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## Protecting Privacy after Death

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**Protecting Privacy after Death**

*Natasha Chu*



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# Protecting Privacy after Death

By Natasha Chu\*

*As more and more Americans use social media to share personal information, privacy issues become critical to the discussion about control over user accounts after their death. Although internet service providers—like Facebook—have policies governing the terms and conditions of a user’s account, these policies usually do not fully protect a deceased person’s right to privacy. There are two primary theories offered as a means for protecting a deceased person’s online privacy. The first is rooted in contract law, while the second is rooted in property law. The contract theory relies on analyzing terms of service agreements that users accept to determine the scope of their posthumous privacy rights, while the property theory evaluates whether a deceased user’s digital assets may be treated similarly to “real property” after death. These measures, however, do not sufficiently protect a deceased person’s right to privacy. This Comment explains why courts should extend tort law to a deceased person’s right of privacy to protect his digital assets and argues that such an extension of tort law is justified because both U.S. statutory law and common law already recognize retention of posthumous rights.*

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¶1 Rohan Aurora, an engineering student living in the United States, relies on Facebook to maintain relationships with friends back home in India.<sup>1</sup> One day, a friend from high school, Lalit Mendhe, posted a photo of himself in a hospital bed.<sup>2</sup> Hoping to cheer him up with a joke, Aurora posted on the photo: “Did you get a haircut?”<sup>3</sup> Shortly after making this comment, another friend informed Aurora that Mendhe had been in a car crash and had died in that hospital bed of cardiac arrest and liver failure.<sup>4</sup> Aurora immediately deleted his comment.<sup>5</sup>

¶2 Four months after Mendhe had passed away, however, his Facebook profile remained active.<sup>6</sup> He popped up in “people you may know” suggestions, and Facebook still suggested friends to tag him in photos.<sup>7</sup> Although Aurora wants to remember his

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<sup>1</sup> Jaweed Kaleem, *Death on Facebook Now Common As ‘Dead Profiles’ Create Vast Virtual Cemetery*, HUFFINGTON POST (Dec. 7, 2012, 3:40 PM), [http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles\\_n\\_2245397.html](http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> The author could not verify whether Mendhe’s Facebook profile remains active at the time of publication of this Comment.

<sup>7</sup> *Id.*

friend's memory, he believes that Facebook disrespected his friend by failing to remove his profile.<sup>8</sup> After all, “[a] Facebook profile is an indication that someone is alive.”<sup>9</sup>

How social media, including Facebook, handles death of its users is becoming increasingly important. As more and more Americans use social media to share personal information, questions about a user's right to privacy become critical to the discussion about control over users' accounts after their death. Concerns about control over digital assets<sup>10</sup>—such as Facebook profiles and Dropbox storage—become particularly significant among young adults who die unexpectedly and without a will. Young adults who die suddenly are more likely to leave behind an enormous trove of digital assets.<sup>11</sup>

Internet service providers—like Facebook—have policies governing the terms and conditions of a user's account. These policies, however, do not fully protect a deceased person's right to privacy. In some instances, these service providers have policies that default to *ignoring* the deceased person's privacy interests, instead choosing to act on the pleas of friends or families of the deceased.<sup>12</sup>

These policies often give rise to a heightened need for protection of posthumous privacy rights. Although many posthumous privacy laws arose as a means to control the behavior of the living<sup>13</sup> and protect the interests of surviving heirs,<sup>14</sup> courts' use of “rights” language when creating legal rules that benefit decedents' interests” suggests a desire to honor decedents' wishes independent of their survivors' wishes.<sup>15</sup>

Honoring the dead is not a new concept. Societies all across the world have traditions and practices to honor the deceased.<sup>16</sup> Deceased individuals should have the right to

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* As a side note, Facebook does process “special requests” and removes profiles of deceased users at the request of “verified immediate family members” or executors. *How Do I Submit a Special Request for a Deceased User's Account on the Site?*, FACEBOOK, <https://www.facebook.com/help/265593773453448> (last visited Jan. 24, 2014). Family members making a request to remove a deceased user's account must provide proof of death (e.g., death certificate), the deceased user's birth certificate, and verification of their relationship to the deceased. *Id.*

<sup>10</sup> “A general definition of a digital asset is ‘any file on your computer or in a storage drive or website and any online account or membership.’” Susan Porter, *Digital Estates: Handling Digital Assets in the Real World*, [http://files.ali-cle.org/thumbs/datastorage/lacidoirep/forms/TPL1308\\_Porter\\_thumb.pdf](http://files.ali-cle.org/thumbs/datastorage/lacidoirep/forms/TPL1308_Porter_thumb.pdf) (last visited Oct. 31, 2013).

<sup>11</sup> This is because American young adults are the age group most likely to use the Internet and access social networking websites. See *supra* note **Error! Bookmark not defined.**. They are also most likely to die intestate. See *infra* note **Error! Bookmark not defined.**

<sup>12</sup> See *How Do I Report a Deceased Person or an Account That Needs to Be Memorialized?*, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last visited Oct. 31, 2013).

<sup>13</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763–64 (2009).

<sup>14</sup> See *generally* Toffoloni v. LFP Publ'g Grp., LLC, 572 F.3d 1201 (11th Cir. 2009).

<sup>15</sup> Smolensky, *supra* note **Error! Bookmark not defined.**, at 763–64 (“Consistent use of rights language, therefore, suggests that a series of social and cultural norms guide judges and legislatures to honor and respect the dead, particularly where the concomitant harms to the living are minimal.”).

<sup>16</sup> See, e.g., FUNERALS IN AFRICA: EXPLORATIONS OF A SOCIAL PHENOMENON ix–xi, 142, 210 (Michael Jindra & Joel Noret eds., 2011) (discussing how funerals are a way for the living to honor the deceased); James Sanders, *The New Ground Zero: Honoring the Dead in the City That Never Weeps*, NYTIMES (Aug. 31, 2003), <http://www.nytimes.com/2003/08/31/arts/the-new-ground-zero-honoring-the-dead-in-the-city-that-never-weeps.html> (discussing how New York City would commemorate and honor those who died on September 11th). Consider also that holographic wills of a deceased individual, if they meet certain conditions, are legally valid. *Wills*, FORD+BERGNER LLP, <http://www.fordbergner.com/legal-practice-areas/texas-wills/handwritten-will-texas> (last visited Feb. 20, 2014).

privacy even after death,<sup>17</sup> and so their dignitary rights should extend posthumously.<sup>18</sup> This is a particular concern for young adult Internet users who are more likely to die intestate.<sup>19</sup>

¶17 There are two primary theories offered as a means for protecting a deceased person's online privacy. The first is rooted in contract law, while the second is rooted in property law. The contract theory relies on analyzing terms of service agreements that users accept to determine the scope of their posthumous privacy rights, while the property theory evaluates whether a deceased user's digital assets may be treated similarly to "real property" after death. These measures, however, do not sufficiently protect a deceased person's right to privacy.

¶18 As technology's role in everyday life continues to grow, courts should take into account the realities of modern technology and its impact on the survival of personal information beyond death when evaluating these cases. Courts could extend existing tort law to a deceased person's digital assets to recognize that a person's right to privacy survives death. Recognition that a deceased person has an enforceable right to privacy is the best way to protect an individual's right to privacy after death. Extending this recognition posthumously is justified both because the law already recognizes the survival of a person's dignitary interests past death and because digital assets can convey much more information about a person than real property.

¶19 This Comment explains why courts should extend tort law to a deceased person's right of privacy to protect his digital assets. In order to examine the importance of a deceased individual's privacy, Part I presents statistics on the pervasiveness of the Internet in the U.S.<sup>20</sup> and on the number of Americans who die intestate. Part II discusses that contract law can be used to enforce a deceased user's interests after death and shows how contract law's limitations ultimately fail to protect privacy interests posthumously. Part III explains how property law can be extended to protect privacy interests posthumously. However, Part III also highlights certain limitations within this approach that ultimately do not sufficiently protect a deceased user's privacy interests. Although some have argued to extend property law as a means to protect the deceased's privacy rights,<sup>21</sup> Part IV argues that extending tort law to these cases would be the most effective and efficient way to address the need for posthumous privacy rights. Such an extension of tort law is justified

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<sup>17</sup> Ronald Z. Domskey, *In Terrorem Clauses: More Bark Than Bite?*, 25 LOY. U. CHI. L.J. 493, 495 (1994) (arguing in favor of enforcing *in terrorem* clauses include giving "full effect to the intent of the testator," implying the rights of the deceased extend beyond death).

