allowing a privacy claim as an "injury to the person" to be brought by a decedent's administratrix under a state statute).

person.[37] In other words, personal rights (like the right to privacy) terminate at the time of death.[38] Property rights, however, are different; they are not seen as personal rights that die with a decedent.[39] Rather, a decedent's estate can enforce property rights on the decedent's behalf.[40] Following this reasoning, courts conclude that privacy rights protect a personal right specific to the person whose privacy was invaded.[41]

To explain this conclusion, courts reason that a privacy intrusion is an injury to feelings as well as to one's own peace of mind and comfort but does not involve economic damage.[42] One court explained, "Since, under the law, recovery may be had for an invasion of the right of privacy for injured feelings alone, the wrongs redressed must be considered as a direct rather than an indirect injury and one that is wholly personal in character . . . ."[43] Thus, the feelings and mental processes that are protected by the right to privacy make the right a personal one, which can only be vindicated through a personal cause of action. In other words, the cause of action for an invasion of privacy cannot be assigned, inherited, or transferred.[44] Other courts do not attempt to explain why privacy rights are personal in nature or why personal claims cannot be transferred to an estate.[45] Instead, these courts merely repeat the rule that an estate cannot sue for an invasion of privacy on behalf of the decedent.[46]

In practice, cases asserting the invasion of a decedent's privacy often arise when news reports or books print information about a

37. Under the common law, personal rights die with the person, but property rights survive and are handled by a decedent's executor. *See* Shafer v. Grimes, 23 Iowa 550, 553 (1867) (discussing the common law maxim "*actio personalis moritur cum persona*," that a personal action "die[s] with the person" while property rights survive).

38. *Id.*

39. *Id.*

40. *Id.*

41. *See, e.g.*, Von Thodorovich v. Franz Josef Beneficial Ass'n, 154 F. 911, 913–14 (C.C.E.D. Pa. 1907); Murray v. Gast Lithographic & Engraving Co., 28 N.Y.S. 271, 271 (Ct. Com. Pl. 1894); *see also* RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (AM. LAW INST. 1977).

42. *See, e.g.*, Kelly v. Johnson Publ'g Co., 325 P.2d 659, 661 (Cal. Dist. Ct. App. 1958).

43. Reed v. Real Detective Publ'g Co., 162 P.2d 133, 139 (Ariz. 1945).

44. RESTATEMENT (SECOND) OF TORTS § 652I cmt. a.

45. *See* Nelson v. Gass, 21 Pa. D. 777, 778 (Ct. Com. Pl. 1912) ("Where the action is founded merely *on an injury to the person, and no property is in question*, it dies with the person; but where *property is concerned*, it survives.").

46. *See* Abernathy v. Thornton, 83 So. 2d 235, 237 (Ala. 1955) (explaining that the right to privacy "is a purely personal action and does not survive but dies with the person"); *see also* RESTATEMENT (SECOND) OF TORTS § 652I cmt. b ("In the absence of statute, the action for the invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded.").

decedent that offends surviving family members.[47] For example, in *Kelly v. Johnson Publishing Co.*,[48] a surviving family member sued a publisher for stating that her brother, an acclaimed boxing champion, had ended up as an impoverished "dope-sodden derelict" and that his "knife-scarred body" had been "fished" from the San Francisco Bay.[49] The decedent's sister argued that this publication was a wrongful invasion of the general right of privacy.[50] The court dismissed her suit, holding that the right of privacy was a personal one that could not be asserted by the decedent's relatives.[51] As another example, in *Gruschus v. Curtis Publishing Co.*,[52] a family sued a local publishing company after an article in a newspaper accused their father of bribing public officials.[53] The court again held that a claim of privacy only extends to one's own privacy and does not survive the death of the party whose privacy was invaded.[54] Courts and commentators have made it clear that privacy rights do not survive death.[55] In limited situations, a family can claim an invasion of their privacy interests to keep information about a decedent private, but no protection extends to guard the privacy of a decedent herself.[56]

2. Posthumous Defamation

The law protects an individual's ability to maintain a good reputation through the torts of defamation, libel, and slander, but, like the right to privacy, none of these causes of action are available

47. *See* Justice v. Belo Broad. Corp., 472 F. Supp. 145, 146 (N.D. Tex. 1979) (evaluating privacy rights when a news broadcast reported a story that stated murder victims were in a homosexual relationship); Flynn v. Higham, 197 Cal. Rptr. 145, 146–47 (Cal. Ct. App. 1983) (determining whether a book claiming that decedent "was a homosexual and a Nazi spy" offended the privacy rights of surviving relatives).

48. 325 P.2d 659 (Cal. Dist. Ct. App. 1958).

49. *Id.* at 660.

50. *Id.* at 661.

51. *Id.* at 661, 664.

52. 342 F.2d 775 (10th Cir. 1965).

53. *Id.* at 776 (construing New Mexico law).

54. *Id.* at 776–77.

55. *See* Metter v. L.A. Exam'r, 95 P.2d 491, 495 (Cal. Ct. App. 1939); Bradley v. Cowles Magazines, Inc., 168 N.E.2d 64, 66 (Ill. App. Ct. 1960) (listing cases supporting its decision not to extend the right to privacy to a decedent's surviving relative); 62A AM. JUR. 2D *Privacy* § 13 (2005 & Supp. 2015) ("The right of privacy is a purely personal one, and the plaintiff must show an invasion of his or her own right of privacy before recovery may be had. The general rule is that even a close relative may not recover for the invasion of privacy of another. Thus, an action for invasion of privacy may be brought only by the person who was the actual subject of the invasion of privacy, and not by other persons such as members of his or her family.").

56. *See infra* Section III.A for a discussion of family privacy after death.

after the rightholder dies.[57] There is a direct link between privacy and reputation: reputation consists of what people think about an individual, and people's thoughts about a person derive from what information they know—or don't know—about an individual. To protect his reputation, an individual must pay careful attention to the information available about him. For those who have secrets that could destroy their reputation, the ability to control the dissemination of that information or otherwise preserve privacy is particularly important.

Defamation and privacy torts are aimed at protecting an individual's reputation. During your life, if someone makes "[a] false written or oral statement that damages [your] reputation," you can bring a suit against that person for defamation.[58] Once you die, however, people can say or write what they want without fear of reprisal because defamation of the dead is not a cause of action recognized by the common law.[59] Although some courts allow defamation suits to continue if a living person brought suit and subsequently died, courts do not allow an action for defamation to be initiated after a person has died.[60]

The justifications for not allowing a cause of action for defamation after the death of the defamed person are similar to those set forth for refusing to extend privacy protections after death. First, modern tort law aims "to give compensation, indemnity or restitution for harms,"[61] and when a person dies, the law finds no harm that can be compensated;[62] courts reason that a dead person's reputation can

57. *See supra* Section I.A.1.

58. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 23 (1990); *Defamation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

59. Bradt v. New Nonpareil Co., 79 N.W. 122, 122 (Iowa 1899); Jones v. Matson, 104 P.2d 591, 595 (Wash. 1940) ("At common law the rule is often stated broadly that causes of action for torts die with the person.").

60. Flynn v. Higham, 197 Cal. Rptr. 145, 147 (Cal. Ct. App. 1983) (noting that there is no "basis for recovery in a civil action" for "the malicious defamation of the memory of the dead"); Saari v. Gillett Commc'ns of Atlanta, Inc., 393 S.E.2d 736, 737 (Ga. Ct. App. 1990) ("[T]hat case merely held that where a living person had brought an action for libel and then died while the action was pending, the action did not abate but survived to his representative. It clearly does not follow from this holding that a person can be libeled after he has died.").

61. *See* RESTATEMENT (SECOND) OF TORTS § 901(a) (AM. LAW INST. 1979).

62. Gugliuzza v. K.C.M.C., Inc., 606 So. 2d 790, 791 (La. 1992) ("Once a person is dead, there is no extant reputation to injure or for the law to protect. Since the cause of action is intended to redress injuries flowing from harm to one's reputation, we conclude that to be actionable defamatory words must be 'of and concerning' the plaintiff or, directly or indirectly, cast a personal reflection on the plaintiff.").

no longer be injured.[63] Second, even if a court finds that harm has been done to a deceased person's reputation, the right to protect one's reputation is a personal one and cannot be enforced by a third party.[64] Thus, the personal nature of the defamation tort is one of the main barriers to recognizing a claim for posthumous defamation.[65] Such a claim, even if warranted by blatantly false publications or statements made about a decedent, is currently unavailable to protect privacy interests after death. Even though the digital age is raising questions of posthumous privacy because of the increased amount of available personal information, tort law is an inadequate solution and offers no protection for posthumous privacy.

B. Constitutional and Statutory Privacy

As noted above, the common law does not allow a decedent's estate to bring a tort action to protect the decedent's privacy. Similarly, cognizable solutions to this problem do not currently exist in constitutional or statutory law. Neither federal nor state law adequately recognizes individual privacy protections after death.

The Fourth Amendment to the U.S. Constitution, which seeks to deter unreasonable search and seizure,[66] and the Fourteenth Amendment's Due Process Clause—the substantive tool protecting individual conduct and choices[67]—offer privacy protection in certain situations. After death, however, a decedent cannot take advantage of the privacy protections embedded in the Fourth and Fourteenth

63. *Id.*

64. Gruschus v. Curtis Publ'g Co., 342 F.2d 775, 776 (10th Cir. 1965) ("[T]he common law did not recognize a right to reflect in the reputation of another and the action did not survive the death of the defamed party."); Lee v. Weston, 402 N.E.2d 23, 30 (Ind. Ct. App. 1980) ("Defamatory words are not actionable unless they refer to some ascertained or ascertainable person, and that person must be the plaintiff."); Renfro Drug Co. v. Lawson, 160 S.W.2d 246, 249 (Tex. Comm'n App. 1941).

65. *See Gruschus*, 342 F.2d at 776.

66. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

67. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment prohibits states from wholly outlawing contraceptives or abortion. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. . . . We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."); Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

Amendments. A decedent is not a "person" within the meaning of the Fourteenth Amendment and therefore cannot take advantage of any privacy protection that the Fourteenth Amendment gives a living person.[68] Recently, an executor filed a civil rights action under 42 U.S.C. § 1983, claiming that a medical examiner's determination that the decedent took her own life was a violation of the Fourteenth Amendment because the determination of suicide deprived the decedent of due process of law.[69] The court dismissed the claim, finding that it was "well settled that a deceased person has no constitutional rights."[70]

Similarly, it follows that the Fourth Amendment's protection from unreasonable search and seizure is a privacy interest that cannot be enforced after death. For example, in *Hubenschmidt v. Shears*,[71] plaintiffs in a wrongful death action challenged evidence that was removed from the bodies of the deceased (blood alcohol tests) as a violation of the Fourth Amendment.[72] The court found the results could be properly admitted because the Fourth Amendment right to privacy ended with the death of the person and could not be claimed by the deceased's estate.[73]

Statutory law, like constitutional law, also fails to recognize personal privacy rights of the dead. Federal courts have found that when a statute uses the term "person," it refers to "a living human being" and does not provide a basis for a posthumous claim for violation of the statute or right at issue.[74] Federal law such as the Freedom of Information Act ("FOIA") and numerous state law counterparts concerning public records contain privacy protections.[75]

68. Swickard v. Wayne Cty. Med. Exam'r, 475 N.W.2d 304, 312 (Mich. 1991) (holding that the privacy right under the Fourteenth Amendment is personal and cannot be asserted by a decedent's estate).

69. Infante v. Dignan, 782 F. Supp. 2d 32, 32, 35 (W.D.N.Y. 2011).

70. *Id.* at 38.

71. 270 N.W.2d 2 (Mich. 1978).

72. *Id.* at 3–4.

73. *Id.* at 4; *see also* McLean v. Rogers, 300 N.W.2d 389, 391 (Mich. Ct. App. 1980) ("Issues such as search and seizure, [or the] right to privacy . . . which could be raised in cases dealing with extraction of a blood sample from a living person do not apply.").

74. *See* Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979) (finding a deceased person could not bring an action under the Civil Rights Act); *see also* Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979) ("[A decedent] is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived.").

75. The Freedom of Information Act exempts "personnel and medical files" from disclosure if the disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (2012). Similarly, § 552(b)(7)(C) exempts disclosure of investigative records complied for law enforcement purposes that constitute "an unwarranted invasion of personal privacy." § 552(b)(7)(C); *see also* Daniel J. Solove,

FOIA protects the ability of "any person" to request records maintained by an executive agency.[76] The law also prevents government records from being released to the public if those records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[77]

Because FOIA acknowledges the importance of privacy interests through these exceptions, it provides only partial protection. Courts look only to common law privacy protections to determine whether a FOIA request should be denied under a privacy exception, and thus FOIA generally does not protect posthumous privacy interests.[78] In *National Archives & Records Administration v. Favish*,[79] a man was found dead in a park near Washington, D.C.[80] During the investigation of the death, police officers took ten pictures of his body, to which journalists later requested access under FOIA.[81] In construing FOIA's privacy exemption, the Supreme Court looked to the common law concerning privacy at death.[82] Rather than finding that the decedent had a privacy interest in the crime scene photos, the Court held that the decedent's family members were the individuals whose privacy interests in the death scene images were protected by FOIA.[83] Therefore, the Court denied the FOIA request for these pictures, holding that revealing this information would be an unwarranted invasion of the family's personal privacy.[84] However, the Court's analysis demonstrated that because FOIA protections look to common law privacy protections, an individual's personal privacy interests are not protected under FOIA after his death.[85]

Access and Aggregation: Public Records, Privacy and the Constitution, 86 MINN. L. REV. 1137, 1160–64 (2002) (discussing federal and state freedom of information laws and their exemptions relating to privacy).

76. § 552(a)(3)(A).

77. § 552(b)(7)(C).

78. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 167 (2004) (explaining that Congress intended for FOIA to protect "against public intrusions long deemed impermissible under the common law and in our cultural traditions"); Ray Madoff, *Dead Right: In America, the Living Aren't Always in Charge*, 21 EXPERIENCE, no. 1, 2011, at 6, 11 ("Although these cases may seem to extend privacy protections to family members . . . they only limit access to information held by a government.").

79. 541 U.S. 157 (2004).

80. *Id.* at 160–61.

81. *Id.* at 161.

82. *Id.* at 168.

83. *Id.* at 167–68.

84. *Id.* at 171, 175.

85. *See supra* notes 36–41 and accompanying text (explaining that at common law, privacy rights were personal rights that were nontransferable and therefore terminated at death); *cf. Favish*, 541 U.S. at 169–70 (acknowledging that Congress enacted FOIA in

Federal law also protects the use and dissemination of personally identifiable information maintained by federal agencies under the Privacy Act of 1974 ("Privacy Act").[86] The Privacy Act prohibits disclosure of identifying information unless the disclosure falls under a statutory exception.[87] Although a decedent's death is not a statutory exception allowing the release of information, in 1975 the Office of Management and Budget published guidelines stating that the Privacy Act did not contemplate permitting relatives to protect the privacy of deceased individuals.[88] These guidelines are treated deferentially by federal courts.[89] Most recently, the Second Circuit noted that a party "correctly asserts that deceased individuals generally do not enjoy rights under the Privacy Act."[90]

Another federal law may play a more significant role in privacy after death, especially as it relates to digital assets. In 1986, Congress passed the Stored Communications Act ("SCA") as part of the Electronic Communications Privacy Act.[91] The SCA governs and protects the privacy of online communications.[92] The SCA criminalizes "intentional[] access[] without authorization [of] a facility through which an electronic communication service is provided."[93] It prohibits "a person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by

consideration of the common law but suggesting that the privacy interest protected under FOIA extends further).

86. 5 U.S.C. § 552a (2014). Section 552a is referred to as the Privacy Act of 1974. *See* Privacy Act Guidelines, 40 Fed. Reg. 28,948, 28,949 (July 9, 1975).

87. 5 U.S.C. § 552a(k).

88. *Id.*; Privacy Act Guidelines, 40 Fed. Reg. 28,948, 28,951 (July 9, 1975) ("The [Privacy] Act did not contemplate permitting relatives and other interested parties to exercise rights granted by the Privacy Act to individuals after the demise of those individuals.").

89. *See, e.g.*, Albright v. United States, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980); Crumpton v. United States, 843 F. Supp. 751, 756 (D.D.C. 1994) ("The releases complained of are not covered by the Privacy Act because [the individual] is deceased . . . .").

90. Warren v. Colvin, 744 F.3d 841, 844 (2d Cir. 2014).

91. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C.A. §§ 2701–2712 (West, Westlaw through P.L. 114-114, approved Dec. 28, 2015)); Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 & n.1 (2004).

