

THE LAW OF DIGITAL RESURRECTION

VICTORIA J. HANEMAN

INTRODUCTION	1571
I. DIGITAL RESURRECTION	1576
<i>A. Chatbots, Avatars, Digital Counterparts</i>	1576
<i>B. Celebrity Resurrection</i>	1579
II. CURRENT LEGAL PROTECTIONS	1582
<i>A. Privacy Law</i>	1583
<i>B. Property Law</i>	1587
<i>C. Intellectual Property Law</i>	1589
<i>D. Criminal Law</i>	1591
<i>E. State or Uniform Law</i>	1592
III. SCAFFOLDING THE LAW OF THE DEAD	1596
<i>A. The Law of Human Remains</i>	1596
1. “No Property” in Remains	1597
2. The Legal Right to Bury	1599
3. The Living Supersede the Deceased	1601
<i>B. The Law of Inheritance</i>	1601
<i>C. Contemplating Theoretical Status</i>	1604
1. Commodification	1604
2. Quasi-Property Law	1605
3. Quasi-Personhood	1607
IV. TOWARD SOLUTIONS	1613
<i>A. Shaping a Facilitative Paradigm</i>	1613
<i>B. A Right to Delete</i>	1616
<i>C. Constraining the Dead Hand</i>	1621
<i>D. A Fortified Right of Publicity</i>	1625
CONCLUSION	1626

THE LAW OF DIGITAL RESURRECTION

VICTORIA J. HANEMAN*

Abstract: The digital right to be dead has yet to be recognized as an important legal right. Artificial intelligence, augmented reality, and nanotechnology have progressed to the point that personal data can be used to resurrect the deceased in digital form with appearance, voice, emotion, and memory recreated to allow interaction with a digital app, chat bot, or avatar that may be indistinguishable from that with a living person. Users may now have a completely immersive experience simply by loading the personal data of the deceased into a neural network to create a chatbot that inherits features and idiosyncrasies of the deceased and dynamically learns with increased communication. There is no legal or regulatory landscape against which to estate plan to protect those who would avoid digital resurrection, and few privacy rights for the deceased. This intersection of death, technology, and privacy law has remained relatively ignored until recently. This Article is the first to respect death as an important and distinguishing part of the conversation about regulating digital resurrection. Death has long had a strained relationship with the law, giving rise to dramatically different needs and idiosyncratic legal rules. The law of the dead reflects the careful balance between the power of the state and an individual's wishes, and it may be the only doctrinal space in which we legally protect remembrance. This Article frames the importance of almost half of a millennium of policy undergirding the law of the deceased, and proposes a paradigm focused upon a right of deletion for the deceased over source material (data), rather than testamentary control over the outcome (digital resurrection), with the suggestion that existing protections are likely sufficient to protect against unauthorized commercial resurrections.

* Victoria J. Haneman is the Associate Dean for Research & Innovation and Frank J. Kellegher Professor of Trusts & Estates at Creighton University School of Law. It was an honor to present this Article as the Keynote at the Seattle University School of Law's Seventh Annual Innovation & Technology Law Conference. I am also grateful for the feedback of the participants and organizers of the Yale Information Society Project Workshops and the Critical Legal Conference 2022 at UiT The Arctic University of Tromsø. Special thanks to Meera Gajjar at *Westlaw Today* for featuring this research in *Q&A: Digital Resurrection—Planned Immortality or Unauthorized Imposter?*. I am profoundly grateful to Edward A. Daur, Mark A. Lemley, Darren Bush, Yonathan Arbel, Katherine Macfarlane, Paul McGreal, Yvette Joy Liebesman, and Brian Frye for their deep engagement with this Article. And special thanks to my hardworking and brilliant research assistants, Tony Thies and Christopher A. Carter.

INTRODUCTION

The digital right to be dead is not yet recognized as an important legal right.¹ Artificial intelligence, augmented reality, and nanotechnology have progressed to the point that personal data can be used to digitally resurrect the deceased,² creating an artificial avatar that can indistinguishably mimic the appearance, voice, and even memory of a living person.³ The powerful and privileged have chased immortality throughout history by cementing tributes to themselves,⁴ but a form of virtual immortality achieved through digital tools and online spaces is now available to the masses.⁵ A vast amount of digital data is stored online in the ordinary course of living (emails, text messages, social media posts, and so forth),⁶ and this data may be used to create a posthu-

¹ See TAMARA KNEESE, *DEATH GLITCH: HOW TECHNO-SOLUTIONISM FOILS US IN THIS LIFE AND BEYOND* 185 (2023) (noting that current technology has yet to reach the point where digital immortality is possible). “Digital immortality implies that if people gather enough pieces, if they build the right monuments, they may outlast the collapse of human civilization and catastrophic climate change. The data, attached to living institutions and infrastructures, will enable the dead to live on indefinitely.” *Id.*

² Both “dead” and “deceased” mean “no longer living.” The word deceased has been in use since at least the fifteenth century and is generally considered to be gentler and more formal or indicative of a legal status. *See generally Deceased*, BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/deceased> [<https://perma.cc/7SWL-RGYA>].

³ Cindy Gordon, *What Are the Ethical Boundaries of Digital Life Forever?*, FORBES (Sept. 26, 2021), <https://www.forbes.com/sites/cindygordon/2021/09/26/what-are-the-ethical-boundaries-of-digital-life-forever/?sh=58cc9b61238a> [<https://perma.cc/HA3X-QX3A>] (“Scientists are experimenting with algorithms that can take a person’s emails and text messages and use them to generate text messages that are at least evocative of a specific person. The messages can use emojis like the dead person once did. And with data pulled from the internet, the texts can even include back-and-forth about topical things like weather and current events.”).

⁴ The Great Pyramid of Giza is a funeral monument containing the burial chamber of the Egyptian pharaoh Khufu. *10 Famous & Inspiring Tombs Around the World*, FUNERAL BASICS, <https://www.funeralbasics.org/10-famous-inspiring-tombs-around-world/> [<https://perma.cc/6M5Z-2S57>]. The Taj Mahal was built in memory of the wife of Emperor Shah Jahan. *Id.* Westminster Abbey houses 3,300 deceased prominent figures. *Westminster Abbey*, HISTORIC UK, <https://www.historic-uk.com/HistoryMagazine/DestinationsUK/Westminster-Abbey/> [<https://perma.cc/6NTJ-EGQZ>]. The mausoleum of the first Qin Emperor houses the Terracotta Army. *10 Famous & Inspiring Tombs Around the World*, *supra*. Grant’s Tomb in New York City houses General Ulysses S. Grant and his wife, Julia. *Id.* Lenin Mausoleum holds the embalmed remains of Vladimir Lenin. *Id.* The Pantheon in Paris holds the remains of Voltaire, Hugo, and Zola. *Id.*

⁵ See TIMOTHY RECUBER, *THE DIGITAL DEPARTED: HOW WE FACE DEATH, COMMEMORATE LIFE, AND CHASE VIRTUAL IMMORTALITY* 131 (2023) (noting that there is something populist and democratizing about mourning options now available because of digital tools).

⁶ Digital assets include social media accounts, blogs, non-fungible tokens, website domain names, online billing and banking, browser history, apps, cryptocurrency, browser bookmarks, email accounts, contact lists, digital photos and videos, subscription accounts (e.g., Netflix, Hulu), loyalty and point programs, files stored on the cloud, electronic medical records, online personas and gaming profiles, and digital avatars. *Digital Asset: Meaning, Types, and Importance*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/digital-asset-framework.asp> [<https://perma.cc/T6R9-GB65>] (May 17,

mous digital clone by anyone with access to data and interest in maintaining an emotional connection with someone now gone.⁷ This is an intersection of death, technology, and privacy law that has remained relatively ignored until recently.⁸ In fact, there are few legal protections to balance the many interests and values that are at stake,⁹ and some insist that it is now time to legislate a digital right to be dead.¹⁰

We have always been able to hire an actor to portray someone who has been long deceased, and the ability to recreate or mimic the deceased is neither new nor remarkable.¹¹ The remarkable advancement is the fidelity with which the deceased may now be reproduced because of generative artificial intelligence (AI).¹² Users may now have a completely immersive experience simply by loading the personal data of the deceased into a neural network to create a chatbot that inherits features and idiosyncrasies of the deceased and dynamically learns with increased communication.¹³ To the extent that highly sensi-

2024); Rachel Sommer, *What Is RUFADAA and Why Should You Care?*, EASEENET (Apr. 19, 2021), <https://easeenet.com/blog/what-is-rufadaa-and-why-should-you-care/> [<https://perma.cc/5Q7W-GEA3>].