<sup>18</sup> See *infra* Part IV.A for further discussion.

<sup>19</sup> Sheryl Nance-Nash, *Why More Than Half of Americans Don't Have Wills*, DAILYFINANCE (Aug. 26, 2011, 3:05 PM), <http://www.dailyfinance.com/2011/08/26/what-america-thinks-about-estate-planning/>. Only 44% of surveyed American adults reported having a will. *Id.* People under thirty-five years old "said that it is less important for people to have wills because people are living longer, healthier lives." *Id.*

<sup>20</sup> See, e.g., Mary Madden, *Internet Penetration and Impact*, PEW RESEARCH CENTER (Apr. 26, 2006), <http://www.pewinternet.org/Reports/2006/Internet-Penetration-and-Impact.aspx>.

<sup>21</sup> See generally Maria Perrone, *What Happens When We Die: Estate Planning of Digital Assets*, 21 J. COMM'LAW CONCEPTUS 185 (2013) (discussing how estate planning can encompass one's digital assets); Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 208–10 (2012) (advocating for clarification of what a "digital asset" is); cf. Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1055–57 (2011) (arguing that abandoned property statutes are problematic for "advocates of lifetime security at all costs").

because both U.S. statutory law and common law already recognize that people can retain their rights posthumously.

#### I. STATISTICAL BACKGROUND ABOUT SOCIAL MEDIA USAGE EMPHASIZES THE NEED FOR PRIVACY PROTECTION OF THE DECEASED'S INFORMATION

¶10 An increasing number of Americans today access and use the Internet.<sup>22</sup> Although research has found that individual Internet use varies according to age, ethnicity, income, and education, research consistently reports that young adults<sup>23</sup> are the age group that most frequently accesses the Internet.<sup>24</sup> Similarly, statistics show that most American adults use social networking websites. As of May 2013, seventy-two percent of American adults with access to the Internet reported using social networking websites.<sup>25</sup> This exponential growth is astounding considering that only eight percent of adults reported using social networking sites in February 2005.<sup>26</sup>

¶11 Young adults are also more likely to die intestate, raising issues about what happens to their digital assets after death. The 2007 U.S. death statistics showed that the death rate for individuals ages fifteen to thirty-four was 184.8 deaths per 100,000 people in that age group.<sup>27</sup> In 2011, Entrustet<sup>28</sup> predicted that 580,000 U.S.-based online users would die in

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<sup>22</sup> The first time the Census Bureau asked Americans about Internet access in 1997, 18.0% of households reported they accessed the Internet. Thom File, *Computer and Internet Use in the United States: Population Characteristics*, U.S. CENSUS BUREAU 1 (May 2013), available at <http://www.census.gov/prod/2013pubs/p20-569.pdf>. By 2011, 71.7% of households reported they accessed the Internet. *Id.*

<sup>23</sup> I define “young adults” as eighteen to twenty-nine year-olds. See File, *supra* note 22, at 4. My use of “adult” also reflects the Pew Center study’s use of the word—all individuals eighteen years old and older. See Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, PEW RESEARCH CENTER (Aug. 5, 2013), <http://pewinternet.org/Reports/2013/social-networking-sites/Findings.aspx>.

<sup>24</sup> File, *supra* note 22, at 4.

<sup>25</sup> Brenner & Smith, *supra* note 23. Social networking users remain young: eighty-nine percent of eighteen to twenty nine-year-olds with access to the Internet are social networker users. *Id.*; Amanda Lehnhart & Mary Madden, *55% of Online Teens Use Social Networks and 55% Have Created Online Profiles; Older Girls Predominate*, PEW RESEARCH CENTER (Jan. 3, 2007), [http://www.pewinternet.org/~media/Files/Reports/2007/PIP\\_SNS\\_Data\\_Memo\\_Jan\\_2007.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2007/PIP_SNS_Data_Memo_Jan_2007.pdf.pdf) (“Social networking sites” are defined “as sites where users can create a profile and connect that profile to other profiles for the purposes of making an explicit personal network.”).

<sup>26</sup> Brenner & Smith, *supra* note 23. Facebook’s statistics are particularly notable. As of December 2012, sixty-seven percent of U.S. adults online were reportedly using Facebook, and eight-three percent of U.S. adults ages eighteen to nineteen reported using the social networking site. Cooper Smith, *7 Statistics About Facebook Users That Reveal Why It’s Such a Powerful Marketing Platform*, BUSINESS INSIDER (Oct. 27, 2013, 1:34 PM), <http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10>.

<sup>27</sup> *Worktable 23R. Death Rates by 10-Year Age Groups: United States and Each State, 2007*, CENTERS FOR DISEASE CONTROL AND PREVENTION – NATIONAL CENTER FOR HEALTH STATISTICS (Sept. 20, 2010), available at [http://www.cdc.gov/nchs/data/dvs/MortFinal2007\\_Worktable23r.pdf](http://www.cdc.gov/nchs/data/dvs/MortFinal2007_Worktable23r.pdf). As a point of reference, the United States’ population in July 2007 was approximate 301.23 million. *U.S. Population by Year*, MULTPL, <http://www.multpl.com/united-states-population/table> (last visited Oct. 31, 2013).

<sup>28</sup> Entrustet is a company that allows users to securely list all their digital assets and decide what to do with each one after death (e.g., delete, bequest to another individual).

2012.<sup>29</sup> Yet, in a 2009 survey, only about sixty-five percent of Americans reported having any type of will.<sup>30</sup> Most notably, only twenty-five percent of Americans between ages twenty-five and thirty-four have a will, while fewer than ten percent of people eighteen to twenty-four have one.<sup>31</sup>

## II. PROTECTING PRIVACY RIGHTS THROUGH CONTRACT LAW IS INSUFFICIENT

¶12 The statistics about Internet use, online behavior, and likelihood of a young adult dying intestate highlight the necessity for the law to evolve in order to sufficiently protect the deceased's right to privacy.

¶13 One method of protecting the privacy rights of a deceased user is through contract law. Relying on contract law, however, does not provide users with sufficient privacy protections after death because they agree to terms drafted by the Internet service provider. Instead, these terms focus on the interests of the drafter—the Internet service provider—and therefore are unlikely to protect the deceased's right of privacy.

¶14 When an individual opens an account with a service provider like Facebook or Dropbox, he or she must agree to the provider's "Terms of Service" by affirmatively clicking "yes."<sup>32</sup> Many of these agreements are the modern equivalent of "shrinkwrap" agreements.<sup>33</sup> "Clickwrap" or "browsewrap" agreements<sup>34</sup> are typically utilized when users sign up to use an online service, and such agreements are generally upheld in court.<sup>35</sup> Yet, most people do not read the terms in their entirety before agreeing to them; only about seven percent of people actually read the full terms.<sup>36</sup> Most users are overwhelmed by the various policies and terms governing their use of various websites. For example, if

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<sup>29</sup> Nathan Lustig, *2.89m Facebook Users Will Die in 2012*, NATHAN LUSTIG (June 6, 2012), <http://www.nathanlustig.com/2012/06/06/2-89m-facebook-users-will-die-in-2012-580000-in-the-usa/>.

<sup>30</sup> Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 ESTATE PLANNING 27, 27 (Apr. 2011).

<sup>31</sup> Tanya Roth, *New FindLaw Survey: Most Americans Don't Have Will*, FINDLAW (Dec. 20, 2010), <http://www.lawyermarketing.com/blog/new-findlaw-survey-most-americans-dont-have-will/>.

<sup>32</sup> See, e.g., *Log In, Sign Up or Learn More*, FACEBOOK, <https://www.facebook.com> (last visited Feb. 11, 2015) ("By clicking Sign Up, you agree to our Terms and that you have read our Data Policy, including our Cookie Use.").

<sup>33</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) ("Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).").

<sup>34</sup> Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1645–46 n.11 (2011) ("'Browsewrap' contracts involve terms of use agreements that are available from the site's home page, but the user is never required to actually click any agreement button . . . . Alternatively, 'clickwrap' agreements require the user to click an 'I Agree' button or some variation thereof to demonstrate acceptance. Both types of contracts are used regularly on the Internet.").