92. Kerr, *supra* note 91, at 1208 ("The SCA . . . by and large . . . reflects a sound approach to the protection of stored Internet communications.").

93. 18 U.S.C. § 2701(a)(1) (2014). Fines and imprisonment of up to ten years are imposed upon those who violate § 2701(a). *See* § 2701(b).

that service[,]"[94] unless the recipient of the information is an agent[95] or the disclosure is made with the customer's consent.[96] Further, the government may not obtain information from an Internet company without a warrant or a subpoena.[97] If a company violates the SCA, it could be liable for statutory and punitive damages and attorney's fees.[98] The SCA has no provision on how information should be treated after an account holder's death or whether an estate could bring a claim under the Act if a company divulged the electronic communications of a decedent.

The general lack of posthumous privacy protection reflected in FOIA, the Privacy Act, and SCA extends beyond federal law. Some states create privacy protections in their constitutions, but these constitutional provisions remain silent on privacy protections after death.[99] Questions about privacy after death under state law most often arise when the public wants access to autopsy or crime scene photographs, video recordings, or other records that show or describe a deceased individual.[100] As with the Supreme Court in *Favish*, state courts often hold that disseminating autopsy photos violates the

94. 18 U.S.C.A. § 2702(a)(1).

95. § 2702(b)(1).

96. § 2702(c)(2).

97. §§ 2702(a)(3), 2702(b)(2), 2703(a), 2703(c)(2).

98. 18 U.S.C. § 2707(c).

99. *See, e.g.*, ALASKA CONST. art. I, § 22 (LEXIS through 2015 First Reg. Sess. and First and Second Spec. Sess.) ("The right of the people to privacy is recognized and shall not be infringed."); ARIZ. CONST. art. II, § 8 (West, Westlaw through 2015 First Reg. Sess.) ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); FLA. CONST. art. I, § 23 (West, Westlaw through Nov. 4, 2014) ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."); MONT. CONST. art. II, § 10 (West, Westlaw through 2015 Sess.) ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

100. *See, e.g.*, Williams v. City of Minneola, 575 So. 2d 683, 685–86, 694–95 (Fla. Dist. Ct. App. 1991) (holding that plaintiff family members stated a claim for outrageous infliction of emotional distress by reckless conduct when police officers publically disclosed photos and video of an autopsy which were part of a criminal investigation); Reid v. Pierce Cty., 961 P.2d 333, 342 (Wash. 1998) (holding that family members have a common law right to privacy in the photographs and autopsy reports of deceased loved ones); Comaroto v. Pierce Cty. Med. Exam'r's Office, 43 P.3d 539, 542–44 (Wash. Ct. App. 2002) (denying a convicted child molester access to his victim's suicide note, which was part of the medical examiner's report, under state public records law); Clay Calvert, *A Familial Privacy Right over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions*, 40 HASTINGS CONST. L.Q. 475, 500 & n.162 (2013) (describing how Hustler Magazine's request for a set of gruesome crime scene photographs spurred change in Georgia's public records law).

surviving family members' privacy.[101] A few states have even passed legislation to prevent public disclosure of certain death images.[102] Although some states provide limited posthumous privacy protections, examples are sparse; states, in general, have not adopted comprehensive statutory privacy protections for decedents.

C. Testamentary Privacy

There is also a lack of privacy protection for decedents' testamentary documents. The law of wills and intestate succession ensure that a decedent's property is distributed according to her intent after death, but neither wills nor intestacy statutes protect a decedent's personal, posthumous privacy interests.

Because probate proceedings are public proceedings, decedents lose privacy as to the contents and distribution of their estate when the estate probates a will.[103] The contents of a will, documents, or information that arise during a probate proceeding are public records open to public inspection.[104] Journalists, curious neighbors, or estranged family members are welcome to examine a decedent's will.[105] Newspaper articles, books, and websites track the wills of

101. For more discussion of family members' privacy as related to decedents' digital assets, see *infra* Section III.A.

102. FLA. STAT. § 406.135 (West, Westlaw through end of 2015 First Reg. & Spec. A Sess.) (exempting autopsy records from public disclosure); GA. CODE ANN. § 45-16-27(e)(1) (2002 & Supp. 2015) (preventing autopsy photos from being disclosed if not under a listed exception); LA. STAT. ANN. § 44:19(B) (West, Westlaw through 2015 Reg. Sess.) ("[P]hotographs, video, or other visual images, in whatever form, of or relating to an autopsy conducted under the authority of the office of the coroner shall be confidential, are deemed not to be public records, and shall not be released . . . except as otherwise provided in this Section."); N.C. GEN. STAT. § 130A-389.1(a) (2013 & Supp. 2015) ("Except as otherwise provided by this section, no custodian of the original recorded images shall furnish copies of photographs or video or audio recordings of an autopsy to the public.").

103. *See In re* Estate of Hearst, 136 Cal. Rptr. 821, 824 (Cal. Ct. App. 1977).

104. *Id.* at 823 ("[T]here can be no doubt that court records are public records, available to the public in general, including news reporters, unless a specific exception makes specific records non-public. . . . [N]o statute exempts probate files from the status of public records[.]" (citations omitted)).

105. *Id.*; Booth Newspapers, Inc. v. Cavanaugh, 166 N.W.2d 546, 547, 549 (Mich. Ct. App. 1963) (upholding the right of a newspaper corporation to view the will of a prominent, recently deceased member of the community); GEORGE M. TURNER, 2 REVOCABLE TRUSTS § 64:7.4 (5th ed. 2014) ("By definition, the probate system is intended to be a public vehicle. The spectacles of people's lives, finances, and family relationships as well as nonfamily relationships, are so notorious that they need not be reviewed."). A current TV show, *The Will: Family Secrets Revealed*, is devoted to uncovering family secrets after death. *See* The Will: Family Secrets Revealed *Gets a Facelift for Season Three, Featuring Celebrity Stories and Famous Family Feuds*,

celebrities or interesting individuals to give the public more information about their lives from the property they left at their passing.[106] For example, in *In re Estate of Hearst*,[107] family members requested that the court seal probate proceedings, claiming that the proceedings revealed information about their identities and property that could be used against them by terrorist groups.[108] The appellate court remanded the case to a lower court to determine the risk to the family, emphasizing that "when individuals employ the public powers of state courts [such as probate] to accomplish private ends, . . . they do so in full knowledge of the possibly disadvantageous circumstance that the documents and records filed in the trust will be open to public inspection."[109]

Because documents filed in a probate proceeding are public, decedents lose privacy as to the contents of their estate, which could include the amount of money in accounts, the net value of an estate, or the specific personal property owned by a decedent. For instance, when Jacqueline Kennedy Onassis died, her will revealed that her estate was worth less than widely expected.[110] In addition, her will revealed a detailed list of her personal property, including such items as a "Greek alabaster head of a woman[,]" Indian miniatures, a copy of her first husband's inaugural address signed by Robert Frost, furniture, jewelry, and clothes.[111]

DISCOVERY: PRESS WEB, https://press.discovery.com/us/id/press-releases/2012/will-family-secrets-revealed-gets-facelift-se-2056/ [http://perma.cc/W82T-M646].

106. *See generally* RUSSELL J. FISHKIND, PROBATE WARS OF THE RICH AND FAMOUS: AN INSIDER'S GUIDE TO ESTATE PLANNING AND PROBATE LITIGATION (2011) (tracking the estate litigation contests of several celebrities); ANDREW W. MAYORAS & DANIELLE B. MAYORAS, TRIAL AND HEIRS: FAMOUS FORTUNE FIGHTS! (2009) (describing stories of inheritance contests of public figures); HERBERT E. NASS, WILLS OF THE RICH AND FAMOUS (2000) (providing descriptions and excerpts from wills of public figures); *Family Feud Erupts over Heath Ledger's Will After Daughter Matilda Is Left Out*, DAILY MAIL (Mar. 10, 2008, 3:59 PM), http://www.dailymail.co.uk/tvshowbiz/article-529408/Family-feud-erupts-Heath-Ledgers-daughter-Matilda-left-out.html [http://perma.cc/4NMJ-QH8F] (revealing details of actor's will); *Famous Wills and Trusts*, TRUETRUST.COM, http://www.truetrust.com/Famous_Wills_and_Trusts/Famous_Wills_and_Trusts.html [https://perma.cc/373X-NDUE] (providing copies of several last wills of public figures).

107. 136 Cal. Rptr. 821 (Cal. Ct. App. 1977).

108. *Id.* at 825.

109. *Id.* at 825–26.

110. David Cay Johnston, *Mrs. Onassis's Estate Worth Less than Estimated*, N.Y. TIMES (Dec. 21, 1996), http://www.nytimes.com/1996/12/21/nyregion/mrs-onassis-s-estate-worth-less-than-estimated.html [http://perma.cc/8P62-AWUD].

111. Steve Fainaru, *Onassis Gave Bulk of Estate to Children*, BOSTON.COM (Dec. 31, 2003), http://www.boston.com/news/packages/jfkjr/jackie_will.htm [http://perma.cc/F4UX-JLMG].

In addition to losing privacy as to the content of the estate, when a will is filed, a decedent also loses the ability to keep private the identities of the will's beneficiaries. In Onassis's example, her will revealed various gifts to her longtime friends and confidantes, her maids, her children's governess, her accountant, her butler, and her lawyer.[112] Furthermore, bequests and devises in a will can reveal secret relationships. In the case of *In re Estate of Kuralt*,[113] Charles Kuralt's holographic will revealed that he had continued a thirty-year extra-marital affair with a woman named Patricia Elizabeth Shannon.[114] He kept this relationship secret from his wife and from the public throughout his life.[115] When his wife attempted to probate his property in Montana, she learned that Kuralt had attempted to give the property to Shannon in a 1989 holographic will and again in a 1997 letter.[116] This testamentary devise revealed to the Kuralt family and the public the extent of Kuralt's private relationships with Shannon and her children.[117] This demonstrates how a decedent may not realize the extent of personal information that is conveyed to the public when her will is probated.

There is, however, a tool to protect one's privacy as to the contents of her estate and to whom the estate is distributed—an *inter vivos* revocable trust.[118] Although revocable trusts and wills serve almost identical purposes, a trust is accorded privacy after death while a probated will becomes a matter of public record.[119] A trust is a nonprobate asset, which means that a trustee distributes property

112. *Id.*

113. *In re* Estate of Kuralt (*Kuralt II*), 2000 MT 359, 15 P.3d 931; *In re* Estate of Kuralt (*Kuralt I*), 1999 MT 111, 981 P.2d 771.

114. *Kuralt II*, 2000 MT at ¶ 6, 15 P.3d at 932; *Kuralt I*, 1999 MT at ¶ 2, 981 P.2d at 771.

115. *Kuralt II*, 2000 MT at ¶ 5, 15 P.3d at 932; *Kuralt I*, 1999 MT at ¶ 9, 981 P.2d at 773. Charles Kuralt was a public figure as host and journalist of a CBS show called "On the Road." *Kuralt I*, 1999 MT at ¶ 9, 981 P.2d at 772.

116. *Kuralt II*, 2000 MT at ¶¶ 8, 11, 15 P.3d at 932–33; *Kuralt I*, 1999 MT at ¶¶ 14, 17, 981 P.2d at 773–74.

117. *See* Bob Anez, *Charles Kuralt's Secret Life*, SALON (June 8, 1999, 12:01 PM), http://www.salon.com/1999/06/08/kuralt/ [http://perma.cc/UX47-FEGM] (describing the relationship Kuralt had with Shannon and her children).

118. *See* TURNER, *supra* note 105, § 64:7.4 ("[T]he vast majority of Revocable Living Trusts go through no scrutiny by any individual or organization which would invade the privacy of the estate or the beneficiaries."); *see also In re* Estate of Hearst, 136 Cal. Rptr. 821, 824 (Cal. Ct. App. 1977) (stating that family members "can eschew court-regulated devices for transmission of inherited wealth and rely on private arrangements such as *inter vivos* gifts, joint tenancies, and so-called 'living' or grantor trusts").

119. *See* Francis H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 566 (2008) (discussing the strength of "trust privacy"); *supra* notes 103–06 and accompanying text (describing how a probated will is generally available for public viewing).

according to the terms of the trust without court supervision.[120] Because a trust instrument is not part of a public record, individuals who use a trust to distribute their property are entitled to privacy—the public cannot obtain information concerning the amount of money held in the estate, the method of distribution, or the recipients of the funds.[121] When Bing Crosby died, for example, the public was unable to obtain information about his estate because Crosby had placed it in a revocable trust.[122] Similarly, Marlon Brando used a trust to keep his distribution scheme private.[123] Privacy is one of the most compelling reasons to have a revocable trust instead of a will.[124]

A trust's privacy, however, is not absolute. If a beneficiary challenges the trust or brings suit against the trustee, a trust instrument may become part of a public record.[125] Some states even require a trust instrument to be recorded or otherwise available.[126] Third parties may require copies of a trust instrument as a precondition to investing or dealing with trust assets.[127] In general, however, "[t]he vast majority of Revocable Living Trusts go through no scrutiny by any individual or organization which would invade the privacy of the estate or the beneficiaries."[128] Thus, succession law does provide a method to protect the privacy of a decedent's estate through the use of a revocable trust. But if a trust is not created, intestacy or will proceedings become a matter of public record.

The terms of a will may reveal private information, but the personal property distributed under the terms of a will or intestacy statutes may reveal even more private information about a decedent. Once an estate asserts control over a decedent's belongings, the estate owns any information revealed through the content of those

120. *See* TURNER, *supra* note 105, § 64:7.4; DUKEMINIER & SITKOFF, *supra* note 12, at 42.

121. *See* UNIF. TRUST CODE § 1013 cmt. (UNIF. LAW COMM'N 2010) (stating that trust certification "is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument" and that privacy is compromised if the trust instrument must be disclosed to the public).

122. Foster, *supra* note 119, at 558 n.17.

123. *Id.* at 563–64.

124. *Id.* at 565–66 ("[M]any see privacy as an essential feature of the revocable trust, one that the legal system has gone to extraordinary efforts to preserve.").

125. *Id.* at 564.

126. *See, e.g.*, IND. CODE ANN. § 30-4-4-4(a) (West, Westlaw through 2015 First Reg. Sess.) (permitting an individual to petition the court for information concerning beneficiaries of a trust with a showing of reasonable need).

127. JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS: CASES AND MATERIALS 555 (3d ed. 2007) (stating that "the trustee may have to provide copies of the trust document to financial institutions that invest trust assets").

128. TURNER, *supra* note 105, § 64:7.4.

belongings.[129] A decedent's documents, diaries, letters, and secrets are left behind for survivors to find and disseminate if they choose. Accordingly, our system of succession does not protect privacy from family members at death, because property dissemination usually reveals an individual's secrets, with a narrow exception offered to those who create *inter vivos* revocable trusts. Our system of succession, however, allows an individual to choose who gets what information from the devised property. Individual intent is always the paramount concern in distributing a decedent's property.

* * *

As we have seen, the common law does not recognize personal privacy interests after death in the form of a privacy tort (i.e., intrusion upon solitude, public disclosure of private facts, or false light) or defamation.[130] Rather, courts hold that privacy is a personal interest that dies with a decedent.[131] Similarly, constitutional privacy rights do not persist after death.[132] In addition, federal statutory law relies on common law principles and generally does not protect posthumous privacy.[133] Lastly, our testamentary structure does not protect personal privacy, as wills and intestacy actions are public record.[134] Under these principles, a decedent has no personal privacy interests in his digital assets. Internet companies may assert their users' privacy concerns by prohibiting inheritance, but there is currently no sound legal basis to protect personal privacy at death.[135] Yet, with the proliferation of digital assets and the immense amount

129. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 1.1 (AM. LAW INST. 1999).

130. *See supra* Section I.A.

131. Justice v. Belo Broad. Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979) (listing cases); Flynn v. Higham, 197 Cal. Rptr. 145, 149 (Cal. Ct. App. 1983) (listing cases).

132. *See supra* Section I.B; *see also* Swickard v. Wayne Cty. Med. Exam'r, 475 N.W.2d 304, 312 (Mich. 1991) (finding that the privacy right under the Fourteenth Amendment is personal and cannot be asserted by a decedent's estate).