⁷ The market for digital resurrection of the deceased is particularly robust in China, with at least a dozen companies offering the technology to the public for “a few hundred dollars.” Zeyi Yang, *Deepfakes of Your Dead Loved Ones Are a Booming Chinese Business*, MIT TECH. REV. (May 7, 2024), <https://www.technologyreview.com/2024/05/07/1092116/deepfakes-dead-chinese-business-grief/> [<https://perma.cc/XZ4G-FPN2>].

⁸ In April 2024, Apple announced a Digital Legacy Program available for the Fall 2024 release of iOS 15.2, iPadOS 15.2, and macOS 12.1, which allows users to add a Legacy Contact for their Apple ID. *How to Add a Legacy Contact for Your Apple ID*, APPLE, <https://support.apple.com/en-us/102631> [<https://perma.cc/TL59-X3ZG>] (Apr. 24, 2024).

⁹ See Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be the Potential Alternatives?*, 10 SCRIPTED 19, 21 (2013), <https://script-ed.org/wp-content/uploads/2013/04/harbinja.pdf> [<https://perma.cc/GA8V-LSS2>] (observing that post-mortem privacy has been “of interest predominantly for sociologists, psychologists, anthropologists and other humanities and social sciences scholars” and far less so for legal academics).

¹⁰ See generally Mark Bartholomew, *A Right to Be Left Dead*, 112 CALIF. L. REV. 1591 (2024) (arguing that legislators should consider creating a right to be left dead).

¹¹ Depicting or describing the deceased is not the same as resurrecting the deceased, with the difference being one of fidelity. With the latter, the depiction is so accurate that it could be confused for actual footage of the deceased. See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1195 (2006) (discussing the likelihood of confusion arising from the publicity of a public figure in the trademark context).

¹² Actor Tom Hanks recently stated, “Anybody can now recreate themselves at any age they are, by way of AI or deep fake technology. . . . I could be hit by a bus tomorrow and that’s it, but my performances can go on and on and on Outside of the understanding that it’s been done by AI or deep fake, there’ll be nothing to tell you that it’s not me.” Dani Di Placido, *Tom Hanks Predicts He’s Doomed to Be Digitally Resurrected by AI*, FORBES (May 18, 2023), <https://www.forbes.com/sites/danidiplacido/2023/05/18/tom-hanks-predicts-hes-doomed-to-be-digitally-resurrected-by-ai/?sh=5d91d73634d2> [<https://perma.cc/2PAX-RK89>].

¹³ See Shannon Molloy, *A Social Media Influencer Made a Clone of Herself and Men Paid \$1 a Minute to ‘Date’ It. It Was a Disaster*, NEWS.AU.COM (June 25, 2024), <https://www.news.com.au/technology/online/social/a-social-media-influencer-made-a-digital-clone-of-herself-and-men-paid->

tive information is being used to create a digital clone, and sensitive information may then be shared by grieving loved ones with the clone, this raises profound privacy concerns for the deceased and their loved ones.¹⁴ Further, there are few legal regulations or restrictions on the use of data to train AI language models,¹⁵ and companies are not always forthcoming with how data is gathered, used, or later shared.¹⁶

Several high-profile figures have made it clear that they do not wish to be resurrected through technology.¹⁷ And while such a request included in a testamentary instrument may be ethically binding, whether it will be (or should be) interpreted as legally binding is an open question. There is no legal or regulatory landscape against which to estate plan to protect those who would avoid digital resurrection¹⁸ and few privacy rights for the deceased.¹⁹ Digital

1-a-minute-to-date-it-it-was-a-disaster/news-story/bde2ceaf1164f13a7f692458299b51a2 [https://perma.cc/R8TM-U3MM] (describing how a social media influencer spent \$100,000 on a digital clone of herself, only to find that the AI clone started instigating sexual chats with her followers).

¹⁴ James Huston & Jay Ratican, *Life, Death, and AI: Exploring Digital Necromancy in Popular Culture—Ethical Considerations, Technological Limitations, and the Pet Cemetery Conundrum*, 4 METAVERSE, June 30, 2023, at 1, 1, <https://aber.apacsci.com/index.php/met/article/viewFile/2166/2574> [https://perma.cc/WML4-CKVZ]. It also raises concerns about the long-term emotional impact on the community, and whether perceptions of finitude and the authenticity of human experience will dramatically shift attitudes and rituals surrounding death. See *id.* at 2–3 (noting that “continuously interacting with a digital representation of the deceased may hinder the natural progression of grief, inhibiting the necessary emotional healing and adjustment to life without the physical presence of the loved one”).

¹⁵ Abigail Basset, *The Digital Afterlife Is Burgeoning—and It’s Worrying AI Ethicists*, OBSERVER (May 28, 2024), <https://observer.com/2024/05/generative-ai-griefbot-privacy-issue/> [https://perma.cc/RA3Z-5NVF].

¹⁶ *Id.*

¹⁷ Singer Dolly Parton has expressly rejected the idea of “being grounded here forever,” stating, “I have to decide how much of that high-tech stuff I want to be involved [with] because I don’t want to leave my soul here on this earth.” Jack Irvin, *Dolly Parton Doesn’t Want to Become an AI Hologram After She Dies: ‘I’ve Left a Great Body of Work Behind,’* PEOPLE (July 3, 2023), <https://people.com/dolly-parton-doesnt-want-to-become-ai-hologram-after-death-7555915> [https://perma.cc/G6HV-PACX]. Actress Whoopi Goldberg has stated that she does not want to be a hologram and “that’s been in my will for fifteen years.” Tommy McArdle, *Whoopi Goldberg Says Her Will Forbids Anyone from Making a ‘Hologram’ of Her After Death*, PEOPLE (July 12, 2023), <https://people.com/whoopi-goldberg-will-forbids-anyone-from-making-a-hologram-after-death-7560272> [https://perma.cc/8FTF-7LTX].

¹⁸ Caroline Thayer, *Dolly Parton, Whoopi Goldberg Are Anti-Holograms; Expert Warns They ‘Can Never Fully Ensure’ Against Use*, FOX NEWS (July 21, 2023), <https://www.foxnews.com/entertainment/dolly-parton-whoopi-goldberg-anti-holograms-expert-warns-can-never-fully-ensure-against-use> [https://perma.cc/P8U6-E2RY] (“Unfortunately, in the age of AI, celebrities can never fully ensure that their name and likeness won’t be used as a hologram post-mortem without their permission.”).

¹⁹ See Matthew Dunne-Miles, *Deepfakes, Dead Relatives and Digital Resurrection*, THE FACE (Apr. 6, 2021), <https://theface.com/society/deepfakes-dead-relatives-deep-nostalgia-ai-digital-resurrection-kim-kardashian-rob-kardashian-grief-privacy> [https://perma.cc/A4U3-PGCE] (“Your privacy dies with

resurrection of the deceased, without permission, is a complicated issue that exists at the juncture of technology law, privacy law, and property law, and this issue is made more complicated by the fact that the dead have very different legal entitlements than the living in each of these areas. Further, death has long had a strained relationship with the law,²⁰ but it is particularly problematic when legislators and big tech (also known as #bigtech)²¹ do not always distinguish between the living inactive user and the deceased user.²²

Death is a unique, legally significant, and distinguishing event.²³ The dead exist in a legal liminality. The law of inheritance provides the deceased with broad rights of disposition over property, with some ability to control use of the property, subject to important restraints.²⁴ Although there is great deference to the wishes of the decedent,²⁵ estate planning done today is based upon imperfect information.²⁶ The law of human remains further emphasizes the

you It hits so many sore buttons and yet the law doesn't cover it. Right now, it's privacy by obscurity." (quoting Professor Lillian Edwards)).

²⁰ See Brendan Parent & Angela Turi, *Death's Troubled Relationship with the Law*, 22 AMA J. ETHICS 1055, 1055 (2020), <https://journalofethics.ama-assn.org/article/deaths-troubled-relationship-law/2020-12> [<https://perma.cc/2ZDT-W3HE>] (outlining the difficulties reconciling the legal definition of death with modern medical science).