<sup>35</sup> See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (enforcing terms of service agreement because the user had notice and was aware of the terms); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825 JW, 2005 WL 756610, at \*2 (N.D. Cal. Apr. 1, 2005) (discussing how a contract formed when Cairo continued to use the website, thereby agreeing to the browsewrap agreement). *But see* *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 791–92 (N.D. Ill. 2011) (finding terms of a browsewrap agreement to be unenforceable because the hyperlink to the Conditions of Use was too buried).

<sup>36</sup> Rebecca Smithers, *Terms and Conditions: Not Reading the Small Print Can Mean Big Problems*, THE GUARDIAN (May 11, 2010, 2:00 PM), <http://www.theguardian.com/money/2011/may/11/terms-conditions-small-print-big-problems>.

someone were to take the time to read all of the privacy policies she encountered in a year, it would take about 200–250 hours.<sup>37</sup> By not fully reading all these terms and policies, users may not completely understand what service providers can or will do with their information. However, even if users understood of all the terms, there may not be a good alternative to the service and they therefore effectively have no choice but to accept the terms.

#### A. *Limitations of the contractual approach*

¶15 The contractual approach suffers from a primary limitation: users’ rights are limited by what service providers state in their terms of use agreements. If users do not affirmatively click “agree” to a service provider’s terms, they cannot access the website.<sup>38</sup> Most users, however, do not even realize what they are agreeing to.<sup>39</sup> This is problematic for many reasons, but especially because users often do not realize that many of the terms are very favorable to the service provider’s interests.<sup>40</sup> Expecting that users review every terms of service agreements they accept is not reasonable. The sheer number of agreements people encounter and the lack of alternatives to these services makes it impossible for users to fully read and understand these agreements.<sup>41</sup>

¶16 These terms of service agreements ultimately put the privacy of a deceased person at the mercy of a service provider who may disregard the deceased’s wishes regarding how his privacy is treated after death. Because young people are more likely to die intestate, the contractual approach to protecting a deceased person’s online privacy is particularly challenging. Without the user—young or old—alive to contest his or her understanding of the contract, the immediate default is to interpret the contract on its face.<sup>42</sup> Additionally, because these agreements are written so strongly in favor of the service provider, the privacy rights of the deceased user are left even more vulnerable. The deceased’s digital information governed by these service agreements is often very personal and sensitive,<sup>43</sup> which makes protecting the privacy rights of the deceased so important.

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<sup>37</sup> Shankar Vedantam, *To Read All Those Web Privacy Policies, Just Take a Month Off Work*, NPR (Apr. 19, 2012, 3:30 AM), <http://www.npr.org/blogs/alltechconsidered/2012/04/19/150905465/to-read-all-those-web-privacy-policies-just-take-a-month-off-work>; see also Mike Masnick, *Supreme Court Chief Justice Admits He Doesn’t Read Online EULAs or Other “Fine Print,”* TECHDIRT (Oct. 22, 2010, 9:48 AM), <http://www.techdirt.com/articles/20101021/02145811519/supreme-court-chief-justice-admits-he-doesn-t-read-online-eulas-or-other-fine-print.shtml>.

<sup>38</sup> See, e.g., *Myspace Services Terms of Use Agreement*, MYSPACE, <https://myspace.com/pages/terms> (last visited Feb. 11, 2015) (“If you do not agree to this international transfer of data, then you must refrain from using the Myspace Services.”).

<sup>39</sup> See *supra* notes 34 and 35.

<sup>40</sup> See, e.g., *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Feb. 11, 2015) (“For content that is covered by intellectual property rights . . . you specifically give [Facebook] the following permission, subject to your privacy and application settings: you 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.”).

<sup>41</sup> See *supra* note 37.

<sup>42</sup> See, e.g., *Puerto Rico v. Russell & Co.*, 315 U.S. 610, 618 (1942) (The Court interprets the word “deliver” by looking at the agreements themselves, or the “four corners” of the agreements.).

<sup>43</sup> See *infra* Part IV.A. (contrasting real and digital property); see also *infra* Part III.A. (discussing the counterargument to the longstanding theory of dead hand control).

*B. What this means for the deceased user*

¶17 Most Internet service providers also prohibit the sharing or transferring of account login details to another person, regardless of her relationship to the deceased user.<sup>44</sup> Despite an increase in services like Deathswitch<sup>45</sup> and Legacy Lock, which grant specified individuals access to the deceased's digital assets, online services agreements may act as a barrier to fulfilling the deceased user's final wishes. For example, if Amanda signs up for Deathswitch and sets it to send a pre-scripted message with her Facebook account password to her boyfriend after her death, the boyfriend may violate Facebook's rules by accessing her account after her death.<sup>46</sup> If he accesses Amanda's account and violates Facebook's terms of use, it is unlikely that a court would uphold Amanda's desire for her boyfriend to retain access to her account if the matter is litigated.<sup>47</sup>

¶18 Following the death of an individual intestate, the question of ultimate ownership of the information stored on the deceased's account is troublesome and often dependent on the service provider's terms. For example, Facebook memorializes the profile pages of deceased users.<sup>48</sup> In other words, Facebook will turn a deceased user's Facebook page into an online memorial. Users agree to this policy when they sign up for an account.<sup>49</sup> Although Facebook will not provide the user's account login details, most of the content a deceased user had previously shared (e.g., photos, posts) will remain visible.<sup>50</sup> And, while most Internet websites permit only family members to cancel the account of a deceased user,<sup>51</sup> anyone—regardless of their relationship to the deceased individual—can request to memorialize a deceased person's profile, ensuring that the profile will be preserved and remain visible for as long as Facebook exists (or, longer).

¶19 In contrast, services such as Dropbox and Gmail consider requests for access to a deceased's account on a case-by-case basis in order to determine whether or not to grant

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<sup>44</sup> See, e.g., *Statement of Rights and Responsibilities*, *supra* note 40 (“You will not solicit login information or access an account belonging to someone else.”); *Contacting Twitter About a Deceased User*, TWITTER, <https://support.twitter.com/articles/87894-contacting-twitter-about-a-deceased-user> (last visited Feb. 11, 2015) (“We are unable to provide account access to anyone regardless of his or her relationship to the deceased.”). *But see Can I Access the Dropbox Account of Someone Who Has Passed Away?*, DROPBOX, <https://www.dropbox.com/help/488/en> (last visited Feb. 11, 2015) (a person demonstrating a legal right to access the deceased's files may request access).

<sup>45</sup> DEATHSWITCH, <http://deathswitch.com/> (last visited Feb. 11, 2015) (“A deathswitch is an automated system that prompts you for your password on a regular schedule to make sure you are still alive. When you do not enter your password for some period of time, the system prompts you again several times. With no reply, the computer deduces you are dead . . . and your pre-scripted messages are automatically emailed to the individuals you designated.”).

<sup>46</sup> See *Statement of Rights and Responsibilities*, *supra* note 40.

<sup>47</sup> See Kutler, *supra* note 34 at 1641, 1665.

<sup>48</sup> *How Do I Report a Deceased Person or an Account that Needs To Be Memorialized?*, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last accessed Feb. 11, 2015).

<sup>49</sup> See *Log In, Sign Up or Learn More*, *supra* note 32.

<sup>50</sup> *What Happens When a Deceased Person's Account Is Memorialized?*, FACEBOOK, <https://www.facebook.com/help/www/103897939701143> (last accessed Feb. 11, 2015).

<sup>51</sup> See, e.g., *Contacting Twitter About a Deceased User*, TWITTER, <https://support.twitter.com/articles/87894-contacting-twitter-about-a-deceased-user> (last visited Feb. 11, 2015); *How Do I Submit a Special Request for a Deceased Person's Account on the Site?*, FACEBOOK, <https://www.facebook.com/help/www/265593773453448> (last visited Feb. 11, 2015).

access.<sup>52</sup> Dropbox will only consider granting access to the deceased if the requester can prove the account holder is in fact deceased and that the requester has a “legal right to access the person’s files under all applicable laws.”<sup>53</sup> On the other hand, a requester seeking access of a deceased individual’s Google account may simply submit a form with proof of death indicating a request to “[o]btain data from a deceased user’s account” and then wait for Google’s preliminary review.<sup>54</sup> Despite providing for case-by-case consideration, it seems extremely unlikely that Google will grant the request without a court order.<sup>55</sup>

¶20 Being at the mercy of the service provider’s terms is especially concerning when there is no clear rule of law that addresses what happens to an online account following the death of its owner. For example, OkCupid, an online dating service, states that a “[user’s] subscription for the Service will continue indefinitely until cancelled . . . .”<sup>56</sup> Consequences of the absence of such a legal rule addressing these problems are already evident in reports of accounts remaining “live” despite multiple requests from the deceased’s family members to delete these profiles.<sup>57</sup>

¶21 While perhaps contract law is the most obvious legal theory to apply to interpret the deceased’s privacy rights, it does not fully protect these rights if the individual dies intestate. In fact, the opposite is true: the contractual approach strongly favors the service provider who drafted the terms. As such, a deceased user’s right to privacy is at the mercy of the service provider’s terms under the contractual approach.