133. An argument can be made that the SCA protects posthumous privacy because it does not specifically mention death and prohibits Internet companies from disclosing the contents of an account without consent. *See* 18 U.S.C.A. § 2702(a)(3), (b)(3) (West, Westlaw through P.L. 114-114, approved Dec. 28, 2015). Although Internet companies have argued that they are prevented from disclosing digital assets after an account holder's death, the SCA has not been used to prosecute disclosure of digital assets to an estate after death. *See* Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 841 n.260 (2014).

134. *See supra* notes 103–06; *supra* note 129 and accompanying text.

135. *See* Banta, *supra* note 133, at 816–18, 837–38.

of information stored in these accounts, we should reconsider posthumous privacy interests in a digital world.

II. PERSONAL DIGITAL ASSET PRIVACY AFTER DEATH

Digital assets raise new concerns and questions about privacy after death that the common law has, so far, failed to address. The fate of email and social networking accounts is especially important to consider, as these digital accounts contain more personal information—such as writings, thoughts, and pictures—than ever before. There are at least three ways digital accounts could be treated after death. First, these accounts could be deleted at the account holder's death to preserve individual privacy. Such deletion could occur at the request of the decedent's executor or under the terms of the service agreement between a deceased account holder and an Internet company.[136] Second, the family of a decedent could claim ownership of the digital "property" held in these accounts and demand access to the accounts under the principles of succession law.[137] Third, if accounts are not deleted, there may be a point when they are released to the public in the service of history—long after the account holders have died.[138] Each scenario poses significant risks to posthumous privacy, testamentary intent, and historical preservation.

Of these three treatments, the only ways to truly protect personal digital asset privacy after death are through our succession law, additional public legislation, or the terms of a private contract. This Part analyzes the ways personal digital asset privacy can be ensured after death and argues that succession principles should be followed to empower individual account holders to make testamentary privacy decisions about the posthumous treatment of their digital accounts. Private contracts with blanket provisions about account termination at death are inadequate; instead, default rules about termination of digital asset accounts after death should be legislatively determined.

136. *See, e.g.*, *Yahoo Terms of Service*, YAHOO!, http://info.yahoo.com/legal/us/yahoo/utos/en-us/ (last updated Mar. 16, 2012) [http://perma.cc/TKK5-R3VF] ("*No Right of Survivorship and Non-Transferability*. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted." (emphasis added)).

137. *See* Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 606, 609 (Mass. App. Ct. 2013).

138. Think for a moment what it would be like to have access to the email account of John F. Kennedy, soldiers fighting in World War I and World War II, or Elvis Presley. Americans are creating an unparalleled historical treasure trove through their creation of digital assets and regular Internet use.

A. Honoring Testamentary Intent

Succession law aims to protect a decedent's testamentary intent, so long as that intent does not violate public policy.[139] If a decedent makes it clear that she would like her digital assets destroyed, the law of wills requires courts and beneficiaries to honor her clear intent. If a decedent does not make her intent known, intestacy laws require that assets descend to the decedent's survivors.[140] The law honors testamentary intent by (1) allowing an individual to determine how her body (something that is not a property interest) is treated after death and (2) requiring executors to fulfill fiduciary duties implementing a will. Both examples show that traditional succession law protects a decedent's privacy interests and could be used to ensure that a decedent's wishes regarding her digital assets are honored.

1. Human Dignity and Decency Support Posthumous Privacy

The principles of modern succession law are geared towards maintaining human dignity, a goal that would be furthered by honoring an individual's last wishes about his privacy. For example, modern succession law protects a decedent's privacy in a limited way by honoring a decedent's wishes about his bodily remains.[141] Yet this was not always the case. Under the English common law, neither a decedent nor his estate had a property right in his corpse, and, therefore, a decedent had no power to direct the disposition of his remains by testamentary instrument.[142] Instead, burial was in the exclusive power and jurisdiction of the church.[143] In America, however, beginning in the seventeenth and eighteenth centuries, testators began to claim the right to control the manner in which their bodies were buried.[144] This practice derived from Roman law, which gave an individual power to direct his burial.[145] Eventually, the

139. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. LAW INST. 2003).

140. *See* UNIF. PROBATE CODE §§ 2-101 to -103 (UNIF. LAW COMM'N 2010).

141. DUKEMINIER & SITKOFF, *supra* note 12, at 507–08.

142. *See In re* Johnson's Estate, 7 N.Y.S.2d 81, 83 (Sur. Ct. 1938); *In re* Riegle's Estate, 32 N.Y.S. 168, 171 (Sur. Ct. 1894); Pettigrew v. Pettigrew, 56 A. 878, 879 (Pa. 1904).

143. *In re Johnson's Estate*, 7 N.Y.S.2d at 84.

144. *Id.*; *see also* Thompson v. Deeds, 61 N.W. 842, 843 (Iowa 1895) ("[T]he duty of courts [is] to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out.").

145. *In re Johnson's Estate*, 7 N.Y.S.2d at 89. ("Thus we find in the Roman law express recognition of the right of a deceased by testament to direct his burial and to nominate the person to take charge of it. The testament of this deceased, therefore, follows a pattern of the ancient Roman law."); John H. Corwin, *Burial Law*, 39 ALB. L.J. 196, 197 (1889)

majority of courts held that a testator could direct how his body should be disposed of via testamentary instrument.[146]

Courts will enforce a decedent's wishes regarding the treatment of her remains even over objections from her family.[147] For example, where a decedent had stated his desire for his body to be cremated, but his next of kin opposed the cremation, the court found that the testamentary wishes of the decedent were "paramount to all other considerations" and, thus, enforced the cremation.[148] A more recent example occurred in Iowa, where a decedent made it known to a company that he wished the company to cryopreserve his head.[149] The decedent's family disregarded his wishes and buried his remains.[150] The court ordered disinterment of the decedent's body according to his testamentary instructions.[151] Similarly, testamentary intent for an individual's reproductive material is also enforced under the law. In *Speranza v. Repro Lab Inc.*,[152] a decedent's parents sought to use the decedent's stored sperm to impregnate a surrogate mother.[153] The decedent, however, had given instructions to the sperm bank that he wished his sperm to be destroyed at his death.[154] Ultimately, the court

("The ancient Greeks and Romans were particular to carry out the directions of the deceased respecting the disposition of his body. . . . The law of New York more than follows these unwritten and ancient customs and the law of Solon . . . .").

146. *In re* Henderson's Estate, 57 P.2d 212, 215 (Cal. Dist. Ct. App. 1936) (collecting cases); *In re Johnson's Estate*, 7 N.Y.S.2d at 87 (quoting GEORGE W. THOMPSON, THE LAW OF WILLS 640 (2d ed. 1936) ("[T]he weight of authority in this country holds that a testator has a right to direct the manner in which his body shall be disposed of after death, and his directions in this respect generally have been given effect.")); Wood v. E. R. Butterworth & Sons, 118 P. 212, 214 (Wash. 1911) ("[T]he wishes of the deceased person, if ascertained, should be given controlling force . . . ."). There are also actions at law that protect a corpse from being disturbed or mutilated. *See* Palmquist v. Standard Accident Ins. Co., 3 F. Supp. 358, 360 (S.D. Cal. 1933) (mutilation); Brown Funeral Homes & Ins. Co. v. Baughn, 148 So. 154, 156 (Ala. 1933) (improper preparation for burial); Bessemer Land & Improvement Co. v. Jenkins, 18 So. 565, 565 (Ala. 1895) (disturbance of burial site).

147. Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel, 606 N.Y.S.2d 965, 967–68 (Sup. Ct. 1993).

148. *Id.*; *see also* Kasmer v. Limner, 697 So. 2d 220, 220–21 (Fla. Dist. Ct. App. 1997) (upholding testator's desire to cremate his body in the face of his family's objections based on "reasons of conscience").

149. Alcor Life Extension Found. v. Richardson, 785 N.W.2d 717, 719 (Iowa Ct. App. 2010).

150. *Id.*

151. *Id.* at 732.

152. 875 N.Y.S.2d 449 (Sup. Ct. 2009).

153. *Id.* at 451.

154. *Id.*

enforced the decedent's testamentary intent and refused to allow his parents to obtain their son's sperm.[155]

Interestingly, modern courts allow a decedent to exercise power over her corpse without dislodging the common law notion that there is no property interest in a corpse.[156] This is especially striking given that the right to devise, which allows decedents to pass their property on to beneficiaries, *is* a property interest. The justification for such freedom of disposition is based on the recognition that an individual's property interest in a thing allows an individual to control the distribution of that thing after death.[157] Because a decedent has no property interest in her corpse, this justification cannot be the basis for protecting her right to dispose of her corpse according to her own intent and gives rise to several implications. One implication of failing to recognize a property right in a corpse is that courts retain power to limit testamentary control over bodily remains and ensure that dispositions are "done within the limits of reason and decency as related to the accepted customs of mankind."[158] Another implication is that courts must recognize some other kind of interest to justify allowing a decedent's desires to control her bodily remains. As one court put it, "the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property."[159]

It seems as though the courts imply that a personal interest in disposing of one's own property mirrors a person's privacy interests after death—not quite property but nonetheless invoking the protections of property. Some sort of "quasi-property" interest allows

155. *Id.* at 454.

156. *In re* Henderson's Estate, 57 P.2d 212, 214 (Cal. Dist. Ct. App. 1936) (finding elements of a proprietary interest, but not a full property interest, in a dead body); *In re* Johnson's Estate, 7 N.Y.S.2d 81, 87–88 (Sur. Ct. 1938) ("In New York it has been stated that there is no property in a corpse. . . . [N]o action can be maintained by the executor . . . upon the theory of any property right . . . in a decedent's body . . . ." (quotations omitted)).

157. *See In re* Estate of Moyer, 577 P.2d 108, 110 (Utah 1978) ("[A] person has some interest in his body, and the organs thereof, of such a nature that he should be able to make a disposition thereof . . . ."); DUKEMINIER & SITKOFF, *supra* note 12, at 1–2 (introducing freedom of disposition).

158. *In re Estate of Moyer*, 577 P.2d at 110. Testamentary control over bodily remains "should [not] be regarded as an absolute property right by which a person could give absurd or preposterous directions that would require extravagant waste of useful property or resources, or be offensive to the normal sensibilities of society in respect for the dead." *Id.*

159. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 237–38 (1872).

courts to enforce a testator's wishes concerning his body.[160] When courts honor the wishes of an individual with respect to his bodily remains, courts do not protect a property interest per se, but rather the individual's personal interest in maintaining his dignity even after death.[161] In this way, an individual's interest in controlling his bodily remains is akin to a privacy interest. Although protecting the privacy of digital assets is not the same as honoring an individual's last wishes regarding burial, the principle that succession law protects interests beyond property rights (disposition of a corpse) after an individual's death can be extended to the proposition that an individual's wishes regarding privacy of digital assets should be given greater weight, whether or not the digital assets are seen as a property interest.

2. Fiduciary Duties Support Posthumous Privacy

The second way traditional succession law can protect posthumous privacy is through the fiduciary duties it imposes on executors to carry out a decedent's intent. If the law were to treat digital assets like tangible assets, accounts would be released to a decedent's estate. It would then be incumbent upon executors and beneficiaries to protect the decedent's privacy interests. Although a decedent has no enforceable claim to protect a privacy interest after death, succession law enforces a decedent's testamentary intent. If a decedent has made her intention for the posthumous treatment of her digital assets known, families and courts must honor those wishes as a matter of succession law.

Courts go to great lengths to protect the control a decedent has over his property,[162] enforcing a decedent's testamentary intent for

160. *See, e.g.*, Burnett v. Surratt, 67 S.W.2d 1041, 1042 (Tex. Civ. App. 1934), *superseded by statute*, Act of Feb. 27, 1934, ch. 66, 1934 Tex. Gen. Laws 146, 157–58.

161. Thompson v. Deeds, 61 N.W. 842, 843 (Iowa 1895) ("In one view, it is true it may not matter much where we rest after we are dead; and yet there has always existed, in every person, a feeling that leads him to wish that after his death his body shall repose beside those he loved in life. Call it sentiment, yet it is a sentiment and belief which the living should know will be respected after they are gone."); *Burnett*, 67 S.W.2d at 1041 ("Public policy and due regard for the public health, as well as the universal sense of propriety, require that dead bodies of human beings be decently cared for and disposed of at the very earliest moment . . . .").

162. *See, e.g.*, *In re* Estate of Thompson, No. 1-948 / 11-0940, 2012 Iowa App. LEXIS 116, at *1–2 (Iowa Ct. App. February 15, 2012) (holding that proceeds of life insurance should go to second wife per a premarital agreement, against wishes of the executor); Rostanzo v. Rostanzo, 900 N.E.2d 101, 117 (Mass. Ct. App. 2009) (denying widow's attempts to invalidate decedent's prenuptial agreement); Malek v. Patten, 678 P.2d 201, 206 (Mont. 1984) (holding that certificates of deposit and assets within a checking account were meant to be a gift by decedent, despite the fact that the cotenant did not sign nor have a key to the safety deposit box where the certificates were held).

the distribution of his tangible and intangible goods even if such distribution appears unfair, bizarre, or distasteful.[163] The American law of succession honors the testamentary intent of a decedent so long as that intent is not contrary to public policy.[164] To the extent we view online accounts as property, we must view the information in such accounts as belonging to the estate and therefore distribute that information according to the intent of the testator.[165] For example, an individual may leave an executor instructions concerning property containing secrets that he wants destroyed. In the digital asset world, a provision in a will would direct an executor to terminate and ensure deletion of all online accounts in the testator's name. Such instructions would protect an individual's privacy as well as take steps to avoid identity theft or fraud.[166] In fact, this logic has led many estate planners to encourage their clients to include provisions concerning their digital assets.[167]

Instructions from a decedent to her executor to destroy or delete her digital accounts may be the only sure way to protect personal

163. *In re* Estate of Feinberg, 919 N.E.2d 888, 904–06 (Ill. 2009) (holding that a provision of a will considering grandchild to be deceased for marrying outside of the Jewish faith did not violate public policy); Gordon v. Gordon, 124 N.E.2d 228, 228, 235 (Mass. 1955) (holding that a beneficiary lost rights to a will based on the condition that no child marry into the Hebrew faith where the beneficiary converted to Judaism after marriage); U.S. Nat'l Bank of Portland v. Snodgrass, 275 P.2d 860, 872 (Or. 1954) (en banc) (allowing condition that beneficiary neither adopt nor marry someone of the Catholic faith by the age of thirty-two).

164. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. LAW INST. 2003).

165. *See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 3–4 (2009) ("When people die, everything they think they own . . . everything will pass on to somebody or something else."). As we will see, the law has been favorable to families' commercial interests in a decedent through the right of publicity and copyright protections. *See infra* Section III.B.

166. *See* John Conner, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 301, 321 (2011) (discussing the threat of posthumous identity theft). A 2012 study revealed that thieves used the identities of 2.5 million deceased Americans to engage in fraudulent activities. Susan Johnston Taylor, *5 Prime Target Groups for Identity Thieves*, U.S. NEWS & WORLD REP. (Jan. 13, 2015, 11:21 AM), http://money.usnews.com/money/personal-finance/articles/2015/01/13/5-prime-target-groups-for-identity-thieves [http://perma.cc/NHS6-P57U].

167. *See, e.g.*, Gerry W. Beyer & Naomi Cahn, *When You Pass On, Don't Leave the Passwords Behind: Planning for Digital Assets*, 26 PROB. & PROP. 40, 41 (2012); Joseph M. Mentreck, *Estate Planning in a Digital World*, 19 OHIO PROB. L.J. 195, 198 (2009); Nicole Schneider, *Social Media Wills—Protecting Digital Assets*, J. KAN. B. ASS'N, June 2013, at 16, 16; Nancy Anderson, *You Just Locked Out Your Executor and Made Your Estate Planning a Monumental Hassle*, FORBES (Oct. 18, 2012, 9:26 AM), http://www.forbes.com/sites/financialfinesse/2012/10/18/you-just-locked-out-your-executor-and-made-your-estate-planning-a-monumental-hassle/ [http://perma.cc/RUA3-E9G9 (staff uploaded archive)].

privacy after death.[168] Executors are bound by fiduciary duties to carry out the intent of a testator.[169] We trust that executors will carry out the wishes of a decedent, although we realize that sometimes an executor does not or may not implement the testator's intention. An executor can be persuaded to take another action, or a court could decide that the testator's intention as stated in her testamentary instrument violates public policy. For example, in *Eyerman v. Mercantile Trust Co.*,[170] a testator directed her executor to destroy her home and sell the land on which it was located, transferring the proceeds of the sale to the residue of her estate.[171] Neighboring property owners challenged the will as contrary to public policy.[172] The destruction of the house would have caused the destruction of property worth nearly $40,000 in a neighborhood of "high architectural significance."[173] The court frustrated the testator's intent by refusing to enforce her will, holding that "[a] well-ordered society cannot tolerate waste and destruction of resources when such acts directly affect important interests of other members of that society."[174] In a similar case, another court noted that "[t]here is a greater need for the protection of the community interests after the death of the testator," implying that the interests of the living took priority over the desires of the dead when those desires were arbitrary and capricious.[175] If, however, a testator gives a rational reason for her desire to have her house destroyed after her death, courts have sometimes been more willing to uphold the will.[176]

In the privacy realm, an executor would be bound by fiduciary duties to follow a decedent's instructions to ensure that digital assets were deleted and not passed on to a decedent's survivors.[177] However, due to a practical enforcement problem, it is unclear whether a

168. The importance of deleting or terminating accounts has been recognized by Nevada, which has authorized by law the ability of a personal representative not to access but to delete certain digital accounts of a decedent. NEV. REV. STAT. ANN. § 143.188 (West, Westlaw through 2015 Reg. & Spec. Sess.).