²¹ "Big tech" refers to the largest technology companies in many different tech sectors. Linda Rosencrance, *Big Tech*, TECHTARGET, <https://www.techtarget.com/whatis/definition/Big-Tech> [<https://perma.cc/DNS6-HMFD>] (Mar. 2021).

²² This is particularly troubling in the digital age, when social media platforms such as Facebook and X, largely accessible regardless of the wealth of the user, have become accidental digital memory platforms that are curated by the living but store the personalities of the deceased. Facebook is arguably one of the largest cemeteries in the world, with an estimated 50 million deceased users as of June 2019. At the current rate of births and deaths, Facebook could have 1.4 to 4.9 billion dead users by the end of the twenty-first century. See DAVIDE SISTO, *ONLINE AFTERLIVES: IMMORTALITY, MEMORY, AND GRIEF IN DIGITAL CULTURE* 89 (Bonnie McClellan-Broussard trans., 2020) (estimating the amount of users on Facebook and the rate of deaths per day); see also Houman Barekat, *Digital Immortality*, L.A. REV. BOOKS (Jan. 11, 2021), <https://lareviewofbooks.org/article/digital-immortality/> [<https://perma.cc/LJ5C-F79L>] (reviewing SISTO, *supra*) (noting that "the number of dead users is projected to exceed the number of living ones before too long; with each passing day, the platform is turning inexorably into a giant ghost ship"); Gary F. Rycroft, *Legal Issues in the Afterlife* (noting that tech companies have not generally thought of how to handle accounts operated by the deceased), in *DIGITAL AFTERLIFE: DEATH MATTERS IN A DIGITAL AGE* 127, 133 (Maggi Savin-Baden & Victoria Mason-Robbie eds., 2020).

²³ See Bartholomew, *supra* note 10, at 1591 (noting that New York and Louisiana's laws to prevent digital cloning do not make a distinction between life and death).

²⁴ Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 425; see also Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 877 (2012) (discussing the firm understanding in U.S. law that a property owner can control the disposition of their property after death).

²⁵ For a discussion of the doctrine of testamentary freedom and literature review, see Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 248 (2010).

²⁶ Glover, *supra* note 24, at 430–31.

liminal space occupied by the deceased, who are arguably quasi-property, quasi-persons, with special rules as to commodification and limits on commercialization. A corpse is unique—it is neither person nor property, but far more than medical waste or garbage. Human remains are protected against various forms of abuse, while occasionally being legally unprotected to be leveraged to create a legacy that perhaps the deceased would not have wanted. Taken together, the law of the dead reflects the careful balance between the power of the state and an individual's wishes, and it may be the only doctrinal space in which we legally protect remembrance.²⁷ It is not the tidiest area of the law, but the theoretical messiness arises from a balancing of legal ownership, moral personhood, and the law of memory.²⁸

Several scholars have considered digital recreation and resurrection against the backdrop of current law, but this Article is the first to acknowledge death as an integral part of any conversation in this space. The Article constructs a paradigm for developing the law of digital resurrection that centers death and applies the existing and idiosyncratic law of the dead, including the rights of the deceased while living, dead hand control of fiduciaries, and dignitary protections, as a framework for developing policy. Part I provides an overview of current technologies available to immortalize the deceased for non-commercial purposes and compares it to commercial resurrection of celebrities.²⁹ Existing legal protections to prevent unauthorized digital recreation or digital resurrection are considered in Part II.³⁰ The law of the dead is a blend of idiosyncratic theoretical frameworks that strive to balance deference to the deceased against the interests of the living. This balance is explored in Part III, where a descriptive analysis of existing law connects past to present by revealing important throughlines that may otherwise go unnoticed in developing policy on the law of digital resurrection.³¹ Part IV then proposes a middle path whereby the lightest of regulation will allow technology to continue to advance while lending some deference to the deceased.³² The proposed paradigm focuses upon a right of deletion for the deceased over source material (data), rather than testamentary control over the

²⁷ See Carl Ohman & Luciano Floridi, *An Ethical Framework for the Digital Afterlife Industry*, 2 NATURE HUM. BEHAV. 318, 319, 320 (2018) (discussing the difficulties faced by regulators, big tech, and academic experts in developing frameworks to “ensure ethical usage of digital remains for commercial purposes”).

²⁸ See Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253, 277–79 (2017) (discussing justifications for dead hand control, including the desire to preserve one's memory after death, and arguing that the wishes of the dead should yield to the needs of the living).

²⁹ See *infra* notes 33–88 and accompanying text.

³⁰ See *infra* notes 89–195 and accompanying text.

³¹ See *infra* notes 196–320 and accompanying text.

³² See *infra* notes 321–391 and accompanying text.

outcome (digital resurrection), with the suggestion that existing protections are likely sufficient to protect against unauthorized commercial resurrections.

I. DIGITAL RESURRECTION

Digital afterlife businesses fall into one of three categories: informational management services, posthumous messaging and memorial services, and recreation services.³³ Informational management services are those that purport to assist customers with digital assets or create some sort of “digital will.”³⁴ Posthumous messaging services will send communications after death, and memorial sites provide a digital space for mourners or remembrance.³⁵ The third category—recreation services—is the focus of this Article. This category of afterlife businesses applies AI technology to personal data from the deceased to create entirely new content.³⁶ This Part considers the advancements that have been made in shaping digital identities and consciousness that allow for immersive interaction, with differing considerations for celebrity versus non-celebrity use. Section A describes the variety of digital technologies available for use in creation of a digital afterlife.³⁷ Section B explores the present-day monetization of digital resurrections using details from celebrity experiences.³⁸

A. Chatbots, Avatars, Digital Counterparts

For centuries, the living have consulted with spiritualists and mediums in an attempt to have two-sided communication with the dead.³⁹ The technology exists today⁴⁰ for the brokenhearted or grieving to use any personal data in their possession to generate an interactive digital clone of anyone now deceased.⁴¹ SeanceAI, StoryFile, Replika, MindBank Ai, and HereAfter are digital platforms that feed data through AI to create chatbots (also known as deathbots or griefbots) that will allow for immersive interaction.⁴² Some of these chatbots are developed by the living in anticipation of their eventual death,

³³ Ohman & Floridi, *supra* note 27, at 318.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *infra* notes 39–63 and accompanying text.

³⁸ See *infra* notes 64–88 and accompanying text.

³⁹ Samantha Murphy Kelly, *When Grief and AI Collide: These People Are Communicating with the Dead*, CNN (May 6, 2024), <https://www.cnn.com/2024/05/06/tech/ai-communicating-with-dead/index.html> [<https://perma.cc/6F8W-8ZYB>].

⁴⁰ See SISTO, *supra* note 22, at 76 (describing modern chatbots).

⁴¹ Ashley Bardhan, *After Breakups, the Brokenhearted Are Creating AI Clones of Their Exes*, FUTURISM (Feb. 12, 2024), <https://futurism.com/ai-exes> [<https://perma.cc/F3B4-TEPT>] (noting that “even an empty happily-ever-after is tantalizing in the bleakness of 2024”).

⁴² Basset, *supra* note 15.

while others are developed after the death of a loved one utilizing the data that they have left behind.

Numerous technology startups are exploring digital preservation of the deceased.⁴³ A defining characteristic for many of these startups is a focus on preservation versus the myriads of opportunities presented by the immersive experience. The business model built around preservation offers a product that can be fully designed and implemented today—legacy avatars or chatbots that can share stories and jokes as a memorial to the deceased.⁴⁴ Some start-ups have centered development around creating something more real and immersive, which may not be fully implemented today.⁴⁵

Having identified a need, the conversational AI marketplace is expected to balloon from \$13.2 billion in 2024 to \$49.9 billion by 2030.⁴⁶ These companies have the goal of amassing a lifetime of data to create a simulacrum of the deceased⁴⁷ that will allow for open-ended conversations and Socratic dialogue.⁴⁸ Many of these start-ups are developing products not yet available because of the level of technological advancement.⁴⁹ For example, Microsoft has obtained a patent⁵⁰ to fuse a chatbot of the deceased with a two- or three-dimensional image to “create a more realistic, human-like chat experience,”⁵¹

⁴³ B. David Zarley, *You Can Now Live Forever. (Your AI-Powered Twin, That Is)*, BIGTHINK (Oct. 9, 2021), <https://bigthink.com/the-future/ai-twin-immortality/> [https://perma.cc/KH36-9CRT].