### III. PROTECTING PRIVACY RIGHTS THROUGH PROPERTY LAW

¶22 Another proposed method of protecting a deceased person’s privacy rights treats an individual’s digital assets (e.g., Facebook profiles, email account content, cloud storage files, online banking accounts) as property.<sup>58</sup> This approach has been convincingly argued

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<sup>52</sup> See *Can I Access the Dropbox Account of Someone Who Has Passed Away?*, *supra* note 44 (requires proof of death and proof of requestor’s legal right to access the deceased’s files); *Accessing a Deceased Person’s Mail*, GMAIL, <https://support.google.com/mail/answer/14300?hl=en> (last visited Feb. 11, 2015) (involving a two-step process that requires proof of death and “additional legal documents”).

<sup>53</sup> *Can I Access the Dropbox Account of Someone Who Has Passed Away?*, *supra* note 44.

<sup>54</sup> *Accessing a Deceased Person’s Mail*, *supra* note 52.

<sup>55</sup> See *id.*; see also Stefanie Olsen, *Yahoo Releases E-Mail of Deceased Marine*, CNET (Apr. 21, 2005, 12:39 PM), [http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038\\_3-5680025.html](http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-5680025.html) (discussing how Yahoo finally shared information contained in a deceased Marine’s email account with his father after a court order); Colin Korzec & Ethan A. McKittrick, *Estate Administration in Cyberspace*, 150 TR. & EST. 61, 62 (2011) (discussing how to avoid potential conflict by obtaining a court order).

<sup>56</sup> *Terms & Conditions*, OKCUPID, <http://www.okcupid.com/legal/terms> (last updated Apr. 24, 2014).

<sup>57</sup> See, e.g., MisterWoodles, *Getting Profile of Deceased Person Removed?*, REDDIT (Oct. 26, 2013), [http://dd.reddit.com/r/OkCupid/comments/1p9qcy/getting\\_profile\\_of\\_deceased\\_person\\_removed](http://dd.reddit.com/r/OkCupid/comments/1p9qcy/getting_profile_of_deceased_person_removed); ZapCropduster, *So I Guess I’m Talking to a Dead Person*, REDDIT (June 20, 2013), [http://www.reddit.com/r/OkCupid/comments/1gr1ud/so\\_i\\_guess\\_im\\_talking\\_to\\_a\\_dead\\_person/](http://www.reddit.com/r/OkCupid/comments/1gr1ud/so_i_guess_im_talking_to_a_dead_person/).

<sup>58</sup> Kutler, *supra* note 34, at 1650. Digital assets are treated similarly to real property because estate planning tends to view them as analogous. See Perrone, *supra* note **Error! Bookmark not defined.**, at 186–89. In traditional estate planning, an asset is “[t]he amount, degree, nature, and quality of a person’s interest in land or other property . . . .” *Id.* at 187 (internal citations omitted). Digital assets are similar because they tend to encompass a person’s interest in intangible property such as “e-mail, word processing documents, audio and video files, and images.” *Id.* at 188.

by several academics.<sup>59</sup> While a comparatively more robust approach than contract law to protecting a deceased's right to privacy, property law nevertheless falls short because it is still evolving to analogize digital assets to tangible property.<sup>60</sup>

¶23 Despite how slowly the common law of property has evolved, the legal line between digital assets and tangible property has already blurred. For example, in the early days of the War on Terror, the family of a twenty-year-old U.S. Marine killed in Afghanistan received notification of his death.<sup>61</sup> Although the Marine's family received his physical personal possessions, they also wanted access to his Yahoo! email account as a way to remember him.<sup>62</sup> Yahoo! barred the request because company policy prohibited the sharing of login credentials with anyone except the account holder.<sup>63</sup> However, the following year, a probate court in Michigan ordered Yahoo! to turn over the contents of the deceased Marine's email account to his father.<sup>64</sup> Therefore, by ordering Yahoo! to grant the Marine's father access to the contents of his email account, the court essentially ordered the "return" of his property in the same way that his physical possessions were delivered to his family upon his death.<sup>65</sup> This illustrates how a court may blur the line between digital assets and real property.<sup>66</sup>

#### A. Limitations of property law

¶24 Although property law is a compelling and more persuasive method of protecting the privacy rights of deceased individuals than the contract law approach, it suffers from two significant limitations. First, property law has not fully developed to address how probate courts should address a deceased individual's digital assets.<sup>67</sup> Second, treating digital assets as real property subject to intestate laws may result in unintended transfers of digital assets to the deceased's next of kin.

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<sup>59</sup> See Perrone, *supra* note **Error! Bookmark not defined.**, at 186–89; Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1648 (2012). See generally Jamie P. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209 (2013).

<sup>60</sup> Jenna Dutcher, *Data After Death*, UC BERKELEY SCHOOL OF INFORMATION (July 25, 2013), <http://datascience.berkeley.edu/data-after-death/>.

<sup>61</sup> Jim Hu, *Yahoo Denies Family Access to Dead Marine's E-Mail*, CNET (Dec. 21, 2004, 2:49 PM), [http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038\\_3-5500057.html](http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038_3-5500057.html).

<sup>62</sup> *Id.* ("All letters destined for mail are sent to their recipients, and received mail, including opened letters, are sent to their families.").

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* The probate order is not publicly available. Nicole Schneider, Comment, *Social Media Wills—Protecting Digital Assets*, 82 J. KAN. B. ASS'N 16, 16 n.9 (2013).

<sup>65</sup> Schneider, *supra* note 64, at 16 n.9 ("Experts say there has yet to be a definitive court ruling on the status of e-mail as to whether it is an extension of the deceased's estate at the time of his or her passing. But, they say, it would stand to reason that e-mail account information and the data within the account would be treated equally to other possessions.").

<sup>66</sup> Olsen, *supra* note 55.

<sup>67</sup> See Gerry W. Beyer & Naomi Cahn, *When You Pass On, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP. MAG. (Jan./Feb. 2012), [http://www.americanbar.org/publications/probate\\_property\\_magazine\\_2012/2012/january\\_february\\_2012/article\\_beyer\\_cahn\\_planning\\_for\\_digital\\_assets.html](http://www.americanbar.org/publications/probate_property_magazine_2012/2012/january_february_2012/article_beyer_cahn_planning_for_digital_assets.html).

¶25 The biggest question that has yet to be answered is “What is a digital asset?”<sup>68</sup> There is currently no universal definition or understanding of what a digital asset encompasses.<sup>69</sup> Courts interpret “digital asset” as encompassing nontangible content such as digital photos, software, videos, and online accounts,<sup>70</sup> yet, no court has explicitly defined this term.

¶26 This lack of clarity is concerning because digital property can contain significantly more personal information than real property. Digital assets such as email accounts, social media profiles, cloud computing storage, and online bank accounts can easily reveal many personal and intimate details about the user. In contrast, physical property, such as a house or its contents, cannot reveal nearly as much personal information. Even if a deceased person leaves behind physical letters, these letters cannot reveal as much about that person’s likes, dislikes, or habits in the same way that a Facebook profile can. Additionally, physical property, like letters, can only capture a pinpoint in time. In contrast, social media, like Facebook, captures information over time<sup>71</sup> and compiles it, permitting a user to build and increase the information stored in her profile. As such, a deceased’s digital assets can contain very sensitive material that he or she may not want to reveal.

¶27 Without any clarity on whether digital assets should be treated like physical property in probate court, courts may choose to fallback on the terms of use agreements. This is problematic because, as previously discussed, these terms are generally more favorable to the service provider who drafted the agreement.<sup>72</sup>

¶28 The second shortcoming of utilizing property law occurs if the other extreme is taken and digital assets are viewed as real property. In the event that digital assets are viewed as real property, the digital assets of a person who dies intestate would pass along according to the rules of intestate succession. In other words, all property would pass along to the next of kin.<sup>73</sup> However, if the deceased intended to delete his social media accounts upon his death, inheritance law would transfer those digital assets to next of kin rather than destroying those assets in accordance with the deceased’s wishes. Since most young adults are likely to die intestate, adherence to the rule of intestate succession could violate the deceased’s privacy if he or she would not have wanted to share access to his or her digital assets after death.