169. 31 AM. JUR. 2D *Executors and Administrators* § 342 (2012 & Supp. 2015).

170. 524 S.W.2d 210 (Mo. Ct. App. 1975).

171. *Id.* at 211.

172. *Id.* at 211–12.

173. *Id.* at 213.

174. *Id.* at 217.

175. *In re* Will of Pace, 400 N.Y.S.2d 488, 492 (Sur. Ct. 1977).

176. *See, e.g.*, *In re* Estate of Beck, 676 N.Y.S.2d 838, 841 (Sur. Ct. 1998) (finding that a testator's instructions to destroy her house were done in good faith and negotiated with the city); Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 818 (Ohio Ct. Com. Pl. 1976) (finding instructions to destroy a house so it would not be used for commercial purposes were not repugnant or capricious).

177. *See* 31 AM. JUR. 2D *Executors and Administrators* § 342 (2012 & Supp. 2015).

testator's stated desire for destruction would actually be carried out if an executor refused to abide by his fiduciary duties and the beneficiaries of an estate agreed with an executor's action. Of course, if an executor failed to follow a decedent's intent and the beneficiaries did not approve, the beneficiaries could bring a suit to compel the executor to implement the decedent's wishes.[178] If beneficiaries of an estate agree with the executor's action, however, there is no plaintiff available to bring suit against the executor for failing to carry out a testator's intention.[179] Only those who have a "direct, immediate, and legally ascertained" interest in a decedent's estate have standing to challenge a will or an executor's actions.[180]

There are several examples where famous individuals wished their papers to be destroyed at death, but their survivors defied those instructions despite being bound by fiduciary duties. Franz Kafka, for example, left instructions to his friend and lawyer, Max Brod, to burn everything Kafka left behind—letters, diaries, manuscripts, sketches, etc.[181] Brod refused to burn Kafka's unpublished work and instead prepared a posthumous publication of Kafka's manuscripts.[182] Kafka's fame as a literary giant of the twentieth century was a result of Brod's decision to retain and publish the manuscripts Kafka himself wanted burned.[183] Kafka's estate never sued Brod for violating the author's last wishes.[184] Similarly, Vladimir Nabokov requested that his last

178. *See, e.g.*, Clark v. Greenhalge, 582 N.E.2d 949, 950, 951 (Mass. 1991) (holding that the executor must turn over a painting to the beneficiary, after beneficiary brought suit).

179. *In re* Estate of Luongo, 823 A.2d 942, 954 (Pa. Super. Ct. 2003) ("A contestant to the validity of a will does not have standing to do so unless he can prove he would be entitled to participate in the decedent's estate if the will before the court is ruled invalid.").

180. York v. Nunley, 610 N.E.2d 576, 578 (Ohio Ct. App. 1992) (stating that a person who could challenge a will is "[a]ny person who has such a *direct, immediate and legally ascertained* pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will" (quoting Bloor v. Platt, 84 N.E. 604, 605 (Ohio 1908))).

181. Arval A. Morris, *Law, Language, and Ethics*, 73 COLUM. L. REV. 1342, 1344 (1973) (reviewing WILLIAM R. BISHIN & CHRISTOPHER D. STONE, LAW, LANGUAGE, AND ETHICS (Foundation Press 1972)).

182. Elif Batuman, *Kafka's Last Trial*, N.Y. TIMES (Sept. 22, 2010), http://www.nytimes.com/2010/09/26/magazine/26kafka-t.html?pagewanted=all&_r=0 [http://perma.cc/ACW5-3KVD].

183. DUKEMINIER & SITKOFF, *supra* note 12, at 15.

184. Two-thirds of Kafka's actual letters and manuscripts ended up in Oxford's Bodleian Library. Batuman, *supra* note 182. Brod retained the remaining letters and manuscripts and passed them on to Esther Hoffe, who in turn bequeathed them to her daughters. *Id.* The National Library of Israel challenged the legal validity of Hoffe's will. *Id.* A Tel Aviv judge ruled in favor of the National Library in 2012, and the library said it would publish the documents. Alison Flood, *Huge Franz Kafka Archive to Be Made*

novel be destroyed if he died while writing it—which he did—but his son published the novel in 2009 despite his request.[185] Ernest Hemingway also requested that his letters not be published, but his wife ultimately published 600 of them after his death.[186] These actions were all presumptive breaches of fiduciary duties owed to the decedent, yet no one with standing challenged the preservation of these writings. Society may have benefited from the preservation of leading literary figures' previously unpublished works, and the authors' estates may have benefited from increased profit. The loss, however, is that the authors' testamentary intent and privacy were ignored. If an individual with standing were to challenge an executor's decision to not destroy manuscripts or letters according to the intent of a decedent, a court would likely uphold the executor's action because such action would be in accordance with protecting testamentary intent.

Of course, if a decedent is of such public stature that her personal materials would carry historical significance, the societal value of preservation and disclosure could override personal privacy. Some well-known public figures have recognized the danger that a court might so find, leading them to ensure that their personal materials were destroyed during their lives. For example, Justice Black destroyed the bulk of his Supreme Court conference notes as soon as he became ill.[187] Similarly, Martha Washington realized the immense historical value of her letters to her husband, George Washington, and to prevent their being made public after her death, destroyed them before she died.[188]

Thus, the law provides a mechanism for an individual to keep his information private after death by stating his intention in a legally executed will and relying on an executor to follow his wishes. Applying succession principles will ensure that courts honor decedents' intent concerning their digital assets just as courts honor decedents' intent concerning physical distribution of their assets. Where a formally executed will states a desire to destroy or delete

Public, GUARDIAN (Oct. 15, 2012), http://www.theguardian.com/books/2012/oct/15/franz-kafka-archive-public [http://perma.cc/8M96-AKNW].

185. Elizabeth Barber, *Franz Kafka: Should We Have Never Known Him?*, CHRISTIAN SCI. MONITOR (July 3, 2013), http://www.csmonitor.com/Innovation/2013/0703/Franz-Kafka-Should-we-have-never-known-him [http://perma.cc/2WBR-U4RW].

186. *Id.*

187. DUKEMINIER & SITKOFF, *supra* note 12, at 14.

188. *See* JAMES WALTER, MEMORIALS OF WASHINGTON AND OF MARY, HIS MOTHER, AND MARTHA, HIS WIFE 228–29 (1997); ROBERT P. WATSON, AFFAIRS OF STATE: THE UNTOLD HISTORY OF PRESIDENTIAL LOVE, SEX, AND SCANDAL 82 (2012).

online accounts, that desire must be protected. As we have seen, "the organizing principle of the American law of donative transfers is freedom of disposition," and the law generally implements this principle by ensuring that "the donor's intention is given effect to the maximum extent allowed by law."[189] A fundamental principle of succession law is that a court will implement a testator's intent even if that intent is unreasonable or unfair.[190] An individual may not have privacy interests under the common law, but an individual does have testamentary interests protected by fiduciary principles. Accordingly, executors should be compelled to follow an individual's testamentary intent to delete digital assets at death and thereby protect digital privacy as a matter of testamentary law.

B. Using Private Contracts

Although the common law does not protect personal privacy from disclosure to a decedent's next of kin, and testamentary intent regarding privacy has not been applied to digital assets, digital assets have another potential layer of protection because they are formed by private contracts. Contracts may allow or require an account to be deleted after a decedent's death, thereby preserving personal privacy and prohibiting disclosure to an account holder's estate.[191]

The treatment of digital assets after death is largely decided by companies' online terms of service agreements.[192] The evolution of law in this area is in its nascent form. Because the common law affords virtually no protections to privacy after death for an individual, private contracts may be the best way to ensure that digital accounts are deleted after death rather than distributed to the decedent's family.

189. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

190. *See id.* ("American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property.").

191. *See, e.g.*, *Contacting Twitter About a Deceased User or Media Concerning a Deceased Family Member*, TWITTER, https://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/87894-how-to-contact-twitter-about-a-deceased-user [http://perma.cc/9SF6-TKH2] (noting that Twitter will delete the account of a deceased person, but will not give access to said account regardless of the requester's relationship to the deceased); *see also Dropbox Terms of Service*, DROPBOX, https://www.dropbox.com/terms [http://perma.cc/4QJ8-RVJC] (noting that inactive accounts are automatically deleted ninety days after the last login); YAHOO!, *supra* note 136 (noting that accounts may be deleted after an account holder's death).

192. *See, e.g.*, sources listed *supra* note 191.

There are three main concerns, however, with digital asset private contracts as they currently exist: (1) they do not allow an individual to choose the level of privacy that should be accorded;[193] (2) they do not ensure the deletion of an account (with all the private information an account holds) at death;[194] and (3) they dramatically alter succession law by crafting a default rule without legislative input.[195] Private contracts can be successful in protecting posthumous privacy if they work within the principles of succession law, implement testamentary intent, and include legislatively sanctioned default rules.

Given the previously discussed failures of common law and testamentary structure to adequately protect posthumous privacy,[196] private contracts may be the only means of protecting privacy after death. We may assume that many people have some correspondence, pictures, or other personal information in their digital asset accounts that they would prefer to be destroyed after death instead of transferred to surviving relatives. It is also likely that some would want their digital assets to be passed on to their surviving relatives after they have died.[197] Terms of service agreements, as a default, do not take individual intent into account in their blanket clauses that terminate digital accounts upon the account holder's death. Yet, as a third party providing a service online, digital asset companies are well positioned to effectuate individual intent as manifested in the contract between user and company.[198] The third-party service provider could simply include in the contract an opportunity for an individual to choose how she would want her account to be treated upon her death. Google, for example, has pioneered this kind of contractual agreement with its Inactive Account Manager, addressing the need of its users to have a voice in what happens to their accounts when they die.[199] The third-party service provider would then be bound by contract either to delete private information after death or transmit the information to the estate. Furthermore, the third-party service

193. *See infra* notes 196–203 and accompanying text.

194. *See infra* notes 210–13 and accompanying text.

195. *See infra* notes 229–33 and accompanying text.

196. *See supra* Part I.

197. One of the gaping holes in discussions about digital assets after death is the complete lack of reliable, empirical evidence about how the majority of Americans would like their digital assets to be treated postmortem.

198. For concerns about the additional cost this might impose on digital asset companies, see Banta, *supra* note 133, at 835–37.

199. *About Inactive Account Manager*, GOOGLE, https://support.google.com/accounts/answer/3036546?hl=en [http://perma.cc/GM4T-6C6S].

provider would have no commercial interest in exploiting the contents of an account,[200] and thus might be more faithful and neutral in carrying out the wishes of the deceased than a beneficiary.

Consider the situation that arises when companies refuse to allow a decedent's estate access to his online account,[201] or if no family member petitions the company for access to the account. Some companies' default policy for managing a decedent's account is to terminate an inactive account regardless of testamentary intent or the desires of an estate.[202] These companies justify their refusal to allow an estate access by citing concerns about their users' privacy.[203] These blanket deletion policies protect a decedent's privacy where the law does not. Thus, private contracts can give stronger privacy interests and rights than the common law or statutory law, but they ignore succession principles and testamentary intent. Whether such contracts can be enforced is another question taken up in the next Section.

At first blush, companies' concern with the privacy interests of their users seems reasonable and socially responsible. Legal concerns may also motivate them, as some industries have been compelled by federal law to establish privacy policies regarding personal information.[204] But privacy measures by many companies have been

200. Any commercial interest in the contents of the account would descend to the decedent's survivors. *See infra* Section III.B.

201. *See infra* notes 298–300.

202. *See* YAHOO!, *supra* note 136.

203. *Options Available When a Yahoo Account Owner Passes Away*, YAHOO!, http://help.yahoo.com/kb/index?locale=en_US&page=content&id=SLN9112 [http://perma.cc/QU5X-U6NC] (stating that "[t]o protect the privacy of your loved one, it is our policy to honor the initial agreement that they made with us, even in the event of their passing," meaning Yahoo! "cannot provide passwords or allow access to the deceased's account, including content such as email. At the time of registration, all account holders agree to the Yahoo Terms (TOS). Pursuant to the Terms, neither the Yahoo account nor any of the content therein are transferable, even when the account owner is deceased"); *see also Report a Deceased Person*, FACEBOOK, https://www.facebook.com/help/408583372511972/ [https://perma.cc/46J9-KYCU] ("Please keep in mind that we cannot provide login information for someone else's account, even after [his death]. It's always against Facebook's policies to log into another person's account."); *Submit a Request Regarding a Deceased User's Account*, GOOGLE, https://support.google.com/accounts/answer/2842525?hl=en&ref_topic=3075532 [https://perma.cc/KA7A-3Q6U] ("Users have a strong and reasonable expectation of privacy and security when using Google's products . . . even in the event of their death." However, "in certain circumstances we may provide content from a deceased user's account. In all of these cases, our primary responsibility is to keep our users' information secure, safe, and private. . . . Any decision to satisfy a request about a deceased user will be made only after a careful review.").

204. *See, e.g.*, Children's Online Privacy Protection Act (COPPA) of 1998, 15 U.S.C. §§ 6501–6502 (2012) (instituting online child identity protection policies); Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801–6809 (2012) (regarding the financial services industry); Telecommunications Act of 1996, 47 U.S.C. § 222 (2012) (requiring privacy

largely voluntary.[205] Companies often use their privacy policies as a marketing tool to show consumers that they are careful with the personal information stored on their websites.[206] Sometimes, however, the privacy policies of a company are more for show than to protect substantive privacy—policies may disclose how personal data are collected, while also allowing the company to transfer those data freely.[207] Policies that do so lack any real commitment to safeguarding personal privacy during life or after death.

Companies also may take different positions on user privacy depending on what is at stake. For example, Google espouses a commitment to personal user privacy after death[208] but in litigation has stated that users do not have a reasonable expectation of privacy in emails.[209] On the other hand, when a service provider states in a contract that it will not release the contents of an account due to privacy concerns, we assume that companies delete a decedent's inactive account.[210] As with all contracts, however, slight nuances in

policies for telecommunications entities); Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 2033 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) (regarding the privacy of individual health information).

205. Mary J. Hildebrand & Jacqueline Klosek, *Recent Security Breaches Highlight the Important Role of Data Security in Privacy Compliance Programs*, INTELL. PROP. & TECH. L.J., May 2005, at 20, 20 ("[M]any entities, even those that are not under any legal obligation to do so, have been developing and posting Web site privacy policies."); James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy*, 2005 U. ILL. J. L. TECH. & POL'Y 1, 1 (stating that in unregulated industries, "disclosing information practices is largely voluntary").

206. Nehf, *supra* note 205, at 1 ("Market pressures encourage many businesses to at least appear sensitive to customers' privacy concerns.").

207. *See, e.g.*, David Goldman, *Your Phone Company Is Selling Your Personal Data*, CNN MONEY (Nov. 1, 2011, 10:14 AM), http://money.cnn.com/2011/11/01/technology/verizon_att_sprint_tmobile_privacy/ [http://perma.cc/B8PS-9D4Q] ("Your phone company knows where you live, what websites you visit, what apps you download, what videos you like to watch, and even where you are. Now, some have begun selling that valuable information to the highest bidder. . . . Verizon is the first mobile provider to publicly confirm that it is actually selling information gleaned from its customers directly to businesses.").

208. *See* GOOGLE, *supra* note 203.