⁴⁴ See SISTO, *supra* note 22, at 44 (providing an example of how a journalist, James Vhalos, created a chatbot). James Vhalos’s journey started when his father was diagnosed with terminal cancer, and Vhalos wanted to tell his father’s story through an AI chatbot called “Dadbot.” *Id.*

⁴⁵ Researcher Hossein Rahnama is developing a platform called Augmented Eternity through the Massachusetts Institute of Technology’s Media Lab that will allow users to activate a digital avatar or construct that will start to understand sentiments and patterns. Courtney Humphries, *Digital Immortality: How Your Life’s Data Means a Version of You Could Live Forever*, MIT MEDIA LAB, <https://www.media.mit.edu/articles/digital-immortality-how-your-life-s-data-means-a-version-of-you-could-live-forever/> [https://perma.cc/M6HU-MCZB]. The ability to create a digital counterpart has utility for both the living and the deceased. *See id.* The digital avatar may allow for a CEO to provide business input while on vacation or after any prolonged absence, including but not limited to death. *Id.* Further, this technology can allow you to lend your expertise to your loved ones after your passing through a mentor-mentee relationship. *See id.*

⁴⁶ MarketsandMarkets Research Priv. Ltd., *Conversational AI Market Worth \$49.9 Billion by 2030, Growing at a CAGR of 24.9%*, YAHOO!FINANCE (May 6, 2024), <https://finance.yahoo.com/news/conversational-ai-market-worth-49-142000830.html> [https://perma.cc/DB37-QV7G].

⁴⁷ Zarley, *supra* note 43 (examining the mission of MindBank AI).

⁴⁸ MindBank AI wants to generate a twin that acts and thinks like the deceased. *Id.*

⁴⁹ *See id.* (describing the technological difficulties MindBank AI might face).

⁵⁰ Asa Fitch, *Could AI Keep People ‘Alive’ After Death?*, WALL ST. J. (July 3, 2021), <https://www.wsj.com/articles/could-ai-keep-people-alive-after-death-11625317200> [https://perma.cc/PV8P-59BH]. It appears Microsoft may have stepped back from these plans because of public backlash: A Microsoft spokesperson said in 2021 that there are no plans to develop the patented technology. *Id.*

⁵¹ *Id.* Kanye West gifted a holograph of deceased Robert Kardashian telling his daughter, Kim Kardashian, that she married “the most, most, most, most, most genius man in the whole world.”

and Humai is working with AI and nanotechnology to store conversation styles, thought processes, and biological data with the goal of one day fusing cryonic technology with nanotechnology to create an artificial body and brain.⁵²

The desire to resurrect some version of the deceased is also not new. For decades, humans have listened to saved voicemails, smelled an old sweater, watched home videos, and gazed upon photos to remember those we have loved and lost long after their passing.⁵³ It is new, however, that neural networks will allow us to create chatbots of our deceased loved ones to engage with us on an ongoing basis. Grieving loved ones have already started feeding text messages and emails into existing AI platforms, such as ChatGPT, and asking the AI to respond to questions in the voice of the deceased.⁵⁴

This technology allows us to continue relationships⁵⁵ that have ended because of death in a way some consider a tribute, and others consider a violation.⁵⁶ Creator Eugenia Kuyda⁵⁷ lost her best friend Roman Mazurenko and spent three months loading more than eight thousand lines⁵⁸ of text messages and emails into a neural network.⁵⁹ The resulting chatbot, available for quite some time through Apple iTunes for free, allowed anyone to have a conversation

Kanye West Gives Kim Kardashian Birthday Hologram of Dead Father, BBC (Oct. 30, 2020), <https://www.bbc.com/news/entertainment-arts-54731382> [<https://perma.cc/ZR7Y-24MS>].

⁵² Philip Perry, *Startup Promises Immortality Through AI, Nanotechnology and Cloning*, BIGTHINK (May 7, 2017), <https://bigthink.com/surprising-science/startup-promises-immortality-through-ai-nano-technology-and-cloning/> [<https://perma.cc/8YEG-2TRW>].

⁵³ See ANNE ALLISON, BEING DEAD OTHERWISE 3 (2023) (noting that people often hold onto pieces of the deceased in their honor).

⁵⁴ Aimee Percy, *'It Was as if My Father Were Actually Texting Me': Grief in the Age of AI*, THE GUARDIAN (July 18, 2023), <https://www.theguardian.com/technology/2023/jul/18/ai-chatbots-grief-chatgpt> [<https://perma.cc/3RJA-64HJ>] (describing the experience of Sunshine Henle, who fed text messages with her mother into ChatGPT). Henle had initially hoped ChatGPT would allow her to converse with “a reincarnated version of her mother,” but she decided to use the technology differently:

I think I'm going to use it when I'm doubting myself or some part of our relationship . . . But I will probably not try to converse with it as if I really believe it's her talking back to me. What I'm getting more out of it is more just wisdom. It's like a friend bringing me comfort.

Id.

⁵⁵ “Death cannot stop true love. All it can do is delay it for a while.” THE PRINCESS BRIDE (Act III Communications 1987).

⁵⁶ See Davide Sisto, *Chatting with the Dead*, MIT PRESS READER (Jan. 4, 2021), <https://thereader.mitpress.mit.edu/chatting-with-the-dead-chatbots/> [<https://perma.cc/27BM-2QKX>] (discussing the impact of digital resurrection on loved ones).

⁵⁷ THE WEEK STAFF, *Her Best Friend Died. So She Rebuilt Him—Using Artificial Intelligence*, THE WEEK (Nov. 6, 2016), <https://theweek.com/articles/659229/best-friend-died-rebuilt--using-artificial-intelligence> [<https://perma.cc/KA22-QXV4>].

⁵⁸ *Id.*

⁵⁹ Miranda Luong, *Roman Bot*, SPOOKY TECH. (June 15, 2020), <https://spookytech.ch/inventory/roman-bot/> [<https://perma.cc/3G7C-KFY8>].

with digital Roman.⁶⁰ Roman Bot has inherited features of Mazurenko's personality and also some of his speech patterns,⁶¹ and because of machine learning, the bot dynamically learned with increased communication.⁶² And while many of his friends found the similarities between living and digital Roman to be "uncanny," several friends "refused to interact with [the chatbot]" at all and questioned the appropriateness of Roman Bot being made available to the world.⁶³

B. Celebrity Resurrection

Digital resurrection is being used to monetize the identity of deceased celebrities for entertainment or through endorsements. We have always been able to hire an actor to portray someone who has been long deceased, but AI brings a level of fidelity that is so astounding that it may be impossible to determine if a video of the deceased is an AI-generated simulation or actual footage.⁶⁴ Digital recreations have been used to resurrect celebrities who have passed away before completion of post-production on a movie, including Carrie Fisher and Paul Walker.⁶⁵ Actor Bruce Willis retired due to illness but was recently recreated through AI to appear in a Russian wireless commercial.⁶⁶ Digital clones of long-deceased celebrities are also being created through generative AI for new movie projects. Anthony Bourdain's voice was recreated using AI technology

⁶⁰ Roman Bot is not alone: Journalist James Vlahos created Dadbot when his father was diagnosed with terminal lung cancer. Sisto, *supra* note 56.

⁶¹ Perhaps more problematic is whether the text messages populating the AI that drives Roman Bot captured Roman Mazurenko at a particularly low or depressed time in his life. Casey Newton, *Speak, Memory*, THE VERGE, <https://www.theverge.com/a/luca-artificial-intelligence-memorial-roman-mazurenko-bot> [<https://perma.cc/F2C8-V7WE>].

⁶² Although the app is no longer available, you could previously download Roman Mazurenko to your iPad or laptop (for free) by going to the Apple Store and searching for the Roman Mazurenko digital avatar. Within two minutes of loading, the digital avatar asked me, "Would it be comfortable for you to live with me?"

⁶³ THE WEEK STAFF, *supra* note 57. Kuyda felt that the chatbot was respectful and appropriate because "Mazurenko was . . . a Singularity proponent who considered himself a futurist." KNEESE, *supra* note 1, at 187. Kuyda's startup, Luka, has since shifted its sales pitch away from digital legacy—particularly when it was discovered that many users were using the app to generate AI girlfriends for them to abuse. *Id.* at 188.