¶29 Notwithstanding these limitations, some may argue that extending privacy protections to a decedent’s property would violate dead hand control principles. Such an argument, however, is unconvincing because digital assets create privacy concerns that do not exist with real property. Dead hand control occurs when a deceased person attempts to

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<sup>68</sup> See also Sherry, *supra* note **Error! Bookmark not defined.**, at 193–204 (conceptualizing what “digital assets” mean and discussing examples); *id.* at 208–10 (discussing the complexity of identifying the nexus between “digital assets” and property law).

<sup>69</sup> Perrone, *supra* note **Error! Bookmark not defined.**, at 188; Emily Stutts, *Will Your Digital Music and E-Book Libraries “Die Hard” With You?: Transferring Digital Music and E-Books Upon Death*, 16 SMU SCI. & TECH. L. REV. 371, 400–01 (2013) (highlighting the persisting definitional problems of “tangible” and “digital” property).

<sup>70</sup> *Cenveo Corp. v. CelumSolutions Software Gmbh & Co.*, 504 F. Supp. 2d 574, 576 (D. Minn. 2007); *Perloff v. Stein*, No. 10-1758, 2011 WL 666167, at \*1 (E.D. Penn. 2011).

<sup>71</sup> *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010).

<sup>72</sup> See *supra* Part II.B.

<sup>73</sup> See, e.g., *Gardner v. Collins*, 27 U.S. 58, 58 (1829) (interpreting a Rhode Island statute governing inheritance of property to the “next of kin”).

control property after death, usually through a will or trust.<sup>74</sup> Extending privacy protections to the deceased's property is not an *extension* of dead hand control because the policy behind dead hand control is *not* rooted in privacy concerns.<sup>75</sup> Courts generally strive to balance dead hand control against the interests of living individuals. While they recognize the right of the deceased to control property after death, they limit this right "by the proposition that life is for the living and should be controlled by the living and not by the extended hand of the dead."<sup>76</sup> This has served to "avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation."<sup>77</sup> The justification of dead hand control does not address the privacy concerns that those who die intestate face. Since digital property contains much more personal information than real property,<sup>78</sup> it does not succumb to concerns of alienation and other restraints because it is unlikely to be treated as a fungible good. Thus, extending privacy protections to the digital property of the deceased does not upend existing dead hand control, which is rooted in real property concerns.

### B. Proposed alternatives

¶30 Proposed alternatives are unable to properly address deceased individuals' privacy concerns. One suggestion is legislative action to redefine the scope of "property" to clarify digital asset ownership rights<sup>79</sup> and to "prohibit service providers from attempting to destroy this right of transferability upon death through the use of their terms of service agreements."<sup>80</sup> The Uniform Law Commission<sup>81</sup> proposed creating a committee to study the issues related to digital estate planning and possibly propose a set of uniform laws.<sup>82</sup>

¶31 Another recommendation is to simply extend bailment law to a deceased individual's loss of ownership rights over their digital assets at death.<sup>83</sup> Under bailment law, when a user creates digital assets by using an online service (e.g., email account or social networking site), the user grants the provider possession of this personal information as a bailment. Ownership rights, however, remain with the creator-bailor.<sup>84</sup> Upon death,

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<sup>74</sup> See *Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano*, 257 Cal.App.2d 22,28 n.\* (Cal. Ct. App. 1967) ("recognizing the right of the individual to control property after death").

<sup>75</sup> See *Atlantic Richfield Co. v. Whiting Oil and Gas Corp.*, 320 P.3d 1179, 1184 (Col. 2014) (explaining that the policy behind dead hand control was "to keep property marketable by limiting restraints on its alienation").

<sup>76</sup> *Id.*

<sup>77</sup> *Atlantic Richfield Co.*, 320 P.3d at 1185 (quoting *First Nat'l Bank and Trust Co. of Oklahoma City v. Sidwell Corp.*, 678 P.2d 118, 127 (Kan. 1984)).

<sup>78</sup> See *supra* Part III.A. (comparing the privacy implications of real property and digital assets).

<sup>79</sup> Kutler, *supra* note 34, at 1656 (arguing that "the UPC, should be amended to define "property" to include one's digital assets, including e-mail, social networking accounts, and other online creations").

<sup>80</sup> Hopkins, *supra* note 59, at 241.

<sup>81</sup> The Uniform Law Commission's role is to "research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practicable. *About the ULC*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Jan. 20, 2014).

<sup>82</sup> See Gavin Johnson, *Who Can Access Your Digital Accounts When You Die?*, iVLG (Feb. 14, 2012), <http://www.invigorlaw.com/who-can-access-your-digital-accounts-when-you-die/>.

<sup>83</sup> See Kutler, *supra* note 34, at 1659–60.

<sup>84</sup> *Id.* at 1659.

ownership of these digital assets should pass to the deceased's beneficiary. Therefore, it is the beneficiary, *not the service provider*, who may make final decisions about whether to retain or destroy this information.<sup>85</sup> In the event the creator-bailor dies intestate, courts should attempt to determine the deceased's intent before defaulting to destroying the information.<sup>86</sup>

### C. Counterarguments to these proposed alternatives

¶32 A legislative solution may not be realistic given the current state of Congress. Given the recent difficulty for a bill to get through both the House and the Senate to eventually become law,<sup>87</sup> it appears a legislative solution may not become viable for a while. Nevertheless, non-legislative solutions including judicial interpretation could extend existing law to protect the online privacy rights of the deceased.

¶33 While the suggestion to apply bailment law to protect the online privacy rights of the deceased is compelling, service providers could easily contract around how bailment law would protect the privacy rights of the deceased. The bailment theory is premised on the idea that the service provider takes responsibility for the information as a bailee.<sup>88</sup> Yet, the service provider can often contract around these responsibilities as long as the user-bailor consents. For example, if a person creates a Gmail account, she would retain ownership of her email account content as the bailor, but Google would be a bailee to this content. However, under bailment law, bailees have strict liability for losses that occur during the bailment.<sup>89</sup> This means that if Google (the bailee) were to accidentally lose the user-bailor's content, it could be liable in the absence of a contractual term limiting its liability.

¶34 The bailee could easily contract around strict liability as long as the term of the agreement is not unreasonable or unfair and does not contract away the bailee's liability for negligence.<sup>90</sup> If a court applied bailment law, the user-bailor would have no remedy because service providers usually contract around strict liability.<sup>91</sup> Assuming *arguendo* that

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<sup>85</sup> *Id.*

<sup>86</sup> Kutler, *supra* note 34, at 1662 (“When a person leaves digital assets intestate, courts should destroy those assets unless a potential beneficiary can demonstrate the deceased’s intent.”)

<sup>87</sup> See Susan Davis, *This Congress Could Be Least Productive Since 1947*, USA TODAY (Aug. 15, 2012, 6:33 AM), <http://usatoday30.usatoday.com/news/washington/story/2012-08-14/unproductive-congress-not-passing-bills/57060096/1>.

<sup>88</sup> Kutler, *supra* note 34.

<sup>89</sup> *Blakemore v. Coleman*, 701 F.2d 967, 970 (D.C. Cir. 1983) (“Rather, when the property that is subject to the bailment is enclosed within a container, responsibility for its disappearance may rest with the bailee even though the bailee has only constructive or imputed knowledge of its existence.”).

<sup>90</sup> *Froct v. Goodloe*, 670 F. Supp. 163, 165-66 (W.D.N.C. 1987) (finding that contracting around strict liability is “repugnant” to public policy when it does not take into account the bailee’s negligent impact on the loss).

<sup>91</sup> See, e.g., *Dropbox Terms of Service*, DROPBOX, <https://www.dropbox.com/privacy#terms> (last visited Oct. 31, 2013) (“You, and not Dropbox, are responsible for maintaining and protecting all of your stuff. Dropbox will not be liable for any loss or corruption of your stuff, or for any costs or expenses associated with backing up or restoring any of your stuff.”); *Google Terms of Service*, GOOGLE, <https://www.google.com/intl/en/policies/terms/> (last visited Feb. 21, 2014) (“WHEN PERMITTED BY LAW, GOOGLE, AND GOOGLE’S SUPPLIERS AND DISTRIBUTORS, WILL NOT BE RESPONSIBLE FOR LOST PROFITS, REVENUES, OR DATA, FINANCIAL LOSSES OR INDIRECT, SPECIAL, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES . . . IN ALL CASES, GOOGLE, AND ITS SUPPLIERS AND DISTRIBUTORS, WILL NOT BE LIABLE FOR ANY LOSS

the service provider did not disclaim strict liability in the terms of service agreement, then the ownership rights to the user-bailor's digital assets would pass to his or her beneficiary user. If a young adult who dies intestate did not intend for this to occur, his or her privacy over the digital assets would depend on the individual who now has ownership.