209. Defendant Google Inc.'s Motion to Dismiss Plaintiffs' Consolidated Individual and Class Action Complaint: Memorandum of Points and Authorities in Support Thereof at 28, *In Re* Google Inc. Gmail Litigation, No. 5:13-md-02430-LHK (N.D. Cal. 2013). *See generally* Jessica Guynn, *Google Must Face Suit over Scanning of Messages in Gmail, Judge Rules*, L.A. TIMES (Sept. 26, 2013), http://articles.latimes.com/2013/sep/26/business/la-fi-tn-google-gmail-scanning-lawsuit-judge-ruling-20130926 [http://perma.cc/JFU5-KEV7] (describing a lawsuit filed over Google's use of Gmail contents for advertising purposes).

210. Of course, it is possible that the companies do not actually delete the account and its contents, thereby assuring that the account information could be revealed at a future date. *See* Jacqui Shine, *You Can Delete, but You Can't Forget*, ATLANTIC (July 3, 2014) http://www.theatlantic.com/technology/archive/2014/07/you-can-delete-but-you-cant-forget

language matter. Yahoo! has a policy that an account holder's rights to an account terminate "upon your death" and "*may* be . . . permanently deleted."[211] Lacking in this language is a promise that the account will be deleted. When pushed by a probate court to release the contents of an account of a deceased user to the user's father several months after the account holder was killed, Yahoo! still had the contents of the account and obliged without appealing.[212] The account had not been deleted.[213] The lack of assurance from service providers that an account will be deleted at the death of an account holder compromises the personal privacy that can be obtained by private contracts.

Furthermore, even though a company has contracted with a deceased individual that the contents of his account will not be transferred at death, there may still be no way to enforce terms of the private contract after death. It is unclear whether a cause of action would lie against a company that released the information to an estate in violation of the terms of the contract.[214] Surely, if an estate were petitioning for access to an account, they would not protest the breach of contract between a company and the deceased. Moreover, mere concerned citizens would lack standing to challenge the release of information by the company to a decedent's family.[215]

/373662/ [http://perma.cc/KBF9-PPEP] (explaining that once an email is deleted, it is still on a commercial server for a period of time).

211. *See* YAHOO!, *supra* note 136 (emphasis added).

212. Order to Produce Information, *In re* Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Apr. 20, 2005) (ordering Yahoo! to give all contents of Justin Ellsworth's account to the personal representative of his estate); Paul Sancya, *Yahoo Will Give Family Slain Marine's E-mail Account*, USA TODAY (Apr. 21, 2005, 11:32 AM), http://usatoday30.usatoday.com/tech/news/2005-04-21-marine-email_x.htm?POE=TECISVA [http://perma.cc/5R9E-LV7M]. *See generally Justin's Family Fights Yahoo over Access to His E-Mail Account*, http://www.justinellsworth.net/email/yahoofight.htm [http://perma.cc/L5V3-8PT6] (collecting news articles about the dispute between Yahoo! and the Ellsworth family).

213. *See* Jacqui Goddard, *Bereaved Father Fights Yahoo for Dead Son's War E-mails*, TELEGRAPH (Jan. 9, 2005), http://www.telegraph.co.uk/news/worldnews/northamerica/1480797/Bereaved-father-fights-Yahoo-for-dead-sons-war-e-mails.html [http://perma.cc/V7FY-BSQ6] (noting that the decedent's father was attempting to gain access to his deceased son's email account prior to its deletion).

214. If the contractual right is seen as a personal right, it dies with the person. *See* Shafer v. Grimes, 23 Iowa 550, 553 (1867) (discussing the common law maxim "*actio personalis moritur cum persona*," that a personal action dies with the person and property rights survive).

215. *See* York v. Nunley, 610 N.E.2d 576, 578 (Ohio Ct. App. 1992) (stating that a person who could challenge a will is "[a]ny person who has such a *direct, immediate and legally ascertained* pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will . . . ." (quoting Bloor v. Platt, 84 N.E. 604, 605 (Ohio 1908))); *In re* Estate of Luongo, 823 A.2d 942, 954 (Pa. Super. Ct. 2003) ("A contestant to the validity of a will does not

Of course, a company may face market pressure if it fails to meet contractual obligations to keep information private after death. Perhaps users would be less likely to use a certain email account or social networking platform if they knew they could not trust the provider to keep it secure during their life and after their death.

The Yahoo! probate case discussed above provides a strong example. When the father of the decedent sought access to his son's account after his son had been killed in Iraq, public pressure mounted against Yahoo!.[216] The father sued Yahoo! and a probate court ordered the company to give the father access to his son's e-mail, despite terms in the service agreement that allowed termination of the account at death.[217] To appease the public and the court, Yahoo! acquiesced, and did not appeal the decision based on the terms of the contract with the decedent.[218] The terms of the agreement, however, were not individually negotiated or agreed to by the decedent.[219] He had assented to the terms of the agreement through his use of Yahoo! as an email provider, but he had never expressed any testamentary intent regarding the treatment of his account after death.[220] If Yahoo! had allowed some way for him to indicate that he desired Yahoo! to destroy his email account upon his death or provided some other document that expressly showed his desire that his account remain private, it is more likely that the court would have upheld the terms of the contract.[221]

Federal law offers a set of unique potential enforcement mechanisms for contract law. If a company tries to renege on an agreement to terminate an account at the holder's death and instead releases account contents to the public, that company may face liability under copyright or federal privacy law. Under copyright laws, a decedent's family could obtain statutory damages if the release of documents, correspondence, or photos has infringed on an estate's copyright.[222] Moreover, the SCA,[223] discussed earlier,[224] prevents the

have standing to do so unless he can prove he would be entitled to participate in the decedent's estate if the will before the court is ruled invalid.").

216. Order to Produce Information, *supra* note 212; Sancya, *supra* note 212.

217. Sancya, *supra* note 212.

218. *Id.*

219. *See* YAHOO!, *supra* note 136.

220. *Id.*; *see also* Banta, *supra* note 133, at 822–23 (discussing the failures of private contracts to address testamentary intent).

221. *See supra* Section II.A.1 (discussing cases that upheld contractual terms in sperm donor and corpse treatment contracts that specifically demonstrated testamentary intent).

222. *See infra* Section III.B.2. Statutory damages are set out in 17 U.S.C. § 504 (2012).

223. 18 U.S.C. §§ 2701–2712 (West, Westlaw through P.L. 114-114, approved Dec. 28, 2015).

disclosure of such information to the public without lawful consent.[225] Presumably, consent could be granted by a decedent's survivor, but consent clearly could not be granted by the decedent herself. Thus, if a company released the contents of an account without the consent of either the decedent, in life, or the decedent's estate, it could be prosecuted under the Act.

Contractual protections may conflict with common law protections and an estate's claims of ownership of publicity or copyright over the decedent's unpublished digital assets. If digital accounts are not deleted or do not pass to a decedent's estate, Internet companies could claim ownership of the information and release the contents of an account to the public. The public may be especially active in demanding a release if these accounts include information of public interest. For example, if the information relates to a celebrity scandal or a moment of national importance, the Internet company and the public may be more willing to allow the digital accounts to be released even in breach of contractual terms. To date, no Internet company has been prosecuted under the SCA for releasing the contents of a deceased account holder to family members,[226] but perhaps there would be more concern about Internet companies publicly releasing information of deceased users.

Even assuming that Internet privacy policies are intended to substantively protect the account holder's privacy after death and will be upheld after the account holder's death, a second conceptual problem with these policies arises—such policies are created unilaterally by companies with no input or direction from an account holder.[227] In effect, companies impose privacy after death through contractual terms no matter what a decedent would have chosen.[228]

This unilateral imposition of terms governing the posthumous disposition of digital assets contradicts the principles of succession law, which first attempt to implement a decedent's testamentary intent and only then rely on state intestacy defaults to fill in gaps.[229] If a decedent has not made his intent known, intestacy statutes control

224. *See supra* notes 91–98 and accompanying text.

225. § 2702(a), 2702(b)(3).

226. An exhaustive search of cases under 18 U.S.C. § 2707(c) revealed no such prosecution for releasing content to a family member.

227. *See, e.g.*, sources cited *supra* note 191.

228. *See, e.g.*, YAHOO!, *supra* note 136 ("Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.").

229. *See* UNIF. PROBATE CODE §§ 2-101 to -103, -105 (UNIF. LAW COMM'N 2008); *see also* DUKEMINIER & SITKOFF, *supra* note 12, at 64–65.

distribution of his property.[230] Intestacy statutes are based on the individual decedent's presumed intent.[231] Private contracts controlling digital assets (unlike intestacy statutes) do not necessarily presume the intent of an account holder. Instead, these contracts dictate terms of an agreement that favor a company's business goals and directives, not necessarily the best interests of society as a whole. Companies assume that contractual terms will be applied universally without regard to individual testamentary intent once an individual begins to use an online service. Because private contracts now control succession principles that have traditionally been regulated by state legislatures, private contracts have the power and ability to fundamentally shift succession norms and property interests in digital assets.[232]

In sum, in the context of private contracts, individuals lack any ability to opt into or out of the default rules set by the companies, and the end users also lack an opportunity to choose how stringent they would like privacy protections to be for digital assets in the event of an untimely death. In sum, private contracts between user and company dictate all the terms of privacy after death and allow little to no input or comment from an account holder. This kind of private ordering is not the most reasoned and appropriate way to reform privacy rights after death.

A default rule of deletion or preservation is the best way to ensure that people make a conscious choice about how their digital assets will be handled after death. In many ways, the debate about posthumous privacy comes down to one issue—if a decedent has not made known her intent about the privacy of her digital accounts, should the default rule be set by the terms of the contract or by a state legislature? Currently, in the majority of states, the default rule is set by contracts with a minimal required showing of the account holder's assent to a company's unilaterally established contractual terms.[233]

230. DUKEMINIER & SITKOFF, *supra* note 12, at 63–65.

231. *Id.*

232. For a fuller discussion of this trend, see generally Banta, *supra* note 133.

233. Only eight states have enacted legislation to allow an estate to receive or delete digital assets of a decedent notwithstanding the terms of service agreements. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-334a (West, Westlaw through 2015 Sess. & June Spec. Sess.); DEL. CODE ANN. tit. 12, § 5004 (LEXIS through 80 Del. Laws, ch. 194, 2016); IDAHO CODE § 15-3-715(28) (LEXIS through 2015 Reg. & First Extraordinary Sess.); IND. CODE ANN. § 29-1-13-1.1 (West, Westlaw through 2015 First Reg. Sess.); NEV. REV. STAT. ANN. § 143.188 (West, Westlaw through 2015 Reg. & Spec. Sess.); OKLA. STAT. ANN. tit. 58, § 269 (West, Westlaw through First 2015 Sess.); 33 R.I. GEN. LAWS § 33-27-3 (LEXIS through chs. 1 & 2, Jan. 2016 Sess.); VA. CODE ANN. § 64.2-110 (2012 & Supp. 2015).

The default rules depend on the policies of each company, which can be changed at any time. If we are to reshape posthumous privacy rights in a digital future, the conversation about how far those rights should extend needs to occur in a public forum, not in terms of service agreements posted online that most people do not read. It is troubling in a democratic society that private companies currently make the default rule rather than state legislatures. In a democratic society, default rules that affect our privacy interests should be established by elected state legislatures, not by corporations with disproportionate bargaining power. State legislatures should pass intestacy laws that enforce decedents' presumed intent and allow for opting out of intestacy defaults.

A few states have resisted online service providers' unilateral control over digital asset succession and have enacted laws addressing the treatment of digital assets after death, but none of these laws explicitly address decedents' privacy interests in their online accounts.[234] Instead, these laws grant access to a decedent's digital assets to his estate, placing the burden of protecting privacy on the estate.[235] Digital asset succession laws in these states have not yet been challenged.[236]

Private contracts have not taken the lead in effectuating individual choice for how accounts should be treated at death, and legislation is needed to protect consumers' interest in devising or destroying their digital accounts. Outside the digital privacy frontier, a similar phenomenon has occurred in other industries where there is an unusual need for individualized protection for consumers. When legislatures find practices problematic, unjust, or fraudulent, they often enact mandatory rules that override private contracts. In landlord-tenant agreements, for example, courts and legislatures impose the warranty of habitability and forbid parties to contract for sub-standard housing.[237] Similarly, courts and legislatures require a

234. *See* sources cited *supra* note 233.

235. As we have seen, an estate does not have an obligation to protect a deceased member's privacy absent an express statement in a testamentary instrument, and, even then, an executor could violate her fiduciary duties to a decedent with the consent of the beneficiaries with little fear of being held accountable for a breach. *See supra* Section II.A.2.

236. No cases are reported that challenge any of the laws cited *supra* note 233.

237. *See, e.g.*, COLO. REV. STAT. § 38-12-503 (LEXIS through 2015 First Reg. Sess.); IOWA CODE ANN. § 562A.15 (West, Westlaw through 2015 Reg. Sess.); VT. STAT. ANN. tit. 9, § 4457(a) (LEXIS through 2015 Reg. Sess.); Landis & Landis Const., LLC v. Nation, 286 P.3d 979, 983 (Wash. Ct. App. 2012) (holding that a rodent infestation is an actionable breach of the warranty of habitability).

landlord to follow specific eviction procedures and prohibit the landlord from unilaterally setting the terms of eviction.[238] Anti-discrimination laws also limit the freedom of contract in landlord-tenant relationships and aim to prevent a landlord from discriminating against potential tenants.[239] In consumer law, rules of misrepresentation or deceit ensure that parties cannot supply faulty information to a consumer.[240] Disclosure laws protect consumers from entering into unfair agreements.[241]

Privacy protection after death is another area where legislation could accomplish a great deal. In the first place, legislatures should be responsible for creating the default rules of what should happen to digital accounts when an account holder dies. Through the democratic system, legislatures can engage in principled reform and create laws that both protect privacy concerns in information-heavy digital accounts and preserve individual testamentary intent. As a potential first step, legislatures could pass disclosure laws ensuring that users know how their accounts will be treated at death. Legislation could also mandate that companies give individuals a contractual choice about how their assets should be treated at death. Namely, individuals could choose either to have their accounts deleted at death or to release their accounts to their estates. If an individual chose to maintain her privacy by having her account deleted after death, her decision should override a family member's desire to obtain access to the account. The third-party's refusal to grant access would be based on the decedent's clearly expressed intent to maintain her personal privacy in the account, even after death. Laws that require an affirmative choice for how assets will be treated at death would protect individual privacy and testamentary intent.

238. ARK. CODE ANN. § 18-17-902 (LEXIS through 2015 Reg. & First Extraordinary Sess.); FLA. STAT. ANN. § 83.21 (West, Westlaw through 2015 First Reg. & Spec. A Sess.); LA. CODE CIV. PROC. ANN. art. 4701 (West, Westlaw through 2015 Sess. & Spec. A Sess.); Hous. Auth. of the City of New Haven v. Martin, 898 A.2d 245, 248 (Conn. App. Ct. 2006); Corpus Christi Hous. Auth. v. Lara, 267 S.W.3d 222, 225–26 (Tex. App. 2008).

239. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 151B, § 4(6)–(8), (11) (West, Westlaw through ch. 164 of 2015 1st Ann. Sess.); N.J. STAT. ANN. § 10:5-12(g)–(h) (West, Westlaw through L.2015); OHIO REV. CODE ANN. § 4112.02(H) (LEXIS through Legis. Passed by 131st Gen. Assemb. and filed with Sec'y of St. through file 45 (SB 223) (excluding file 32 (HB 56), file 34 (HB 124), file 38 (HB 237), file 39 (HB 259), file 40 (HB 340), and file 41 (SB10))).

240. *See, e.g.*, COLO. REV. STAT. § 6-1-105 (LEXIS through 2015 Sess.); KAN. STAT. ANN. § 50-626 (West, Westlaw through 2015 Reg. Sess.); MD. CODE ANN., COM. LAW § 13-301 (LEXIS through 2015 Legis. Sess.); TENN. CODE ANN. § 47-18-104(b)(21) (West, Westlaw through 2015 First Reg. Sess.).

241. *See* ALA. CODE § 8-25-2 (West, Westlaw through 2015 Reg., First Spec. & Second Spec. Sess.); UTAH CODE ANN. § 15-8-5 (West, Westlaw through 2015 First Spec. Sess.).

Private contracts, despite their noted shortcomings, should play a role in protecting privacy after death. The common law is ill suited to the task at hand because it does not recognize an interest in privacy after death. Private contracts and legislative action can fill a gap left by the common law by granting users more choice and control over privacy after death. Google, for example, has created a method for users to affirmatively determine who should have access to an account when it becomes "inactive."[242] Through Google's Inactive Account Manager, a user may choose whether he prefers his account to remain private and be terminated at death or transferred to his survivors.[243] Facebook has also recently allowed individual choice to dictate the fate of the personal information stored in an account.[244] Such avenues for expressing intent accommodate digital privacy interests after death and promote the fundamental principles of both contract and succession law. If digital asset contracts were to include a legislatively mandated choice between succession and destruction, such contracts would effectively balance the difficulties of protecting privacy and enforcing testamentary intent.