⁶⁴ "Digital immortality implies that if people gather enough pieces, if they build the right monuments, they may outlast the collapse of human civilization and catastrophic climate change. The data, attached to living institutions and infrastructures, will enable the dead to live on indefinitely." KNEESE, *supra* note 1, at 185.

⁶⁵ S.J. Velasquez, *How AI Is Bringing Film Stars Back from the Dead*, BBC (July 18, 2023), <https://www.bbc.com/future/article/20230718-how-ai-is-bringing-film-stars-back-from-the-dead> [<https://perma.cc/2P5R-XDZ5>].

⁶⁶ Audrey Schomer, *Avatars as Actors: Will AI Unleash Celebrity 'Simulation Rights'?*, VARIETY (Apr. 28, 2023), <https://variety.com/2023/digital/news/avatars-as-actors-will-ai-unleash-celeb-simulation-rights-1235583875/> [<https://perma.cc/6J3C-SGRF>].

to provide three lines of narration for a film about his life.⁶⁷ A digital clone of James Dean created through AI will be starring in an upcoming movie *Back to Eden*, interacting and collaborating with living co-stars.⁶⁸

This has become a concern for living actors in Hollywood, with a recent Netflix contract granting the streaming service the right to simulate an actor's voice and likeness "by all technologies and processes now known or hereafter developed, throughout the universe and in perpetuity."⁶⁹ Actors on blockbuster franchise movies may soon be asked to submit complete digital scans of their faces and bodies⁷⁰ so that they may be resurrected should they die.⁷¹ Digital resurrection has become such a contentious issue with regard to deceased celebrities and residuals, that a "last, best, and final" offer to the SAG-AFTRA union⁷² in November 2023 was rejected over a proposal that would allow studios to use AI scans of deceased performers without the consent of the union or the actor's estate.⁷³

Concert resurrection⁷⁴ is also a hotly debated issue in the music industry, with AI-recreated rock icons who have or will be appearing on stage.⁷⁵ The

⁶⁷ Maya Yang, *Anthony Bourdain Documentary Sparks Backlash for Using AI to Fake Voice*, THE GUARDIAN (July 16, 2021), <https://www.theguardian.com/food/2021/jul/16/anthony-bourdain-documentary-ai-voiceover-roadrunner> [<https://perma.cc/U4ZQ-J2C5>].

⁶⁸ Nick Farrell, *James Dean Finally Stars in a New Movie*, FUDZILLA (July 16, 2024), <https://www.fudzilla.com/news/57450-james-dean-finally-stars-in-a-new-movie> [<https://perma.cc/T8U2-UKEG>].

⁶⁹ Di Placido, *supra* note 12.

⁷⁰ See Marlow Stern, *Samuel L. Jackson Talks Marvel, Racists Like Trump, and His FBI Threat*, ROLLING STONE (June 20, 2023), <https://www.rollingstone.com/tv-movies/tv-movie-features/samuel-l-jackson-interview-marvel-secret-invasion-brie-larson-trump-racists-fbi-threat-tarantino-1234774278/> [<https://perma.cc/RUJ3-CN5G>] (documenting Samuel L. Jackson's experience with digital scans). Jackson said:

Ever since I've been in the Marvel Universe, every time you change costumes in a Marvel movie, they scan you. . . . Future actors should do what I always do when I get a contract and it has the words "in perpetuity" and "known and unknown" on it: I cross that shit out. It's my way of saying, "No, I do not approve of this."

Id.

⁷¹ See Benjamin Lee, *Discretion, Not CGI: How Philip Seymour Hoffman Was Kept in the Hunger Games*, THE GUARDIAN (Nov. 17, 2015), <https://www.theguardian.com/film/2015/nov/17/philip-seymour-hoffman-hunger-games-mockingjay-2-paul-walker> [<https://perma.cc/QEE6-965F>] (outlining the resurrection procedure for Philip Seymour Hoffman).

⁷² Conor Murray, *Actors' Strike Continues: Here's What's Holding Up Negotiations, Including Artificial Intelligence*, FORBES (Nov. 7, 2023), <https://www.forbes.com/sites/conormurray/2023/11/07/actors-strike-continues-heres-whats-holding-up-negotiations-including-artificial-intelligence/> [<https://perma.cc/86WJ-J2DE>]. SAG-AFTRA is the union that represents more than 160,000 actors and entertainment professionals. *Id.*

⁷³ *Id.*

⁷⁴ Use of artificial intelligence and holograms to perform concerts is not limited to the deceased. In 2022, wanting to be remembered "as we were [in our youth]," the band ABBA performed a ninety-minute concert in London as holograms from 1979. *ABBA's New Concert Will Be a Virtual Reunion*

“Elvis Evolution,”⁷⁶ launched in November 2024, provides younger fans with the opportunity to have an immersive experience with the singer who died in 1977.⁷⁷ The Whitney Houston hologram has a concert residency in Las Vegas,⁷⁸ and started its world tour concert series in 2020.⁷⁹ The Amy Winehouse hologram tour has had a “troubled production process” and has temporarily been put on hold.⁸⁰ Other resurrected singers include Tupac in 2012 and Michael Jackson in 2014.⁸¹

Another way in which the appearance of deceased celebrities is being monetized is through endorsements.⁸² Humphrey Bogart, Louis Armstrong, James Cagney, Cary Grant, Gene Kelly, Fred Astaire, and John Wayne have all been digitally recreated in commercials supporting various products.⁸³ Beloved Brazilian musician Elis Regina was resurrected in 2023 for a Volkswagen commercial where she is seen singing with her daughter, who was only four when she died.⁸⁴ Deceased celebrities are unlikely to make poor or imprudent

After Their New Voyage Album, ABC (Sept. 2, 2021), <https://www.abc.net.au/news/2021-09-03/abba-concert-hologram-virtual-digital-reunion-voyage/100431312> [https://perma.cc/VU2Z-UZUB]. The band said that they will “be able to sit back in an audience and watch our digital selves perform.” *Id.*

⁷⁵ See Gael Cooper, *The New Beatles Video: How AI Is Helping and Hindering the Music Industry*, CNET (Nov. 9, 2023), <https://www.cnet.com/tech/the-new-beatles-video-and-how-ai-is-helping-and-hindering-the-music-industry/> [https://perma.cc/XP96-VG22] (discussing the controversy surrounding the AI recreation of a Beatles performance).

⁷⁶ AI will be using home videos and personal photographs to generate a digital Elvis. Harriet Sherwood, *Return of the King: Elvis Hologram Show to Premiere in London*, THE GUARDIAN (Jan. 4, 2024), <https://www.theguardian.com/music/2024/jan/04/elvis-evolution-hologram-show-london-premiere> [https://perma.cc/BX9Y-G6R7].

⁷⁷ Leslie Katz, *AI Brings Elvis Presley Back to Life for ‘Jaw Dropping’ Immersive Concert*, FORBES (Jan. 4, 2024), <https://www.forbes.com/sites/lesliekatz/2024/01/04/ai-brings-elvis-back-to-stage-for-jaw-dropping-immersive-concert/> [https://perma.cc/7UKM-Y47S].

⁷⁸ *An Evening with Whitney Houston*, HARRAH’S LAS VEGAS, <https://www.caesars.com/harrahs-las-vegas/shows/an-evening-with-whitney-the-whitney-houston-hologram-concert> [https://perma.cc/SA3B-QESD].

⁷⁹ *Whitney Houston Hologram to Embark on World Tour*, GMA (Sept. 17, 2019), <https://www.goodmorningamerica.com/culture/story/whitney-houston-hologram-embark-world-tour-65651063> [https://perma.cc/H49M-VZYE].

⁸⁰ Olive Pometsy, *The Strange Truth Behind the Amy Winehouse Hologram Tour*, GQ (Feb. 21, 2019), <https://www.gq-magazine.co.uk/article/amy-winehouse-hologram-tour> [https://perma.cc/V2VS-JAFJ].

⁸¹ *Id.*

⁸² See Paul Muratore, *Ad People, Don’t Get Stuffed by Dead Celebrities*, ADAGE (Apr. 2, 2014), <https://adage.com/article/cmo-strategy/marketers-beware-dead-celebs-ads/292427> [https://perma.cc/X95Q-L99V] (noting that the commercial use of deceased celebrities was a \$3 billion business as of 2014).