*D. Proposing a modified "right to publicity" cause of action*

¶35 A better way to utilize property law as a means of protecting a deceased individual's privacy would be to extend the right to publicity to a deceased individual's digital assets. Extending the current scope of the right to publicity to apply in these situations would better protect the privacy rights of the deceased than applying the contract law method or the current property law method explained above. Nevertheless, this approach, does have limitations similar to those arising under existing property law.

¶36 The right of publicity is a proprietary right, which "[u]nlike intrusion, disclosure, or false light, . . . does not require the invasion of something secret, secluded or private pertaining to plaintiff, nor does it involve falsity. It consists of the *appropriation*, for the defendant's benefit, use or advantage, of the plaintiff's name or likeness."<sup>92</sup> The "advantage" requirement of this law usually means the person using the deceased's personality, likeness, or name gains some kind of profit or commercial benefit.<sup>93</sup> The right of publicity is frequently used to protect the successor interest of celebrities after death,<sup>94</sup> and protects "the exclusive use of the [individual's] name and likeness as an aspect of his identity."<sup>95</sup>

¶37 Instead of creating a new right, extending the existing right of publicity to protect the privacy rights of the deceased would be an easier and faster way to develop the law in that area. Modifying the right of publicity by removing its "for profit" element could sufficiently extend to cover the privacy rights of the deceased. In other words, under this modified right, a court could find harm when an individual's likeness or name is used, appropriated, or disclosed, even if the person doing so does not profit in any way. However, removing the "for profit" element would change the character of the right from a proprietary right to a tort protecting an individual's right from intrusion.

¶38 The "for profit" element protects the proprietary interests of living heirs and surviving estates.<sup>96</sup> By limiting another's use of the deceased's personality, likeness, or

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OR DAMAGE THAT IS NOT REASONABLY FORESEEABLE."); *Statement of Rights and Responsibilities*, *supra* note 40 ("WE TRY TO KEEP FACEBOOK UP, BUG-FREE, AND SAFE, BUT YOU USE IT AT YOUR OWN RISK . . . WE DO NOT GUARANTEE THAT FACEBOOK WILL ALWAYS BE SAFE, SECURE OR ERROR-FREE OR THAT FACEBOOK WILL ALWAYS FUNCTION WITHOUT DISRUPTIONS, DELAYS OR IMPERFECTIONS.").

<sup>92</sup> *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1206 (11th Cir. 2009) (emphasis added) (citing *Cabaniss v. Hipsley*, 151 S.E.2d 496, 503-04 (Ga. Ct. App. 1966)).

<sup>93</sup> *See, e.g., id.* at 1205 ("Georgia recognizes a right of publicity to protect against 'the appropriation of another's name and likeness . . . without consent and for the financial gain of the appropriator . . . whether the person whose name and likeness is used is a private citizen, entertainer, or . . . a public figure who is not a public official."); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 395 (Cal. 2001) ("By producing and selling such lithographs and T-shirts, [defendant] thus used the likeness of The Three Stooges 'on . . . products, merchandise, or goods' within the meaning of the statute.").

<sup>94</sup> *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 935 (6th Cir. 2003).

<sup>95</sup> *Id.*

<sup>96</sup> *See Toffoloni*, 572 F.3d at 1205.

name, these proprietary interests are protected. However, an heir's *proprietary* interests are separate from the deceased's *privacy* interests. After all, the issue is protecting the deceased's privacy from an intrusion.<sup>97</sup>

¶39 For example, assume *arguendo* that Facebook pages are not memorialized for the purposes of making a profit,<sup>98</sup> but instead are generally memorialized in order to commemorate a deceased person. Yet, if a Facebook user does not want his or her page memorialized but another user does, Facebook's policies appear to follow to the living user's wishes. Defaulting to what a living user wants is problematic because it does not honor the deceased's desires. Extending a modified right of publicity could better protect a deceased's privacy. In the Facebook example, memorializing a deceased user's Facebook page would be using or appropriating that deceased user's likeness and name. Even though the memorialization would not be "for profit," it would still be a violation of this modified right of publicity of the deceased. The memorialized page would need to be taken down, and thus, the deceased user—in the absence of any indication to the contrary—could protect her privacy.

¶40 Although extending this modified right of publicity by removing the "for profit" element is desirable, it removes the proprietary nature of the law and shifts it into the realm of tort law. By focusing on the individual's autonomy and right to be free from intrusions, the law can protect the deceased's privacy rights from a *tort law* approach. Furthermore, existing law shows that courts are willing to grant a deceased individual some rights when the focus is on the rights of the surviving heirs or estate, not the rights of the deceased.<sup>99</sup>

#### IV. EXTENDING TORT LAW TO PROTECT THE PRIVACY OF THOSE WHO DIE INTESTATE

¶41 Extending existing tort law would be the most effective method of protecting the privacy of a deceased user. Under current common law, a deceased individual does not have a right to privacy, but the judiciary is already well-positioned to fill this gap in tort law to meet this pressing need in order to protect the deceased's privacy rights. Courts can achieve this by broadening current tort law to apply posthumously and give the deceased an inherent right of privacy.

¶42 Currently, only a living individual can bring a tort claim for invasion of privacy.<sup>100</sup> Not even an heir can recover under this tort on behalf of a deceased individual; only the

<sup>97</sup> For further discussion on a framework to approach analyzing privacy, see generally Daniel Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006).

<sup>98</sup> Facebook generates revenue by aggregating user information to reveal information that permits targeted advertising, and memorialized pages can continue to reveal information about other users visiting these pages. See Lori Andrews, *Facebook is Using You*, N.Y. TIMES (Feb. 4, 2012), [http://www.nytimes.com/2012/02/05/opinion/sunday/facebook-is-using-you.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/05/opinion/sunday/facebook-is-using-you.html?pagewanted=all&_r=0); TechNewsDaily, *How Facebook Sells Your Personal Information*, DISCOVERY NEWS (Jan. 24, 2013, 2:26 PM), <http://news.discovery.com/tech/gear-and-gadgets/how-facebook-sells-your-personal-information-130124.htm>.

<sup>99</sup> See, e.g., *ETW Corp.*, 332 F.3d at 938 (finding no right to publicity in a celebrity's image that was used for commercial purposes because it was sufficiently transformed so that it was "less likely to interfere with the economic interest protected by [this right]").

<sup>100</sup> RESTATEMENT (SECOND) OF TORTS § 652I(b) (1977); see, e.g., *Hendrickson v. Cal. Newspapers, Inc.*, 48 Cal.App.3d 59, 62 (Cal. Ct. App. 1975) (internal citations omitted) ("It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has

individual whose privacy has been violated can bring a claim.<sup>101</sup> This stems from the idea that the concept of privacy is personal and can *only* be asserted by the individual whose privacy was invaded.<sup>102</sup> The Tenth Circuit has stated that an “action does not survive the death of the party whose privacy was invaded unless the complaining party’s privacy was also invaded.”<sup>103</sup> Therefore, under the current doctrine, the deceased, or his representatives, cannot recover for the invasion of the deceased’s privacy.

*A. Extending the right to the tort posthumously is justified*

¶43 Extending the tort of invasion of privacy to apply to posthumous privacy interests is justified because both U.S. statutory law and common law already recognize that people can retain their rights posthumously.

1. Recognition in statutory law

¶44 Statutes have recognized dignitary interests of deceased individuals. For example, while not prohibited by federal law, twenty-three states have laws prohibiting necrophilia—or, sex with corpses.<sup>104</sup> Furthermore, some states mandate the dignified disposal of dead bodies in certain places to reduce the risk to public health.<sup>105</sup> State laws criminalizing certain acts to a corpse exist because the state legislatures believe these acts are undignified.<sup>106</sup> While these laws focus primarily on public health and safety concerns,<sup>107</sup> they demonstrate a desire for the dead to be disposed of in a dignified manner.<sup>108</sup> In fact, recommendations for disposing bodies after major disasters do not solely focus on disposing them in the most efficient manner possible.<sup>109</sup> Many of these

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been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded. Further, the right does not survive but dies with the person.”).