Any legislation should also account for the fact that information may remain on companies' servers for many years after an account holder's death. Such digital archives may be a source of our history fifty or a hundred years from now. Posthumous privacy has a shelf life. At some point, no reasonable claim of privacy can be made. Recently, three-hundred-year-old letters were found unopened and undelivered in the Netherlands.[245] These letters were written by members of all social classes and in a variety of languages.[246] Academics are eagerly examining them as they provide a unique glimpse into late-seventeenth and early-eighteenth century Europe.[247] No reasonable claim of privacy can be made to prohibit the study of these letters because it has been too long after the deaths of those who wrote them. Legislatures should pass laws to create digital

242. GOOGLE, *supra* note 199.

243. *Id.*

244. *See What Is a Legacy Contact?*, FACEBOOK, https://www.facebook.com/help/1568013990080948 [http://perma.cc/74MR-AK5U]. Facebook allows a decedent to choose an individual who can update a profile picture, respond to friend requests, and write a post on a profile once a decedent's account becomes memorialized. *Id.*

245. These letters are over 300 years old, and no one is concerned about the private information contained therein because they are now a part of history. Maev Kennedy, *Undelivered Letters Shed Light on 17th Century Society*, GUARDIAN (Nov. 8, 2015, 10:36 AM), http://www.theguardian.com/world/2015/nov/08/undelivered-letters-17th-century-dutch-society?CMP=fb_gu [http://perma.cc/C9CC-R24W].

246. *Id.*

247. *Id.*

archives with information that remains sealed until the legislature deems that privacy protection is no longer needed. Because digital accounts will hold many historical treasures of our generation, it may be in the public interest to allow some sort of public dissemination. Such dissemination should only be permitted, however, after any privacy interest in those data has dissipated with the passage of time. By sealing these assets for a period of time after an individual's death, the legislature can balance the need for dissemination and historical preservation with privacy protections.

* * *

As we have seen in this Section, posthumous privacy must be reshaped to adapt to the digital age. This can be achieved by allowing traditional succession principles to apply to digital assets. These principles ensure that an individual account holder's testamentary decisions about her privacy will be honored after her death. Contractual terms can help support testamentary intent regarding posthumous privacy, but any contractual term that forbids transfer after death or presumes the intent of a user without legislative guidance should be invalid. It is the province of state legislatures to craft default rules regarding the assumptions of testamentary intent of digital asset accounts after death, and private contracts are not sufficiently equipped to fill that void. A decedent's family can also protect privacy interests by following traditional succession principles, which will be discussed in the next Part.

III. DIGITAL ASSET INTESTACY: PRIVACY IN A FAMILY PARADIGM

Surviving family members should control the disposition of a decedent's digital information where the decedent has not made his desires known and no specific legislation exists. Although posthumous privacy is generally not protected under the common law, constitutional law, statutory provisions, or our testamentary structure,[248] these systems and laws all point to the principle that surviving family members should have a claim in controlling posthumous privacy interests in a digital future. Legislation should be adopted that applies traditional succession principles to digital asset privacy, and in the absence of specific testamentary intent, a family should have access to a decedent's digital accounts.

248. *See supra* Part I.

There are several justifications for this: first, inheritance has long been locked in a family paradigm. Property passes to an individual's family if she has made no other arrangements.[249] Privacy, too, should be protected or managed by the decedent's living family members if she has made no other arrangements. Second, although the decedent herself may not have enforceable personal privacy interests, the common law affords limited protections to privacy after death based on concerns about familial privacy and human dignity.[250] For instance, the common law is likely to protect distressing or disturbing images and information held in a digital asset account from public exposure based on a family's interest in protecting that information.[251] The law also protects privacy in the hands of a survivor's family to the extent that information about a decedent can be seen as a commercialized property interest.[252] These limited protections based on succession principles, family privacy, and commercial interests suggest that families should have a claim in controlling the privacy interests of a decedent's digital assets if an individual has not elected to have her accounts terminated upon her death. A default rule should rely on a decedent's heirs to protect a decedent's account information from public disclosure, not from disclosure to a decedent's family. Honoring a decedent's testamentary wishes concerning privacy and allowing families to protect the privacy of digital assets after death if no intent is known will maintain testamentary devises in their family paradigm.

A. Familial Privacy and Inheritance

Allowing a family access to digital accounts and holding family members responsible for protecting the privacy interests of a decedent accords with practice and tradition. If a decedent has not

249. *See* UNIF. PROBATE CODE §§ 2-101 to -103, -105 (2008).

250. *See, e.g.*, N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 631 (D.D.C. 1991) (noting the familial privacy interest in audio recordings of astronauts immediately before the Challenger explosion); N.Y. Times Co. v. City of N.Y. Fire Dep't, 829 N.E.2d 266, 269 (N.Y. 2005) ("The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy."); Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895) ("It is the right of privacy of the living which is sought to enforce here. That right may in some bases be itself violated by interfering with the character or memory of a deceased relative . . . ."); Reid v. Pierce Cty., 961 P.2d 333, 342 (Wash. 1998) (holding that surviving family members have a privacy interest in the autopsy records of a decedent).

251. *See supra* Section I.B.

252. *See* 17 U.S.C. § 201(d) (2012) (providing that copyright protection is transferrable through testamentary instrument or intestate succession); 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2015 ed.) (publicity).

made his intent known, intestacy laws divide a decedent's estate and transfer it to the decedent's surviving family members.[253] Family members are usually those who must sort through the tangible possessions that may reveal an individual's secrets. Families also have the privilege to protect information they discover or already knew from public dissemination. Expanding such protections and privileges from tangible possessions into the digital realm, states have begun to enact legislation protecting the ability of a family to access a decedent's online accounts.[254] While these statutes do not address personal privacy protections, they do treat digital assets as if they belong to a decedent's survivors.[255] Although tort law does not protect an individual's privacy after death,[256] it favors a family-centered paradigm to control private information about a decedent. Even if the digital accounts or the information contained within them are not seen as "property" or descendible to a decedent's surviving family members, the information, images, or words in those accounts could receive protection under a limited common law exception that recognizes and protects family privacy. Although this exception has never been formally recognized or named, courts have protected family members' privacy regarding information about or pictures of deceased family members. For purposes of this Article, I use the term "familial privacy exception" to describe the phenomenon of courts protecting family members' privacy concerning the death of a relative. This Section argues that this line of court decisions both in traditional tort law and in interpreting public record dissemination exceptions could be applied to protect digital assets of the deceased from public dissemination.

The familial privacy exception discourages others from revealing information about a decedent if such information would harm surviving family members.[257] Tort law has protected a family's interest

253. *See* UNIF. PROBATE CODE §§ 2-101 to -103, -105 (2008).

254. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-334a (West, Westlaw through 2015 Reg. & June Spec. Sess.); DEL. CODE ANN. tit. 12, § 5004 (LEXIS through 80 Del. Laws, ch. 194, 2016); IDAHO CODE ANN. § 15-3-715(28) (LEXIS through 2015 Reg. & First Extraordinary Sess.); IND. CODE § 29-1-13-1.1 (West, Westlaw through 2015 First Reg. Sess.); OKLA. STAT. ANN. tit. 58, § 269 (West, Westlaw through First 2015 Sess.); 33 R.I. GEN. LAWS § 33-27-3 (LEXIS through chs. 1 & 2, Jan. 2016 Sess.); VA. CODE ANN. § 64.2-110 (2012 & Supp. 2015).

255. *See* sources cited *supra* note 254.

256. *See supra* Part I.

257. *See, e.g.*, Loft v. Fuller, 408 So. 2d 619, 624 (Fla. Dist. Ct. App. 1981) ("[Some courts] support the view that under certain circumstances the deceased's relatives may recover for the invasion of their own privacy interests even though they were not personally the focus of the publicity in question. The rationale behind these decisions is

in keeping disturbing or difficult images from the public based on a sense of familial privacy. To recover for a breach, family members must show that an image's publication or disclosure is an invasion of their privacy interest, which will often require egregious facts and a high threshold of proof.[258] Courts protect the invasion of privacy of a decedent's death-scene images or last recorded moments not on the basis of protecting posthumous privacy, but on the theory that a decedent's survivors have a right to privacy separate from the right of a decedent.[259] Accordingly, if the living family members' privacy rights were also infringed by dissemination of the decedent's private information, those family members can recover.[260] In fact, this tort has begun to expand beyond its common law roots; a relational right of privacy to the relatives of a deceased has been codified in a number of states.[261]

If family members can only claim that they are relatives of the wronged victim and were "unwillingly brought into the limelight" because of the published information about a decedent, they will be unable to recover under an invasion of privacy claim.[262] The tort demands a discrete harm to the family members' privacy, such as additional grief caused by publication of emotionally taxing death-scene photos.[263] Mere supplemental notoriety is not enough. For example, in *Flynn v. Higham*,[264] the court rejected the family's claim

that the relatives of the deceased have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication."); Bazemore v. Savannah Hosp., 155 S.E. 194, 197 (Ga. 1930) (holding that parents of a deceased child could recover for invasion of privacy when a hospital published a picture of the malformed child as part of an advertisement).

258. *Loft*, 408 So. 2d at 624 ("When there are unusual circumstances . . . it may be that a defendant's conduct towards a decedent will be found to be sufficiently egregious to give rise to an independent cause of action in favor of members of decedent's immediate family.").

259. *Bazemore*, 155 S.E. at 197 (Ga. 1930) ("In this case the child was dead when the unauthorized acts were committed, and the right of action could not be in the child, but in the parents.").

260. *Id.*

261. *See, e.g.*, FLA. STAT. ANN. § 540.08 (West, Westlaw through 2015 Reg. & Spec. A Sess.); NEB. REV. STAT. ANN. § 20-205 (West, Westlaw through 2015 Reg. Sess.); OKLA. STAT. ANN. tit. 21 § 839.1 (West, Westlaw through First 2015 Sess.); UTAH CODE ANN. § 76-9-406 (West, Westlaw through 2015 First Spec. Sess.); VA. CODE ANN. § 18.2-216.1 (2014 & Supp. 2015).

262. Hendrickson v. Cal. Newspapers, Inc., 121 Cal. Rptr. 429, 431 (Cal. Ct. App. 1975).

263. *See* Catsouras v. Dep't of Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 358 (Cal. Ct. App. 2010); Reid v. Pierce Cty., 961 P.2d 333, 341–42 (Wash. 1998).

264. 197 Cal. Rptr. 145 (Cal. Ct. App. 1983).

of invasion of privacy when a book claimed that their father had been a homosexual and a Nazi spy because family members were never mentioned in the challenged publication—they could only claim an invasion of their father's privacy, which did not survive his death.[265]

Courts use several policy justifications to support a familial exception in tort privacy law and to prevent dissemination of public records based on concerns about family privacy. These justifications include allowing a family to protect private information after death, protecting human dignity, protecting intensely personal moments, protecting a family from emotional pain, and protecting the decedent's character and memory. These justifications also support allowing families to control private information in digital accounts after the account holder's death in situations where the decedent has not made her intent known.

In situations involving the disclosure of public records such as autopsy photographs, death scene images, photos of a corpse, or recordings of a decedent's last words taped by emergency callers, courts often look to tort privacy principles in allowing the family to bring an invasion of privacy claim to control the dissemination of those materials.[266] Courts have been especially sympathetic to the claims of family members to control the dissemination of photos of the dead or the last recorded moments of a person's life.[267] The Supreme Court recently held that FOIA recognized "surviving family members' right to personal privacy with respect to their close relative's death-scene images."[268]

265. *Id.* at 146–47.

266. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004) (death scene images); *Catsouras*, 104 Cal. Rptr. 3d at 358 (images of decapitated accident victim); Douglas v. Stokes, 149 S.W. 849, 849–50 (Ky. Ct. App. 1912) (images of dead, deformed infants); Providence Journal Co. v. Town of W. Warwick, No. KC 03-207, 03-2697, 2004 WL 1770102, at *3 (R.I. Sup. Ct. July 22, 2004) (taped emergency calls); *Reid*, 961 P.2d at 335 (autopsy photographs).

267. Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, 482–83, 485–86 (D.D.C. 1994) (protecting autopsy photographs of President Kennedy because they were not "agency records" subject to FOIA and stating that even if they were agency records, they would be exempt from disclosure as an unwarranted invasion of privacy). Of course, death image pictures are not always protected. In *Fitch v. Voit*, 624 So. 2d 542 (Ala. 1993), a newspaper published a picture of a woman lying in bed at a hospital and described that she was dying of cancer. *Id.* at 543. The court found that any privacy interests had died with the decedent and the family did not have a relational right of privacy in the picture. *Id.* Similarly, in *Savala v. Freedom Communications, Inc.*, No. F048090, 2006 WL 1738169 (Cal. Ct. App. 2006), a newspaper published a picture of a man who had been shot in a public park, but when the family sued, the court did not recognize the family's right of privacy in the victim's death image. *Savala*, 2006 WL 1738169 at *1, *8.

268. *Favish*, 541 U.S. at 170.

Several other cases concerning death images arise from government officials using the images as a form of personal entertainment. In *Reid v. Pierce County*,[269] for example, medical examiner's office employees allegedly kept a scrapbook of autopsy photographs of corpses that they would show at cocktail parties.[270] The county argued that if any privacy interest was violated by this collection of photographs, it was the interest of the deceased and not the relatives of the deceased.[271] The court rejected that argument, holding that the relatives of the deceased, but not the deceased themselves, had a protectable privacy interest in autopsy records.[272] More recently, in *Catsouras v. Department of California Highway Patrol*,[273] highway patrol officers took pictures of a woman who was decapitated in a car accident and emailed these photographs to friends and family.[274] These pictures quickly spread on the Internet.[275] The court found that the pictures were disseminated "out of sheer morbidity or gossip"[276] and sustained the family members' "common law privacy right in the death images of a decedent."[277]

In protecting emergency calls made by victims in a nightclub fire, a court characterized the calls as "intensely personal" and explained that they were "entitled to protection . . . to avoid a highly intrusive interference with the legitimate privacy entitlement these individuals should be afforded."[278] The victims' families were not involved in these personal phone calls.[279] Yet, the court extended the decedents' privacy interest to the families because of the intimate nature of the calls.[280] The court suggested that both the victims and their family members had a privacy interest in the calls, even though the victims died in the tragedy.[281]

Similarly, in the case that determined whether NASA's Challenger audiotapes would be released, the court found that the sound of the astronauts' voices was an "intimate detail" that the

269. 961 P.2d 333 (Wash. 1998).
270. *Id.* at 335.
271. *Id.* at 339, 341–42.
272. *Id.* at 342.
273. 104 Cal. Rptr. 3d 352 (Cal. Dist. Ct. App. 2010).
274. *Id.* at 358.
275. *Id.*
276. *Id.* at 366.
277. *Id.* at 358.
278. Providence Journal Co. v. Town of W. Warwick, No. KC 03-207, 03-2697, 2004 WL 1770102 at *3 (R.I. Sup. Ct. July 22, 2004).
279. *Id.* at *1.
280. *Id.* at *3.
281. *Id.*

families had a right to protect, despite the fact that the families had no involvement in creating the audio recordings.[282] The court explained that releasing the voice recordings would only add to the survivors' anguish.[283] A court also refused to grant journalists access to audiotapes of emergency calls made by victims in the September 11, 2001, terrorist attacks on the basis that the surviving relatives had an interest in keeping the calls private.[284] In these cases, the nature of the personal information compelled the courts to extend decedents' privacy to their families to protect these intimately personal moments from public scrutiny. In effect, the court protected a decedent's privacy interests through his family.

Courts also justify familial privacy with concerns about protecting human dignity, thus blurring the distinction between a decedent's privacy interest and her family's privacy interest. By "preserv[ing] the dignity of human existence . . . when life has passed,"[285] courts protect the privacy interest of decedents as much or more than families' privacy interests in preserving the dignity of another. In this way, we honor the deceased by not disseminating the pictures of his death or the audio recordings of his final moments. A similar protection may be warranted for the last pictures posted or emails sent via a decedent's online accounts, regardless of the underlying circumstances.