⁸³ Kara Kovalchik, *8 Dead Celebrities Brought Back to Life to Sell Stuff*, MENTAL FLOSS (Apr. 29, 2018), <https://www.mentalfloss.com/article/20659/dead-celebrities-brought-back-sell-stuff> [https://perma.cc/R9XJ-WSTG].

⁸⁴ Tom Phillips, *AI Resurrection of Brazilian Singer for Car Ad Sparks Joy and Ethical Worries*, THE GUARDIAN (July 14, 2023), <https://www.theguardian.com/world/2023/jul/14/brazil-singer-elis>

personal choices or send an offensive tweet that may lead to costly public relations issues for product brands. Or are they? Many deceased celebrities maintain active social media presences through their estate after death.⁸⁵ When Black Lives Matter (BLM) protests were occurring throughout the United States, the Instagram accounts of Amy Winehouse, Elvis Presley, Marilyn Monroe, and John Lennon all participated in #BlackOutTuesday, posting a black square in support of BLM.⁸⁶ During the pandemic, deceased celebrities Tupac Shakur, Bob Marley, Bob Ross, and Jimi Hendrix promoted branded facemasks on their Instagram pages.⁸⁷ Questions remain about the ethics and legality of using the deceased commercially, even when permission is granted by the estate or those who own postmortem rights.⁸⁸

II. CURRENT LEGAL PROTECTIONS

The issue of unauthorized digital resurrection may be a problem of degree rather than kind, and therefore effectively addressed through the framework of existing law. It is consequently important to understand the scope of protections currently in place. Several areas of law are vying against one another to best regulate digital recreation and resurrection of the deceased, with each framework offering distinct legal entitlements. The availability of legal entitlements is vastly different for the dead than it is for the living. This Part considers the current legal protections that govern this area. Section A explores the framework of privacy law in the context of the digital resurrection of the dead.⁸⁹ Section B examines the applicability of property law to digital resurrection.⁹⁰ Section C discusses how digital recreation and resurrection intersect with intellectual property law.⁹¹ Part D underscores the potential impact of new criminal legislation on these same circumstances.⁹² Part E addresses how the

regina-artificial-intelligence-volkswagen [https://perma.cc/75EK-GEK6]. Music producer João Marcello Boscoli posited, “Why did this . . . campaign move people? . . . Because it put them face-to-face with Elis. And almost anyone who listens to Elis Regina finds themselves moved—even when it’s through an AI mask . . . This is the power of great music: emotions, feelings and ideas.” *Id.*

⁸⁵ See Andrew Gilden, *Endorsing After Death*, 63 WM. & MARY L. REV. 1531, 1531 (2022) (discussing instances in which deceased celebrities promoted products on their social media).

⁸⁶ *Id.* at 1534.

⁸⁷ *Id.*

⁸⁸ See Sarah Vizard, *The Pros and Cons of Using Dead Celebrities in Marketing Campaigns*, MKTG. WEEK (Jan. 6, 2015), <https://www.marketingweek.com/the-pros-and-cons-of-using-dead-celebrities-in-marketing-campaigns/> [https://perma.cc/D73G-WKGJ] (telling the story of when Bruce Lee appeared in a commercial for Johnnie Walker with the permission of his daughter, even though he prided himself on remaining fit and refused to drink alcohol).

⁸⁹ See *infra* notes 94–133 and accompanying text.

⁹⁰ See *infra* notes 134–142 and accompanying text.

⁹¹ See *infra* notes 143–159 and accompanying text.

⁹² See *infra* notes 160–172 and accompanying text.

Revised Uniform Fiduciary Access to Digital Rights Act (RUFADAA) can be applicable in the digital resurrection context.⁹³

A. Privacy Law

The dead do not have a right to privacy. It is generally accepted that traditional privacy rights, designed to protect dignity, reputational, and emotional rights of the living, expire at the moment of death.⁹⁴ Cases and commentators offer extensive support of this rule.⁹⁵ The *Restatement (Second) of Torts* provides that there is no action for invasion of the privacy of one already deceased in the absence of statute.⁹⁶ The deceased also do not qualify for constitutional privacy protections that may be based upon the Fourth or Fourteenth Amendments, premised on a rationale that they may no longer be harmed by invasion of privacy or defamation.⁹⁷ There are no federal laws granting postmortem privacy rights to the deceased or their representatives. Further, to the extent that there are state-level privacy protections for the deceased, they seem to pertain to property.⁹⁸

Although privacy rights generally end at death for the deceased, in some states, speaking ill of the dead is criminalized through state-level libel protections.⁹⁹ It is possible, though not likely, to criminally prosecute libeling or defaming the deceased. Idaho and Nevada have statutes criminalizing libel or defamation of the deceased, and Oklahoma punishes libel against one's dead

⁹³ See *infra* notes 173–195 and accompanying text.

⁹⁴ J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY & PRIVACY* § 9:1, at 427 (2d ed. 2024).

⁹⁵ See *id.* § 9:1, at 428–29 & nn.1–2 (listing associated cases and authorities supporting the concept that the dead do not have a right to privacy).

⁹⁶ RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (AM. L. INST. 1965).

⁹⁷ See, e.g., *Keller v. Finks*, No. 13-03117, 2014 WL 1283211, at *6 (C.D. Ill. Mar. 31, 2014) (noting that the dead have no rights); *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986) (“[A] person’s constitutional rights terminate at death.”). See generally DON HERZOG, *DEFAMING THE DEAD* (2017) (proposing to extend civil liability for defamation to disparaging statements about dead people); Reid Kress Weisbord, Essay, *Postmortem Defamation in a Society Without Truth for the Living*, 71 RUTGERS U. L. REV. 667, 667 (2019) (“[W]hile society should . . . strive to recognize a moral obligation to protect decedents against reputational harm, [it] cannot do so without first restoring [its] commitments to truth-telling and respecting the solemnity of death.”).

⁹⁸ The estate of a deceased celebrity cannot file a suit and state a claim for invasion of privacy, but private papers and writings may be protected. See generally Bartholomew, *supra* note 10 (discussing how the right to be left alone and maintain privacy as a deceased person is treated differently throughout the United States).

⁹⁹ See Yvette Joy Liebesman, *The Rule Against Perpetual Celebrity*, 74 AM. U. L. REV. 419, 419–20 (2024) (arguing that the optimal time frame for postmortem rights of publicity parallels the common law rule against perpetuities period).

relative.¹⁰⁰ A number of other states have criminal libel statutes that may be extended to protect the deceased, with the goal of preventing the “tarnishing or ‘blackening’ of a dead person’s character.”¹⁰¹ These prosecutions have declined, however, out of concern that they tread upon the right to constitutionally free expression.¹⁰²

The right of publicity is protected, in some form, in most states through common law or statute (or both). This right creates a private right of action protecting against unauthorized commercial use of someone’s name, image, or likeness.¹⁰³ Some states may extend the right to include “distinctive appearance, gestures, or mannerisms.”¹⁰⁴ Further, some states will broadly include most commercial uses while others limit this right to advertising.¹⁰⁵ Roughly twenty-five states protect the right of publicity posthumously,¹⁰⁶ and this protection usually extends for a fixed term following death.¹⁰⁷ This fixed period ranges from twenty years in Virginia, to one hundred years in Oklahoma, and indefinitely in Tennessee.¹⁰⁸

The right of publicity is a fairly new¹⁰⁹ area of privacy protection that was intended to stop claims of false endorsement but has evolved to be broader.¹¹⁰

¹⁰⁰ IDAHO CODE § 18-4801 (2025); NEV. REV. STAT. § 200.510 (2025); OKLA. STAT. tit. 21, § 771 (2024).

¹⁰¹ William H. Binder, Note, *Publicity Rights and Defamation of the Deceased: Resurrection or R.I.P.?*, 12 DEPAUL-LCA J. ART & ENT. L. 297, 323 (2002).

¹⁰² See *id.* (discussing *Garrison v. Louisiana*, 375 U.S. 900 (1964)).

¹⁰³ CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB11052, ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY 1 (2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB11052> [<https://perma.cc/VX4B-U47S>].

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ Rebecca J. Roberts, Note, *You’re Only Mostly Dead: Protecting Your Digital Ghost from Unauthorized Resurrection*, 75 FED. COMM’NS L.J. 274, 283 (2023).