<sup>101</sup> J. THOMAS MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY § 9.1 (2d ed. 2014); *see, e.g.*, *Bradt v. New Nonpareil Co.*, 79 N.W. 122, 122 (Iowa 1899) (“The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action.”).

<sup>102</sup> *Young v. That Was The Week That Was*, 312 F. Supp. 1337, 1341 (N.D. Ohio 1969).

<sup>103</sup> *Gruschus v. Curtis Publ’g Co.*, 342 F.2d 775, 776 (10th Cir. 1965) (finding daughter of deceased contractor cannot sue for invasion of privacy on behalf of the dead person); *see also James v. Screen Gems, Inc.*, 344 P.2d 799, 801 (Cal. Dist. Ct. App. 1959) (finding no cause of action for Jesse James, Jr.’s widow who allegedly suffered harassment and scorn because of the wrongful portrayal of the decedent in a film).

<sup>104</sup> Daily Mail Reporter, *Necrophilia Set to be Outlawed in Illinois After Officials Realize It Is Technically Legal*, DAILY MAIL (Feb. 18, 2012, 8:09 PM), <http://www.dailymail.co.uk/news/article-2103238/Necrophilia-set-outlawed-Illinois-officials-realise-technically-legal.html>; 720 ILL. COMP. STAT. ANN. 5 / 12-20.6 (West 2012).

<sup>105</sup> Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER’S ADVISOR 197, 233 (2013).

<sup>106</sup> *Id.*

<sup>107</sup> *See, e.g., Management of Dead Bodies After Disasters: A Field Manual for First Responders*, INT’L COMMITTEE OF THE RED CROSS (Apr. 10, 2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0880.pdf>; *Disposal of Dead Bodies in Emergency Conditions*, WORLD HEALTH ORG., [http://www.who.int/water\\_sanitation\\_health/hygiene/envsan/tn08/en/](http://www.who.int/water_sanitation_health/hygiene/envsan/tn08/en/) (last visited Nov. 1, 2013).

<sup>108</sup> Young, *supra* note 105, at 233.

<sup>109</sup> *Disposal of Dead Bodies in Emergency Conditions*, *supra* note 107 (“Burials in common graves and mass cremations are rarely warranted and should be avoided.”).

recommendations, like U.S. laws focusing on the disposal of a dead body, are concerned with the interests of the living; however, they strike a balance between these interests and the dignitary interests of the dead.<sup>110</sup>

¶45 Organ donation is another example of a current U.S. law that gives individuals a right posthumously. In the U.S., all states “have adopted some version of the Uniform Anatomical Gift Act” (UAGA).<sup>111</sup> The UAGA gives “competent adults the legal right to decide whether or not to be posthumous organ donors.”<sup>112</sup> In the event that the deceased did not indicate a preference, the default is no organ donation. However, relatives can decide to donate the deceased’s organs.<sup>113</sup> The deceased individual’s right to decide, however, supersedes the rights of his relatives. If the deceased has affirmatively decided not to donate his organs, then “the family has no legal authority to consent to donation on the deceased’s behalf.”<sup>114</sup> The priority given to the deceased’s choice extends past death. In fact, the 2006 amendments to the UAGA responded to problems of families vetoing a deceased person’s organ donation by giving families the right to choose *only* when the deceased had not made a choice for or against organ donation.<sup>115</sup> Organ donation law provides strong evidence that the government recognizes that individuals retain a posthumous interest after death. The government could easily extend this recognition to protect the privacy rights of a deceased individual.

## 2. Recognition in common law

¶46 Common law also acknowledges deceased persons’ rights after death. Under common law, an individual has the right to decide how to dispose of his or her own body after death.<sup>116</sup> In *Long v. Alford*, for example, the court upheld the testator’s desire to be buried in a specific cemetery, thereby authorizing exhumation of his body for reburial.<sup>117</sup> Similar to the UAGA 2006 amendments that permit relatives to decide about donating a deceased’s organ donation only absent a decision by the deceased, various courts have stated that only in the absence of “testamentary disposition . . . [does] the right of preservation and burial . . . belong[] to . . . the next of kin.”<sup>118</sup> Since common law already recognizes the right of an individual to make decisions about the disposal of his or her own

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<sup>110</sup> *Id.*

<sup>111</sup> Young, *supra* note 105, at 234.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 235.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 236. The amended UAGA protects the deceased’s rights by ensuring that their wishes are not “overridden by [their] next of kin.” *Id.*

<sup>116</sup> DAVID A. ELDER, *PRIVACY TORTS* § 1:3 (2013); *see, e.g.*, *Long v. Alford*, 374 S.W.3d 219, 223 (Ark. Ct. App. 2010) (stating that a “decendent’s wishes concerning ultimate disposition of his or her remains are entitled to consideration and should be carried out as far as possible.”); *Booth v. Huff*, 708 N.Y.S.2d 757, 759 (N.Y. Sup. Ct. 2000) (“[A] decedent’s wishes will be taken into account when a dispute erupts over the ultimate disposition of remains and, in some cases, given effect over the objections of family members.”); *see also Lumley v. Pollard*, 7 S.E.2d 308, 315 (Ga. Ct. App. 1940) (“[T]he right to its possession and disposition is a quasi property right which the courts will recognize and enforce, and, in the absence of testamentary disposition, the right of preservation and burial, to receive the body in the same condition in which it was when death supervened, belongs to the husband or wife, or, if none, to the next of kin.”).

<sup>117</sup> 374 S.W.3d at 223.

<sup>118</sup> *Lumley*, 7 S.E.2d at 315.

dead body, it should also recognize a deceased person's interest in the privacy of her digital assets.

### 3. Nexus between privacy and dignity

¶47 Privacy and dignity are two separate, but closely interrelated concepts. Privacy is “about the protection of human autonomy and dignity—the right to control the dissemination of information about one’s private life.”<sup>119</sup> The U.S. Constitution recognizes an individual’s right to privacy under the Fourth Amendment.<sup>120</sup> The Supreme Court has interpreted the Fourth Amendment to protect against intrusions in the interest of human dignity and privacy.<sup>121</sup> However, the Fourth Amendment only protects privacy interests from *state* action or intrusion.<sup>122</sup> Thus, the Fourth Amendment cannot be invoked as a basis for one’s right to privacy against private actors like Facebook or Google.

¶48 The law already recognizes a deceased individual’s dignity interests posthumously through organ donation laws and dead body disposal rights. Thus, courts should also recognize a deceased person’s interest in the privacy of her personal information. Users have some degree of control over the privacy of their digital assets during their life: Facebook permits accountholders to change what they share with different people;<sup>123</sup> Twitter allows users to decide whether their tweets are public or private;<sup>124</sup> and OkCupid gives its users the ability to visit other users’ profiles in secret.<sup>125</sup> Users’ control over their privacy interest in their digital assets should extend past death.

### 4. Digital assets provide more information for a longer period of time

¶49 Digital assets raise more privacy concerns than the burial of a dead body. A dead body can only provide a limited amount of information about a person.<sup>126</sup> In contrast, digital information about an individual can persist and be transferred much more easily than information derived from a dead body.

¶50 First, digital assets tend to include very personal information captured over an extended period of time.<sup>127</sup> Second, it is much easier to derive private information from a person’s digital assets. Few skills are needed to download or look through content such as photos, tweets, or bank statements. In comparison, gleaning information from a dead body

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<sup>119</sup> N. A. Moreham, *Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort*, in *LAW, LIBERTY, LEGISLATION* 231–248 (Jeremy Finn & Stephen Todd, eds., 2008), available at <http://www.victoria.ac.nz/law/about/staff/publications-nicole-moreham/nm-law-liberty-legislation.pdf>.

<sup>120</sup> See U.S. CONST. amend. IV.

<sup>121</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 672–73 (1995) (considering whether a suspicionless drug testing policy for student athletes violated a student athlete’s Fourth Amendment rights); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”).

<sup>122</sup> See *Katz v. United States*, 389 U.S. 347, 350 (1967).

<sup>123</sup> *Choose Who You Share With*, FACEBOOK, <https://www.facebook.com/help/459934584025324/> (last visited Nov. 2, 2013).