Courts have justified familial privacy by pointing to familial rights in the "character and memory of the deceased"[286] or in "honoring and mourning their dead."[287] In *Schuyler v. Curtis*,[288] family members sued to enjoin an organization from building a statue of their deceased family member. The court ruled in favor of the family, holding that "[a] privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the

282. N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 631 (D.D.C. 1991). Although the case arose in the context of the government asserting the family's privacy interest instead of the family itself, the legal principles at play should remain constant even within the context of a family asserting the same interest for themselves. If anything, that the government here asserted the claim on behalf of the family indicates that the identified principles should apply more broadly.

283. *Id.*

284. N.Y. Times Co. v. City of N.Y. Fire Dep't., 829 N.E.2d 266, 269 (N.Y. 2005).

285. *Id.*

286. Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895).

287. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004).

288. *Schuyler*, 42 N.E. at 25.

deceased."[289] Thus, for a deceased family member to receive privacy protections, those bringing suit must be able to allege an intrusion of their own privacy.[290] *Curtis* is not alone in relying on this justification—other courts similarly argue that this interest is to protect the feelings of the living, not to protect the feelings of the dead.[291] In doing so, however, courts implicitly allow families to protect the privacy interests of the dead and control information about a decedent's death that would cast a shadow over the character and memory of the deceased.

Lastly, courts conflate a decedent's privacy interests with those of family members by emphasizing the pain family members may feel when the decedent's private moments are disclosed. Courts have been concerned with exposure that would cause families pain, humiliation, or distress.[292] By protecting families from the pain of public disclosure, courts extend privacy interests beyond an individual's death. Courts that protect familial privacy allow family members to control the pictures or words of the deceased in an unprecedented way under the common law. Courts have granted this control to families on a limited basis despite the countervailing concerns of freedom of the press and the free flow of information.[293]

Looking at these cases in aggregate reveals that courts give several justifications for the right of familial privacy. These include preserving the human dignity of a decedent,[294] protecting a decedent's

289. *Id.*

290. *Id.*

291. *See, e.g.*, Douglas v. Stokes, 149 S.W. 849, 849 (Ky. Ct. App. 1912) (finding that two parents had a protectable privacy interest in a picture of their deceased twin boys, who had a connected sternum, due to suffering and humiliation that the photographer inflicted upon the parents by disseminating the picture).

292. *See, e.g.*, Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, 485 (D.D.C. 1994) (pointing to the fact that the Kennedy family has been traumatized by prior publication of autopsy records); N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 631 (D.D.C. 1991); *Douglas*, 149 S.W. at 849 (finding that exposure of photographs had "humiliated" the family and "their feelings and sensibilities had been wounded").

293. *See, e.g.*, *Nat'l Aeronautics & Space Admin.*, 782 F. Supp. at 632–33; *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 250–54 (2004) (describing the historical development of First Amendment jurisprudence with regard to a right to the free flow of information).

294. Reid v. Pierce Cty., 961 P.2d 333, 342 (Wash. 1998) ("We hold the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the

"intensely personal" moments,[295] protecting a family's right in the character and memory of the deceased,[296] and protecting the family from emotional pain.[297] Each blurs the line between a decedent's privacy interest and that of the family, and can be logically extended to apply to digital asset privacy after death. By taking into consideration the intimate details that often accompany an unsightly death, courts shield the privacy of a decedent's death from public scrutiny. In doing so, a decedent's right of privacy to intimate moments are still protected through her family members.

Tort law demonstrates that courts are sympathetic to surviving family members' desire to protect private information about decedents. Surely the intimate details, pictures, and voice recordings kept on third-party Internet sites should be entitled to a similar level of protection. Families would be responsible for ensuring that the material and information stored on the Internet, these "intensely personal moments," were protected from public scrutiny through the rights of surviving family members. Because digital assets are more pervasive and capture the most detailed, intimate portrayals of our lives, the tort-created exception for posthumous privacy interests should extend to digital asset privacy as well. Currently, Internet companies control the fate of an account after death without input from the account user or his family. In most cases, however, it would better serve principles of succession law for surviving family members to control digital asset accounts.

If an individual has not made her desires known concerning her digital accounts, a family member's desire to know more about the decedent's life should override a third-party contract's terms of deletion. A family member's desire to know why a decedent committed suicide,[298] to understand more about the circumstances of a decedent's suspicious death,[299] or to obtain closure from the

decedent. That protectable privacy interest is grounded in maintaining the dignity of the dead.").

295. Providence Journal Co. v. Town of W. Warwick, No. KC 03-207, 03-2697, 2004 WL 1770102, at *3 (R.I. Sup. Ct. July 22, 2004).

296. Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. Ct. App. 1895).

297. *Nat'l Aeronautics & Space Admin.*, 782 F. Supp. at 631 ("Exposure to the voice of a beloved family member immediately prior to that family member's death is what would cause the Challenger families pain.").

298. *See* Fredrick Kunkle, *Virginia Family, Seeking Clues to Son's Suicide, Wants Easier Access to Facebook*, WASH. POST (Feb. 17, 2013), http://articles.washingtonpost.com/2013-02-17/local/37149666_1_facebook-page-facebook-spokesman-andrew-noyes-privacy-laws [http://perma.cc/B9RV-EAVH].

299. *See In re* Request for Order Requiring Facebook, Inc. to Produce Documents and Things, 923 F. Supp. 2d 1204, 1205 (N.D. Cal. 2012) (granting Facebook's motion to quash

unexpected death of a loved one[300] are interests that should take precedence over the interests of a third-party company that stores this information. Public policy favors disclosure of factual circumstances regarding an individual's death to family members.

Social networking sites, personal webpages, and blogs are beginning to serve as virtual memorial sites to deceased individuals as family and friends mourn publicly on a digital forum.[301] Family members usually wish to control the content of such platforms when they are used for the purpose of remembering a deceased loved one.[302] For example, a man recently posted a picture of himself holding a gun to his mouth before taking his own life.[303] Facebook refused to give the family access to the man's account, but eventually removed the disturbing photo from his profile.[304] If Facebook had refused to do so, it might have been subject to a privacy tort brought by his family alleging harms to the character of the deceased and the family's memory of him.[305]

In sum, the same justifications that promote familial control of death images and recordings may be used to protect digital asset privacy interests of a decedent from public disclosure. In addition, the common law tort exception for familial privacy interests demonstrates that the law favors giving family members control over information about the decedent. Both the common law exception and testamentary construction of a decedent's privacy interests after death suggest that a decedent's survivors are best suited to ensure the posthumous privacy of digital accounts.

B. Commercialization of Privacy

As we have seen, the law should protect a family's testamentary right to a decedent's digital accounts and favor familial privacy protections. The law also protects a family's commercial interests in a

family members' subpoena for contents of decedent's profile after she died in apparent suicide).

300. *See, e.g.*, Petition to Produce Information, *In re* Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Mar. 4, 2005) (requesting access to decedent's Yahoo! account after petitioner's son was killed in Iraq).

301. Annie Johnson, *Online Memorials Help Students, Families Cope with Loss*, USA TODAY (Dec. 20, 2013), http://www.usatoday.com/story/tech/2013/12/20/online-memorials/4145385/ [http://perma.cc/6N5A-U5F5].

302. Steve Eder, *Deaths Pose Test for Facebook*, WALL ST. J., Feb. 11, 2012, at A3.

303. *Id.*

304. *Id.*

305. *See* Clay Calvert, *Salvaging Privacy & Tranquility from the Wreckage: Images of Death, Emotions of Distress & Remedies of Tort in the Age of the Internet*, 2010 MICH. ST. L. REV. 311, 313 (2010).

decedent's image, likeness, voice, or original works through the right of publicity and copyright law. These doctrines do not necessarily protect a decedent's personal property rights in her digital assets, but they do give the family another legal argument that the contents of those digital accounts should descend to a decedent's estate. These doctrines can be used in an indirect way to allow a decedent's family to protect posthumous privacy. In addition, publicity and copyright rights show that the law protects families' interests in the intangibles of a decedent's personhood, fame, or creation. Since the law protects commercial interests, there is ample room for protecting a family's interest in the information stored on an individual's online accounts if she has not made her wishes known concerning his digital asset personal privacy.

1. Publicity

Privacy interests in digital assets can be protected through a family's right of publicity. The right of publicity protects an individual's right to exploit the commercial value of his name and likeness.[306] This right developed as an offshoot of privacy law to prohibit the nonconsensual exploitation of people's likenesses.[307] Mental suffering and anguish caused by the nonconsensual dissemination of an individual's picture or likeness without consent—the same harm recognized under the right to privacy—justified the recognition of the right of publicity.[308]

Initially, courts used a privacy paradigm to consider exploitations of people's likenesses. For example, in 1902, a woman brought a claim against a flour company that had circulated an advertisement using her picture without her consent or knowledge.[309] She claimed that she had been "greatly humiliated by the scoffs and jeers" of people who had seen the advertisement and felt that her "good name ha[d] been attacked, causing her great distress and suffering."[310] The court viewed this claim as based on privacy, found that New York had not yet adopted the right of privacy, and, therefore, concluded that the plaintiff could not use a privacy-based right to remedy the wrong.[311] A few years later, in Georgia, a court presented with similar facts came

306. *See* Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 694 F.2d 674, 676 (11th Cir. 1983).

307. *See* 1 MCCARTHY, *supra* note 252, §§ 1:4, 1:7.

308. *Id.* § 1:7.

309. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).

310. *Id.*

311. *Id.* at 447–48.

out the opposite way. In *Pavesich v. New England Life Insurance Co.*,[312] a man brought suit against a life insurance company that had used his picture without his consent.[313] The court found that the complaint alleged an invasion of the right of privacy and should not have been dismissed by the trial court.[314]

Eventually, courts recognized publicity as a separate interest from privacy because of the distinct harms that the two were designed to prevent: the right of publicity was designed to protect commercial interests, while the right of privacy was intended to prevent personal harms, such as embarrassment and emotional suffering. For example, in 1953, a court in New York explicitly recognized the right of publicity as separate from the right of privacy.[315] The case involved a dispute between a baseball player and two chewing gum manufacturers that wanted to use his image to market their brands.[316] One manufacturer wanted the exclusive right to the baseball player's photo, and the other manufacturer argued that "a man has no legal interest in the publication of his picture other than his right of privacy . . . a personal and non-assignable right[.]"[317] The court rejected this argument and found that an individual "has a right in the publicity value of his photograph,"[318] reasoning that the value of marketing fame increased if it was an exclusive grant, barring others from using the images.[319]

Once courts generally recognized the right of publicity during life, they next attempted to distinguish the right of privacy from the right of publicity, establishing the right of publicity as distinct and independent from the right of privacy.[320] These courts argued that privacy protects a person from embarrassment as well as guarding her dignity and peace of mind, and also recompenses a person for emotional distress.[321] The right of publicity, in contrast, protects one's right to the commercial value of her identity due to fame and popularity.[322] Therefore, when the right of publicity is infringed,

312. 50 S.E. 68 (Ga. 1905).
313. *Id.* at 69.
314. *Id.* at 81.
315. Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 869 (2d Cir. 1953).
316. *Id.* at 866.
317. *Id.* at 868.
318. *Id.*
319. *Id.*
320. *See* 1 MCCARTHY, *supra* note 252, § 6:3. Over thirty states recognize a right of publicity under the common law or by statute. *See id.* §§ 6:3, 6:8.
321. *See* Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc., 867 F. Supp. 175, 188 (S.D.N.Y. 1994).
322. *Id.*

courts reason, the harm is commercial rather than personal.[323] As one court described, the interest protected by the right of publicity "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation."[324]

By separating the right of publicity from the right of privacy, courts were able to take a fresh approach to the question of whether the right of publicity, unlike the right of privacy, is descendible. Courts and states are currently split on whether the right of publicity can be enforced after an individual's death.[325] The divide usually centers on how clearly a court has tried to distinguish the right of publicity from the right of privacy. Some have found that the right of publicity is not descendible because, like privacy, it is a personal interest that ends at the death of the individual.[326] In finding that the right of publicity was not descendible, the Sixth Circuit explained, "[f]ame falls in the same category as reputation; it is an attribute from which others may benefit but may not own."[327] In a slight variation, other courts have required an individual to exercise the right of publicity during his life in order for his estate to be able to protect it after his death.[328] However, the majority of courts and legislatures that have considered the issue have decided that the right of publicity

323. *Id.*; *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) ("[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.").

324. *Zacchinni*, 433 U.S. at 573.

325. Out of the about thirty states that recognize a right of publicity for living persons, thirteen states recognize a right of publicity after death. *Talk of the Nation, 'Rights of Publicity' Extended Beyond the Grave* (NPR radio broadcast Sept. 4, 2012); *see also, e.g.*, CAL. CIV. CODE § 3344.1 (West 1997 & Supp. 2016); KY. REV. STAT. ANN. § 391.170 (West, Westlaw through 2015 Reg. Sess.); OHIO REV. CODE ANN. § 2741.02 (LEXIS through 131st Gen. Assemb. through file 45 (SB 223)); Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 326 (6th Cir. 2001) (finding a right of publicity postmortem); Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 694 F.2d 674, 682 (11th Cir. 1983) (finding a right of publicity postmortem); *Jim Henson Prods., Inc.*, 867 F. Supp. at 190; Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E.2d 756, 760 (S.C. 2009) (finding the right to control the use of an identity to be descendible postmortem); 1 MCCARTHY, *supra* note 252, § 6:8.

326. Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir. 1980) ("[T]he right of publicity should not be given the status of a devisable right, even where as here a person exploits the right by contract during life.").

327. *Id.* at 959.

328. *See, e.g.*, Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485, 490 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982); Hicks v. Casablanca Records, 464 F. Supp. 426, 429 (S.D.N.Y. 1978).

is descendible at death whether or not the individual exploited the commercial value of his name and likeness during life.[329]

California, for example, protects the name, voice, signature, photograph, or likeness of a deceased person for seventy years after death, during which time consent is needed for any lawful commercial use of the decedent's image.[330] Tennessee allows publicity rights to descend, but only extends the protections for ten years after the individual's death.[331] If, unlike Tennessee, a state legislature has not specifically limited the duration of the right of publicity, the right could extend for an unlimited duration. Oftentimes, however, the right of publicity does not stay in the family;[332] instead, corporations purchase it.[333] No matter who owns the publicity right, the right permits control over the use of a person's identity after death and any profit from it.[334] In fact, Forbes keeps a list each year of the top grossing dead celebrities.[335] The likes of Michael Jackson, Elvis Presley, Charles Schulz, and Elizabeth Taylor top the list.[336]

Of course, it is possible for a testator to request that her family not exploit her image after death, but the right of publicity would not further the testator's objective. The right of publicity protects a family's right to profit from exploitation, but not a decedent's right to

329. *See* CAL. CIV. CODE § 3344.1; KY. REV. STAT. ANN. § 391.170; OHIO REV. CODE ANN. § 2741.02; *Herman Miller, Inc.*, 270 F.3d at 326 ("The district court did not err in recognizing a post-mortem right of publicity under Michigan common law."); *Martin Luther King, Jr., Cent. for Soc. Change, Inc.*, 694 F.2d at 683 ("[A] person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life."); *Jim Henson Prods., Inc.*, 867 F. Supp. at 190 ("Connecticut would interpret the right of publicity as descendible."); *Gignilliat*, 684 S.E.2d at 760 ("[T]he right to control the use of one's identity is a property right that is transferable, assignable, and survives the death of the named individual."); 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 9:17 (2015 ed.).

330. CAL. CIV. CODE § 3344.1(a)(1), (g).

331. TENN. CODE ANN. § 47-25-1104(a) (West, Westlaw through 2015 First Reg. Sess.).

332. *See, e.g.*, CAL. CIV. CODE § 3344.1(b) (acknowledging that publicity rights are freely transferable by any testamentary instrument or by any subsequent owner).

333. *See* FLA. STAT. ANN. § 540.08 (West, Westlaw through 2015 Reg. & Spec. A Sess.) (acknowledging that corporations can be authorized to own the publicity interest of a deceased individual).

334. 1 MCCARTHY, *supra* note 252, §§ 6:3, 6:7.

335. Dorothy Pomerantz, *Michael Jackson Is the Top-Earning Dead Celebrity with a $140 Million Haul*, FORBES (Oct. 15, 2014, 9:52 AM), http://www.forbes.com/sites/dorothypomerantz/2014/10/15/michael-jackson-tops-forbes-list-of-top-earning-dead-celebrities/ [http://perma.cc/F5HS-7NYF (staff-uploaded archive)].