¹⁰⁷ Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, LANDSLIDE MAG., Sept./Oct. 2020, at 20, 22. See generally Sharon L. Klein & Jenna M. Cohn, *The Post-Mortem Right of Publicity: Defining It, Valuing It, and Planning for It*, 48 ACTEC L.J. 63, 72 (2022) (presenting a comparative chart of postmortem publicity rights in the United States by state).

¹⁰⁸ ZIRPOLI, *supra* note 103, at 2.

¹⁰⁹ Ray D. Madoff, Opinion, *The New Grave Robbers*, N.Y. TIMES (Mar. 27, 2011), https://www.nytimes.com/2011/03/28/opinion/28madoff.html?_r=1&ref=opinion&pagewanted=all [<https://perma.cc/CG7Z-KQWE>] (“While we might think of people like the Rev. Dr. Martin Luther King Jr., George Patton, Rosa Parks, Frank Lloyd Wright and Babe Ruth as part of our cultural heritage, available for all to use, the identities of each of them, and thousands more, are claimed as private property, usable only with permission and for a fee. This phenomenon is fairly recent—and it’s getting out of control.”).

¹¹⁰ Celebrity Katherine Heigl sued for \$6 million after drug store Duane Reade tweeted a paparazzi photo of her leaving their store. The lawsuit was voluntarily dismissed after a settlement was reached. Eriq Gardner, *Katherine Heigl Ends Lawsuit Over Duane Reade Tweet*, HOLLYWOOD REP. (Aug. 27, 2014), <https://www.hollywoodreporter.com/business/business-news/katherine-heigl-ends-lawsuit-duane-728552/> [<https://perma.cc/6GZL-EY6Q>]. In 2021, photographer Jonathan Mannion was sued by Jay-Z for using photographs that he took of Jay-Z on products for sale, even though Mannion

It is a right that is usually associated with celebrities, but it is a right that belongs to everyone, though celebrities are more likely to invoke it¹¹¹ because of commercial misappropriation.¹¹² Jurisdictions do not agree as to whether publicity rights are devisable,¹¹³ and the law is murky as to whether such rights are properly treated as property or personal.¹¹⁴

Among the many objections to a postmortem right of publicity is that there is no legal mechanism by which someone can prevent exploitation of identity, in part because courts are loath to enforce destruction of valuable property interests stipulated by will.¹¹⁵ By this reasoning, if Rosa Parks's will contained a request that her identity not be used in any commercial setting, a court would not enforce this request because it destroys the valuable right of publicity.¹¹⁶ Though some courts hesitate to enforce will provisions that require destruction of property, these provisions are regularly enforced in the context of pet euthanasia or burial with valuable items.¹¹⁷ Celebrities have and continue to limit posthumous commercial use of their image, with Adam

claimed a First Amendment right to sell his copyrighted pictures of Jay-Z. Andy Bustard, *Jay-Z Settles Lawsuit with "Reasonable Doubt" Photographer*, HIPHOPDX (Jan. 26, 2023), <https://hiphopdx.com/news/jay-z-settles-lawsuit-reasonable-doubt-photographer-jonathan-mannion> [<https://perma.cc/P4ML-YDHR>]. In 2021, a three-year-old took a selfie with a horse and won a trip in a photography contest. Mike Masnick, *Publicity Rights for a Photobombing Horse? Owner Demands Cut of Photo Prize*, TECHDIRT (Feb. 3, 2016), <https://www.techdirt.com/2016/02/03/publicity-rights-photobombing-horse-owner-demands-cut-photo-prize/> [<https://perma.cc/B4AX-4TQC>]. The owner of the horse demanded part of the prize because their horse was used without permission. *Id.*

¹¹¹ Cristina Fernandez, *The Right of Publicity on the Internet*, 8 MARQ. SPORTS L. REV. 289, 291 (1998).

¹¹² The estates of Albert Einstein and Rosa Parks have been particularly aggressive in enforcing postmortem publicity rights. See Madoff, *supra* note 109 (noting that a wild wig and a bushy mustache cannot be packaged and sold at Halloween as an Albert Einstein costume according to Hebrew University of Jerusalem, which owns Einstein's postmortem right of publicity).

¹¹³ See David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 561–62 (2014) (noting the different approaches taken by various circuit courts in this area). Professor Peter Friedman has remarked that "People as varied as Einstein, Elvis Presley, and Marilyn Monroe become part of our culture's language To remove the identities of dead people from this language in the absence of payment for their use would substantially damage our culture." Mike Masnick, *Publicity Rights After Death Are Severely Limiting Culture*, TECHDIRT (Mar. 31, 2011), <https://www.techdirt.com/2011/03/31/publicity-rights-after-death-are-severely-limiting-culture/> [<https://perma.cc/J8MA-HMYU>].

¹¹⁴ Binder, *supra* note 101, at 329.

¹¹⁵ It is "a basic tenet of wills law that a person cannot order the destruction of a valuable property interest." Madoff, *supra* note 109. The reality is that courts can and do comply with destruction requests, even though the destruction request may have a negative impact on the living.

¹¹⁶ *Id.*

¹¹⁷ See Kathy Y. Emerson & Kevin Bennardo, *Unleashing Pets from Dead-Hand Control*, 22 NEV. L.J. 349, 350 (2021) (noting the legal uncertainty of enforcing some animal euthanasia provisions); Orla Pentelow, *What Will the Queen Wear to Be Buried—and What Jewels Will She Be Buried With?*, YAHOO!LIFE (Sept. 19, 2022), <https://uk.style.yahoo.com/what-queen-wear-buried-jewellery-clothing-funeral-141154482.html> [<https://perma.cc/P5Z6-D8GZ>] (noting that British royals are traditionally buried with jewelry and mementos).

Yauch, the co-founder of the Beastie Boys, directing that his music never be used for commercial purposes and author J.D. Salinger restraining heirs from licensing film rights for *A Catcher in the Rye*.¹¹⁸

A recent example of how estate planning can be used to protect a deceased celebrity from their image being used commercially involves Robin Williams. Williams included a provision in his will that everyone was barred from using his name, taped performances, or voice recordings for twenty-five years¹¹⁹ after his death.¹²⁰ Zelda Williams, his daughter, went so far as to tweet that likeness reproduction clauses would become standard in the estate plans of celebrities, though Williams's estate plan was far more complicated than one clause in a will.¹²¹ Williams created a trust, naming himself as trustee and his business manager as successor trustee.¹²² The trust then distributed the right of publicity to a California nonprofit corporation called The Windfall Foundation, subject to the twenty-five year restriction on use.¹²³ The potential success of this approach requires that the celebrity (1) live in a state that has a postmortem right of publicity, (2) use a nonprofit corporation to avoid potential perpetuity issues, and (3) include language in their will or trust to transfer the restricted postmortem publicity rights to the nonprofit corporation.¹²⁴

In the European Union (EU), human dignity is recognized as a fundamental right, and folded into this fundamental concept of dignity is a right to privacy—as both an independent right and a social value.¹²⁵ The right to be forgotten, or the right to erasure, is codified in the General Data Protection Regulation (GDPR).¹²⁶ Regulators in Europe take an approach that is in sharp contrast to America, drawing from principles such as *le droit à l'oubli* or “the right of oblivion” in France: rehabilitation of a criminal means time served and a right

¹¹⁸ Thomas Simmons, *A Will for Willa Cather*, 83 MO. L. REV. 641, 650 (2018).

¹¹⁹ It is possible that this twenty-five-year restriction may have been used to reduce the value of the postmortem right of publicity that must be included in Williams's estate for estate tax purposes. Mitchell M. Gans, *Publicity Rights and the Estate Tax*, 42 COLUM. J.L. & ARTS 399, 401–02 (2019). The issue of valuation is still open to debate, though there is dicta in the Ninth Circuit that seems to support a reduction in value. *Id.*

¹²⁰ Ben Laney, *Bringing the Dead Back to Life: Preparing the Estate for A Post-Mortem Acting Role*, 12 EST. PLAN. & CMTY. PROP. L.J. 349, 373 (2020).

¹²¹ *Id.* at 375.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 376.

¹²⁵ *Data Protection*, EUR. DATA PROT. SUPERVISOR, https://www.edps.europa.eu/data-protection/data-protection_en [<https://perma.cc/5LYZ-8ZKR>].