<sup>124</sup> *About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016-about-public-and-protected-tweets> (last visited Nov. 2, 2013).

<sup>125</sup> *Privacy Controls*, OKCUPID, <http://www.okcupid.com/help/privacy> (last visited Nov. 2, 2013).

<sup>126</sup> See *supra* Part III.A.

<sup>127</sup> *Id.*

requires skill and, often, special equipment. For example, medical doctors and pathologists are specially trained to perform autopsies on dead bodies to uncover information about the deceased person.

¶51 Additionally, digital assets are easily transferrable. Users can send data to anyone in the world over the Internet almost instantaneously, subject to obstacles they may encounter such as Internet connection speed and download speed. The transferability of digital assets allows for 1) unauthorized or unwanted disclosure that damages reputations and 2) exposure, which causes grief and humiliation.<sup>128</sup> A dead body, on the other hand, is more challenging to transport because of various state public health laws.<sup>129</sup>

¶52 Lastly, digital assets are less likely to be corrupted. Barring a virus or some affirmative act of destruction, information captured online can persist indefinitely. Even if one tried to destroy digital information, it is very difficult to fully erase the trail left by the information from the Internet.<sup>130</sup> Because digital assets can persist for a very long time and usually contain a plethora of personal information,<sup>131</sup> they contain more sensitive information than the information revealed by a dead body. Dead bodies are comparatively more destructible because organic matter decomposes.<sup>132</sup> Human bodies inevitably decompose unless someone preserves the organic matter.<sup>133</sup> And, once organic matter begins to decompose, the information that can be gleaned from it decreases.<sup>134</sup>

¶53 Recognizing that a deceased person has an enforceable right to privacy is the best way to protect an individual's right to privacy after death. Extending this recognition posthumously is justified because the law already recognizes the survival of a person's dignitary interests past her death and because digital assets are much more transferrable and contain more sensitive information than a dead body.

### B. Damages as a means of deterrence

¶54 Relying on tort law to address these privacy concerns can be further justified and strengthened by the potential damage awards.<sup>135</sup> Damages are often brought for the purpose of restitution, punishment, or vindication.<sup>136</sup> They are also frequently used as a means of

<sup>128</sup> See Solove, *supra* note 97, at 527–36.

<sup>129</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 10, § 13.2 (1991); CODE ME. R. tit. 10-146 Ch. 1, § 4.

<sup>130</sup> Polina Polishchuk, *Can You Ever Really Delete Yourself from the Internet?*, VENTUREBEAT SECURITY (Jan. 29, 2013, 2:38 PM), <http://venturebeat.com/2013/01/29/delete-password/>. The European Union is currently amidst efforts to implement a “Right to be Forgotten” policy, which would give individuals to right to request complete removal of information about them. See Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88, 89–90 (2012).

<sup>131</sup> See Solove, *supra* note 97, 505–09 (discussing information aggregation and how it can “form a portrait of a person”).

<sup>132</sup> See, e.g., Richard T. Conant et al., *Sensitivity of Organic Matter Decomposition to Warming Varies with Its Quality*, 14 GLOBAL CHANGE BIOLOGY 868, 868–69 (2008).

<sup>133</sup> *How Long Does It Take a Dead Body to Decompose?*, CURIOSITY.COM, <http://curiosity.discovery.com/question/take-dead-body-to-decompose> (last visited Nov. 1, 2013). Even embalmed bodies will eventually decompose. *Id.*

<sup>134</sup> See generally Michelle J. Thali et al., *Into the Decomposed Body—Forensic Digital Autopsy Using Multislice-Computed Tomography*, 134 FORENSIC SCI. INT’L 109 (2003) (implying a need for technology to evaluate a decomposed body by arguing the usefulness of a type of technology to help with forensic documentation of decomposed bodies).

<sup>135</sup> See M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29, 29 (2011).

<sup>136</sup> STEIN, 1 STEIN ON PERSONAL INJURY DAMAGES § 1:1 (3d ed.) (2013).

detering future misdeeds.<sup>137</sup> Judicial action that imposes punitive tort damages for violating a deceased user’s privacy could deter other actors who may try to gain access to a deceased’s digital accounts.

¶155 Tort damages generally include punitive and compensatory damages.<sup>138</sup> Compensatory damages generally equate to the amount of pecuniary losses suffered by the injured party in order to restore the injured party to his original state.<sup>139</sup> On the other hand, punitive damages are often awarded as a way to deter others from repeating a similar offense, which is “paradoxical because such damages are not intended to compensate for any loss the plaintiff has suffered.”<sup>140</sup> Traditionally, punitive damages are calculated by what a “reasonable man” would find “offensive and objectionable.”<sup>141</sup>

¶156 Calculating tort damages is difficult. It would be particularly challenging to calculate the damages that should be awarded when the privacy of a deceased individual is violated. After all, the person whose privacy was violated would not recover the damages himself.

¶157 One solution would be for Congress to provide explicit guidance on how to calculate compensatory and punitive damages in these cases.<sup>142</sup> However, since waiting on Congress to further develop privacy law takes time,<sup>143</sup> the judiciary could play a more active role and provide guidance on how to calculate damages when a deceased person’s privacy is violated.

¶158 Another proposed solution has been to require a “timely, sincere, and public apology” when dignitary interests have been violated.<sup>144</sup> Apologies validate the victim’s harm and responds to the indignity of the harmful conduct.<sup>145</sup> Requiring an apology—such as a publicly posted letter online or op-ed—could be used as a factor to mitigate the compensatory damages awarded.<sup>146</sup> While this solution may work in certain circumstances, particularly when the injured party is still alive and can directly benefit from the public

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<sup>137</sup> See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 357, 359, 363–64 (2003) (“[F]rom a deterrence perspective the law should require a defendant to internalize the full expected cost of its conduct to others.”).

<sup>138</sup> Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROBS. 326, 333–34 (1966).

<sup>139</sup> See *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1452 (2012).

<sup>140</sup> Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 69–70 (1994).

<sup>141</sup> *Id.* at 334; see also *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). In evaluating the constitutionality of punitive damages, courts have evaluated the defendant’s culpability, the relationship between the harm and penalty, and sanctions imposed in other cases for comparable misconduct. See, e.g., *id.*

<sup>142</sup> See, e.g., *Cooper*, 132 S. Ct. at 1451–52. Injunctions may not have as deterrent effect as punitive damages on other tortfeasors for unrelated tortious acts. For example, an injunction is placed on A for violating the privacy rights of B, but if A later violates the privacy rights of C, the injunction has no affect. An injunction typically is beneficial in making the injured party whole in a way money cannot, but it does not necessarily deter another from committing a similar tort. See Jonathan Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 699, 700 (2000).

<sup>143</sup> Mr. M. Ryan Calo argues that its development has been “slow and uneven” and that the law has yet to catch up to the reality of technology. Calo, *supra* note 135, at 30.

<sup>144</sup> Shuman, *supra* note 140, at 70 (“Another way in which the law could encourage apology is to consider it as an affirmative defense to certain torts whose principal concern is the protection of dignitary interests.”).

<sup>145</sup> *Id.* at 68.

<sup>146</sup> *Id.*

apology,<sup>147</sup> it is more difficult to justify in cases where a deceased person's privacy is violated.

¶159 Not only would extending tort law help protect the online privacy rights of a deceased individual, but the use of tort damages as a means of deterrence could further protect these privacy rights. However, because applying tort law damages to these cases presents several limitations, strengthening tort law's ability to protect privacy will need to go hand-in-hand with establishing an effective means of enforcement.

## V. CONCLUSION

¶160 As online activity becomes a greater part of everyday life, much more of the information collected online can be extremely personal. Despite this, very few young adults have a will dictating what should be done with all the personal information collected online during their life. In the absence of testamentary intent, a deceased individual's posthumous right to privacy is tenuous under current law. Because contract law and property law ineffectively protect a deceased individual's online privacy rights, extending the invasion of privacy tort posthumously is the best way to protect an individual's privacy rights after death. Utilizing common law would be most effective because a legislative approach would take too long. Also, common law and state legislatures already recognize posthumous dignitary interests.<sup>148</sup> Since dignity and privacy are closely intertwined and digital assets tend to elicit much more personal information than a dead body, extending the tort posthumously is necessary to protect these rights.

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<sup>147</sup> *Id.* ("The importance to injured persons that injurers acknowledge responsibility for harm also finds support in medical malpractice claims data.").

<sup>148</sup> *See supra* Parts IV.A.1–2.