336. *Id.*

prevent it.[337] Strong publicity protections therefore give rise to a strange outcome: individuals can publish blatantly false information about a decedent without fear of reprisal, but as soon as that individual tries to put a decedent's image to commercial use by printing it on a mug, advertisement, or pamphlet, the individual could be liable. Accordingly, publicity rights potentially emphasize the trivial while failing to offer substantive protections for a decedent's reputational interests.

No matter how they are couched, publicity rights are extensions of privacy interests in the commercial realm because they allow a decedent's family to control his image. The interests protected by the right of publicity, admittedly, may not be information a decedent would want to keep private. Rather, publicity of image, likeness, or voice has a commercial value that is only realized through disclosure. Yet, the core of the right of publicity, not unlike the right of privacy, allows a family to choose which products and causes a decedent's image will promote. If a company published a picture in a commercial venture that a decedent's family did not want public, the right of publicity could prevent its publication. For example, in *Gracey v. Maddin*,[338] a court found that a family had the publicity right in its deceased family member's name and was able to prevent the deceased individual's former law firm from using his name after his death.[339] In fact, publicity rights have expanded to protect more than just a person's name or likeness; in recent decades, they have been found to include things such as: a game show hostess's physical pose,[340] a professional football player's nickname,[341] frequently used phrases of a television show host,[342] a Broadway singer's unique singing style,[343] and even the distinct details of a race car driver's car.[344]

337. Perhaps a testamentary right, protected by fiduciary duties as discussed *supra* Section II.A would compel a court to enforce the intent and desires of a decedent not to be used for commercial profit. This issue has not been litigated.

338. 769 S.W.2d 497 (Tenn. Ct. App. 1989).

339. *Id.* at 501.

340. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992).

341. *See* Hirsch v. Johnson & Son, Inc., 280 N.W.2d 129, 131, 138, 140 (Wis. 1979) (holding that a cause of action for appropriation of a person's name for trade purposes exists under common law in Wisconsin).

342. *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 831–33, 835 (6th Cir. 1983).

343. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("We need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable. We hold only that when a distinctive voice of a professional singer is widely

Thus, in those jurisdictions where publicity rights are protected after death, a decedent's surviving family members could assert control over the use of a decedent's image, phrases, or voice. This may be especially relevant to social networking accounts where Internet companies receive advertising revenue based on the number of people who view a particular site.[345] If people were viewing the site to see pictures or information about a deceased individual, a family could assert its right of publicity and control how the third-party server used the decedent's image, likeness, or phrases. Of course, asserting the right of publicity would not prevent the public from obtaining information on publicly accessed digital asset accounts and publishing that information. But because companies like Google, Yahoo!, Facebook, and Twitter gain commercial advantages when others visit their websites to view the likeness of a deceased individual, a family's publicity rights arguably are threatened by this commercial use of a decedent's online account. The right of publicity, therefore, is another legal doctrine that favors a decedent's family in controlling her digital persona after death.

2. Copyright

Digital assets are a unique form of property. Whatever property interest an individual may have in his online accounts under a private contract, an individual always owns a copyright interest in his written emails, photos, or other documents he authored.[346] Although

known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.").

344. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974).

345. *See generally* LON SAFKO, THE SOCIAL MEDIA BIBLE: TACTICS, TOOLS & STRATEGIES FOR BUSINESS SUCCESS (2010) (explaining how to make money by using social media); TRACY L. TUTEN, ADVERTISING 2.0: SOCIAL MEDIA MARKETING IN A WEB 2.0 WORLD (2008) (discussing various methods of generating revenue through social media). Revenue also comes to the companies from selling the data obtained about a deceased individual. *See* Tamlin Magee, *What Happens to Your Data After You're Dead?*, FORBES (Nov. 19, 2013), http://www.forbes.com/sites/tamlinmagee/2013/11/19/what-happens-to-your-data-after-youre-dead/#2715e4857a0b78dba54e4f8d [http://perma.cc/4RKW-WP69].

346. 17 U.S.C. § 201(a) (2012) (providing that copyright protection subsists in original works of authorship fixed in any tangible medium of expression now known or later developed from which such works can be perceived, reproduced, or otherwise communicated). "Works of authorship" include literary works, musical works, pictorial, and graphic works and sound recordings. *Id.*; *see also* H.R. REP. NO. 94-1476, at 51 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 ("Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of

copyright law does not aim to protect privacy,[347] it could be used to afford a family limited protection over a decedent's digital materials after death.

Copyrights are based in the U.S. Constitution and governed by federal law.[348] The Copyright Act defines copyrights as "an original work of authorship fixed in any tangible medium of expression."[349] Works of authorship are protected under copyright law irrespective of whether they are published or unpublished.[350] Copyrights are a form of property interest, and the copyright holder owns title to the material.[351] In addition to this title, federal law allows the copyright holder the exclusive rights to reproduce copyrighted work, prepare derivative works, distribute copies, perform the work, and create digital audio transmissions of the work.[352] The copyright holder may also prevent others from using or distorting the work.[353] In addition, the owner of a copyright may transfer her title to the copyright by conveyance during life or through a testamentary instrument after death.[354]

Copyright law does not take privacy principles into account in determining whether or not a violation of copyright law has occurred.[355] Instead, copyright law aims to protect a commercial, proprietary interest in artistic material in order to encourage, not prohibit, public access.[356] It does so by offering a "limited monopoly" over the material it protects.[357] Especially relevant for our purposes, copyright does not extend to facts, so to the extent the decedent's digital material is factual, copyright will not be an adequate tool of

copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent.").

347. Bond v. Blum, 317 F.3d 385, 395 (4th Cir. 2003) ("[T]he protection of privacy is not a function of copyright law.").

348. U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. §§ 101–1332 (2012).

349. 17 U.S.C. § 102(a).

350. § 104(a).

351. § 201(a).

352. § 106.

353. § 106(A).

354. § 201(d).

355. Bond v. Blum, 317 F.3d 385, 395 (4th Cir. 2003) ("[T]he protection of privacy is not a function of copyright law.").

356. REGISTER OF COPYRIGHTS, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5–6 (1961).

357. *Bond*, 317 F.3d at 393.

protection.[358] The following case shows the extent of copyright law's limitation in protecting privacy.

In *Bond v. Blum*,[359] a case arising out of a custody dispute over three children, a father wanted to introduce a manuscript written by his ex-wife's new husband (Bond) to show that their shared home was inappropriate and, in fact, possibly dangerous.[360] To prevent the introduction of this manuscript, Bond registered his manuscript at the copyright office and then commenced an action for copyright infringement.[361] The court, however, held that the introduction of Bond's manuscript into evidence was not a violation of his copyright and that the use of the manuscript "fell within the scope of fair use authorized by Section 107 of the Copyright Act."[362] In conducting this analysis, the court noted that the stepfather was not trying to protect any market use of the manuscript or claim any commercial damage.[363] On the contrary, the harm the father claimed was his lost right to control the dissemination of a private document.[364] The court maintained, as have other courts, that if the "essence" of the claim is a desire for privacy, rather than commercial use, then the common law of privacy must be used to protect against the dissemination because the Copyright Act does not.[365]

From *Bond*, we see that copyright cannot be used to protect the privacy of information in documents if there is no claim of commercial harm. The unauthorized dissemination of the manuscript in *Bond* needed to be challenged under the common law principles of privacy, not as a violation of copyright law. But as we have seen, common law privacy protections do not extend beyond an individual's

358. Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 492 (4th Cir. 1996) ("[C]opyright protection does not extend to ideas or facts even if such facts were discovered as the product of long and hard work." (citation omitted)).

359. 317 F.3d 385 (4th Cir. 2003).

360. *Id.* at 390. The stepfather's manuscript professed to be an autobiographical account of how he had murdered his father. *Id.* Although unpublished, the manuscript was discovered by the children's father and maternal grandfather who were concerned about the children's safety and had begun investigating their stepfather. *Id.* at 390–91. Through their investigation, the children's father obtained the manuscript and attempted to use it in the custody proceedings. *Id.*

361. *Id.*

362. *Id.* at 397.

363. *Id.* at 395.

364. *Id.*

365. *Id.*; *see also* Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325, 1329 (M.D. Fla. 2012) ("The only evidence in the record reflecting harm to Plaintiff relates to harm suffered by him personally and harm to his professional image due to the 'private' nature of the Video's content. This evidence does not constitute irreparable harm in the context of copyright infringement.").

death, and the family's right to protect their own privacy after a decedent's death is limited.[366] Therefore, digital assets that may hold noncommercial but desired information about a decedent's life would not be protected on either the grounds of privacy or of copyright unless the documents, emails, or photos had some kind of commercial value a decedent's family wished to control by asserting the decedent's copyright.

Another hurdle in using copyright to protect the privacy of digital assets is a distinct variation of the fair use defense discussed in *Bond*.[367] The fair use defense presumes that an unauthorized use of copyrighted material occurred but excuses the use nonetheless, as long as it is fairly used for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.[368] For example, the fair use defense may be used to allow publication of facts about a decedent's life gleaned from unpublished letters and personal documents.[369] The fair use defense, however, is not ironclad and does not always justify copyright infringement.[370] In one such case, a memory card with photos of a celebrity wedding was found in the celebrity couple's car and released to a magazine.[371] The couple had kept their wedding secret, but the publication of their wedding pictures informed their families and the public of their marriage.[372] The court held that even though the "clandestine wedding was newsworthy, newsworthiness, by itself, is insufficient to demonstrate fair use."[373] Thus, copyright law was used to provide a remedy for the wrong the couple suffered, and allowed the couple to prevent further

366. *See supra* Sections I.A, III.A; *see also* Justice v. Belo Broad. Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979) (collecting cases); Flynn v. Higham, 197 Cal. Rptr. 145, 149 (Cal. Ct. App. 1983) (collecting cases).

367. To determine whether a particular use of copyrighted material is "fair use," courts apply four factors provided in § 107 of the Copyright Act. 17 U.S.C. § 107 (2012); *Bond*, 317 F.3d at 394.

368. § 107 ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.").

369. Wright v. Warner Books, Inc., 748 F. Supp. 105, 111 (S.D.N.Y. 1990) (concluding that the alleged copyright infringer did not use the deceased's unpublished letters to "recreate [her] creative expression, but to establish facts necessary to her biography").

370. *See, e.g.*, Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1168–69 (9th Cir. 2012) (finding that the fair use defense failed when private, yet newsworthy, photographs were sold to the media).

371. *Id.* at 1169.

372. *Id.* at 1168–69.

373. *Id.* at 1177.

publication of the private pictures.[374] The privacy interests of the couple, however, were only tangentially at play.

Because heirs continue to hold the copyright in the decedent's works of authorship, they are able to protect the privacy of that information, especially when it comes to personal written documents. The copyright of the material does not extend to the actual object holding or embodying the copyrighted material; expression is the sole subject of copyright protection.[375] For example, an author may own a copyright to a book, but that ownership does not extend to the physical book itself. The book is a separate object that may be sold or inherited, but the expressive contents—the actual writing in the book—may not be reproduced for commercial gain because of copyright protections. Thus, an estate has no need to claim ownership of the digital accounts themselves to establish a protectable copyright interest in their contents.[376]

A recent example demonstrates how copyright can protect posthumous privacy many years after an individual's death and may be applicable to digital accounts in the future. Jacqueline Kennedy Onassis willed her copyright interests in her writings, as well as the physical writings themselves, to her children.[377] She also stated, "I request, but do not direct, my children to respect my wish for privacy."[378] Over a period of fifteen years during her adult life, Onassis wrote intimate letters to an ecclesiastical leader in Ireland. These letters reveal many personal and private reflections on her life, her marriage to John F. Kennedy, and her grieving process after her

374. *Id.* at 1183–84.

375. 17 U.S.C. § 202 (2012) ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.").

376. Some terms of service agreements require a user to "license" their intellectual property to the Internet company platform, but even these licenses do not eviscerate a user's copyright in the material. *See, e.g.*, *Facebook Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/terms.php (last updated Jan. 30, 2015) [http://perma.cc/E8FJ-DJUV] ("[Y]ou grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it."). The potential conflict between terms and service license agreements and copyrights is beyond the scope of this Article but is ripe for future discussion.

377. Matt Viser, *Kennedy Letters Fiercely Protected for Decades*, BOS. GLOBE (June 10, 2014), http://www.bostonglobe.com/news/nation/2014/06/09/with-kennedy-family-copyright-claims-letters-from-jackie-kennedy-hold-uncertain-future/UqIpwZkgptcJvBov9e4JbI/story.html [http://perma.cc/KCV7-L99T (dark archive)].

378. *Id.*

husband's death.[379] These letters came into the possession of a college in Ireland, which decided to auction them off in a time of financial difficulty.[380] An Irish auction house planned to sell the letters, which were expected to fetch at least $1.3 million.[381] Caroline Kennedy (the last remaining child of Onassis) had her attorneys contact the auction house, resulting in the auction's cancelation.[382] Although the college owned the physical letters, Caroline Kennedy owned the copyright to their expressive content. The threat of legal action from the copyright owner protected the letters from being publicly sold and disseminated, at least until such time that the copyright expires.[383]

Copyrights to works of authorship exist for only a limited period of time after the copyright owner's death, but during this limited time surviving family members can use copyright to protect a decedent's private correspondence from being commercially exploited or disseminated. Emails and social networking posts have the potential to be exploited after a decedent's death, especially if a decedent was a celebrity or public figure. Because copyright interests descend to a decedent's surviving family members, families are best suited to control whether information about their loved one is disseminated or protected when it is embodied in a decedent's work of authorship.

* * *

If a decedent has not left an indication of how she wants private information stored in her digital accounts to be treated at death, family members should have the ability to control or access that information as a practical matter because they are responsible for ensuring that the decedent's affairs are tied up after her death. Family members should also have a claim over digital assets to protect the intensely personal and intimate details of a family member's life that

379. *Id.*; *see also* Tricia Escobedo, *Jackie Kennedy Letters Withdrawn from Auction*, CNN, http://edition.cnn.com/2014/05/23/politics/jackie-kennedy-letters-auction-canceled/ (last updated Sept. 19, 2014, 6:39 PM) [http:// perma.cc/H8HW-DED3].

380. Diana Reese, *Jacqueline Kennedy's Letters to Irish Priest Pulled from Auction amid Controversy*, WASH. POST (June 3, 2014), http://www.washingtonpost.com/blogs/she-the-people/wp/2014/06/03/jacqueline-kennedys-letters-to-irish-priest-pulled-from-auction-amid-controversy/ [http://perma.cc/V5E8-583C].

381. Michael Kelly, *Jackie Kennedy Letters to Irish Priest Withdrawn from Planned Auction*, CATH. NEWS SERV. (May 22, 2014, 12:00 AM), http://www.catholicnews.com /services/englishnews/2014/jackie-kennedy-letters-to-irish-priest-withdrawn-from-planned-auction.cfm [http://perma.cc/9DV3-FATJ].

382. Reese, *supra* note 380.

383. *Id.* Copyright protection extends for a limited period of time. Seventy years after Onassis's death, the copyright in her letters will expire and the letters will be admitted into the public domain. *See* 17 U.S.C. § 302 (2012).

can be found in digital accounts. In addition, through copyright protections and publicity rights, family members can ensure that service providers do not profit from a deceased individual's information, images, or works of authorship held on their servers. In accessing and closing a loved one's digital accounts, family members will best be able to honor and mourn the dead.

CONCLUSION

Courts have long held that the dead have no privacy interests to protect and that privacy interests therefore do not survive death. Yet, with the advent of digital assets and the immense amount of personal and private information collected and stored on third-party servers, it is incumbent upon state legislatures, courts, and the public to reconsider the efficacy of a posthumous right of privacy. This Article has argued that the current approach to digital asset privacy after death—namely allowing corporations to dictate the terms of posthumous privacy in private contracts—is inadequate because these contracts do not allow individual choice or testamentary intent to control the use of personal information after death.

A multifaceted approach is therefore necessary. Private contracts are a laudable, if imperfect, tool for protecting personal privacy in a manner consistent with individual choice. To better align posthumous privacy interests with the needs of a digital future, the law must ensure that succession principles honoring testamentary intent apply to privacy as well as property rights. Following succession principles empowers individual account holders to make testamentary privacy decisions about their digital accounts and helps ensure that a decedent's individual intent concerning the fate of digital asset accounts is honored. Finally, if a decedent has not made her intent for her digital assets known, the default rule should be crafted by state legislatures, not private companies, and should be in accordance with present law, which allows surviving family members to control information about and commercial interests of a deceased individual and to protect a decedent's posthumous privacy interests. Legal privacy protections were born out of technological advancements, and as technology continues to advance, so too must privacy interests.