¹²⁶ See Council Regulation 2016/679, 2016 O.J. (L 119) art. 17, at 43–44; Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012), <https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/> [<https://perma.cc/59C5-MSYM>] (“The right to be forgotten addresses an urgent problem in the digital age: it is very hard to escape your past on the Internet now that every photo, status update, and tweet lives forever in the cloud.”).

to object to the publication of information about the crime itself.¹²⁷ Interestingly, though, the right to be forgotten found in the GDPR does not, by its own terms, create postmortem privacy protections for the deceased in the EU.¹²⁸ Some EU members have nonetheless passed protections. France adopted the Digital Republic Act in 2016, and the French data protection authority issued guidance in 2020 on the removal of personal data on deceased-user accounts.¹²⁹ Italy also recognizes the right of heirs to access and potentially erase the personal data of the deceased.¹³⁰

It is important in the context of the law of digital resurrection to note, however, that the EU's right to be forgotten would very likely be deemed unconstitutional in the United States because of the First Amendment.¹³¹ Regulating the storage or sale of privately held data differs greatly from prohibiting private companies from communicating public information, and the latter would likely be treated as violating constitutional protections.¹³² State rights of publicity also sometimes strain against the First Amendment as a general matter, with courts lacking "a principled and consistent method of resolving . . . conflict[s]."¹³³

B. Property Law

The term "digital asset" is often used interchangeably with "virtual asset," though virtual assets may be those assets accumulated and held in a virtual, online world.¹³⁴ A digital asset is any asset existing only in digital form with either personal or economic value.¹³⁵ As a category, these assets are vast and encompass a varying array of property. An important step forward regarding

¹²⁷ Rosen, *supra* note 126, at 88.

¹²⁸ See David Edros, *Dead Ringers? Legal Persons and the Deceased in European Data Protection Law*, 40 COMPUT. L. & SEC. REV., Apr. 2021, at 1, 1 (tracing the legal protections that safeguard data protection for the deceased in Europe).

¹²⁹ France: CNIL Issues Guidance on Erasure of Data of Deceased Persons, DATA GUIDANCE (Oct. 28, 2020), <https://www.dataguidance.com/news/france-cnil-issues-guidance-erasure-data-deceased> [<https://perma.cc/5RKT-MUB7>].

¹³⁰ Purvi Morwal, *What Happens to Your Personal Data When You Die?*, PRIV. DESK (Mar. 11, 2022), <https://privacydesk.in/publications/articles/what-happens-to-your-personal-data-when-you-die/> [<https://perma.cc/B2XS-EWZ9>].

¹³¹ Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 163 (2020); see also Amy Gajda, *Privacy, Press, and the Right to be Forgotten in the United States*, 93 WASH. L. REV. 201, 239 (2018) (arguing that there seems to be an increasing, implicit acceptance of right to be forgotten-like protections in the United States).

¹³² Post & Rothman, *supra* note 131, at 163.

¹³³ Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 47 (1994); see also Post & Rothman, *supra* note 131, at 163 (discussing the constitutional issues surrounding the right of publicity).

¹³⁴ EDINA HARBINJA, DIGITAL DEATH, DIGITAL ASSETS, AND POST-MORTEM PRIVACY: THEORY, TECHNOLOGY AND THE LAW 5 (2022).

¹³⁵ *Id.* at 9.

digital assets and the law of digital resurrection is acknowledging that all digital assets are not the same.

There have been many attempts to categorize these assets, though the categorization can be difficult simply because some assets cross multiple categories. There is intellectual property (copyrights, patents), financial assets (online bill pay accounts and cryptocurrency), digital items (iTunes accounts, e-book accounts, website domains), social media,¹³⁶ electronic communications (emails, text messages, voicemails), personal digital files (photos, videos), and personal data (name, address, date of birth, religious information). Some scholars group categories slightly differently, with personal assets including those usually stored on a smartphone or computer, including photographs or videos.¹³⁷ Some digital assets have inherent value, a legally defined status of property, or differing degrees of alienability.

For purposes of this Article and the law of digital resurrection, perhaps the most important segment of data would be electronic communications (emails, text messages, voicemails), personal digital files (photos, videos), and personal data (name, address, date of birth, religious information). What protections are presently in place to protect this type of data? Neither electronic communications nor personal data is considered “property” in the United States for the living.¹³⁸ Personal data may be subject to protection through the tort system for the living (tort-privacy actions).¹³⁹ Email may have limited protection through the copyright system, as discussed below.¹⁴⁰ But data is, for the most part, not considered to be property. The benefits and risks of a property law paradigm for personal data is nonetheless hotly debated,¹⁴¹ with presidential candidates even supporting a “data as property” regime.¹⁴²

¹³⁶ See generally Andrew Gilden, *The Social Afterlife*, 33 HARV. J.L. & TECH. 329 (2020) (explaining the treatment of social media after death).

¹³⁷ Naomi Cahn, *Postmortem Life On-Line*, 25 PROB. & PROP. L.J. 36, 36–37 (2011).

¹³⁸ See Edina Harbinja, *Legal Nature of Emails: A Comparative Perspective*, 14 DUKE L. & TECH. REV. 227, 237 (2016) (noting that property rights do not protect personal data).

¹³⁹ See generally *id.* (providing an overview of the currently available methods of protecting personal data).

¹⁴⁰ See generally *id.* (elaborating on data protections afforded to emails).

¹⁴¹ See generally *Exploring Implications for Data Privacy Rights and Data Valuation: Hearing on Data Ownership Before the S. Comm. on Banking, Housing, and Urban Affairs*, 116th Cong. 7–8 (2019) (statement of Will Rinehart, Director of Technology and Innovation Policy, American Action Forum) (summarizing debate surrounding the propertization of personal data); James Grimmelmann & Christina Mulligan, *Data Property*, 72 AM. U. L. REV. 829 (2023) (“Under our theory, a person has possession of data when they control at least one copy of the data. A person who interferes with that possession can be liable, just as they can be liable for interference with possession of real property and tangible property.”); Jeffrey Ritter & Anna Mayer, *Regulating Data as Property: A New Construct for Moving Forward*, 16 DUKE L. & TECH. REV. 220 (2018) (“We propose a property rules construct that clearly defines a right to own digital information arises upon creation”); Elizabeth Renieris & Dazza Greenwood, *Do We Really Want to “Sell” Ourselves? The Risks of a Property Law Paradigm*

C. Intellectual Property Law

Trademark and copyright law may offer protection for some deceased people. A foundational principle of trademark law is that distinctive words have an impact on competition, and protecting those words generally inures to the benefit of consumers.¹⁴³ For example, a name or surname may be trademarked, but a person's identity may not be.¹⁴⁴ Some celebrities and public figures are able to register their names or likenesses as a trademark.¹⁴⁵ The U.S. Trademark and Patent Office has been inundated over the past decade with trademark registration applications¹⁴⁶ from celebrities for their names, their children's names, catchphrases, and even Instagram handles.¹⁴⁷ To obtain a

for *Personal Data Ownership*, MEDIUM (Sept. 23, 2018), <https://medium.com/@hackylawyer/do-we-really-want-to-sell-ourselves-the-risks-of-a-property-law-paradigm-for-data-ownership-b217e42edffa> [<https://perma.cc/D654-82ZP>] (arguing that property law rules alone are insufficient to protect personal data); Lothar Determann, *No One Owns Data*, 70 HASTINGS L.J. 1 (2019) (suggesting that proprietization is not necessary to protect personal data); Avi Gesser & Michelle Adler, *Should Protection of Personal Data Be Regulated Using a Property Model, Rather Than a Privacy Model? Probably Not*, COMPLIANCE & ENF'T (Oct. 15, 2019), https://wp.nyu.edu/compliance_enforcement/2019/10/15/should-protection-of-personal-data-be-regulated-using-a-property-model-rather-than-a-privacy-model-probably-not/ [<https://perma.cc/Z5TH-YVAR>] (exploring arguments on both sides of the data proprietization debate); Sam Curry & Joseph Moreno, *INSIGHT: Laws Protect My Physical Property, So Why Not My Electronic Data?*, BLOOMBERG L. (Nov. 13, 2019), <https://news.bloomberglaw.com/privacy-and-data-security/insight-laws-protect-my-physical-property-so-why-not-my-electronic-data> [<https://perma.cc/ADC8-KBUK>] (discussing the ownership of personal data in the modern world); Rob Frieden, *An Introduction to Data Property Ownership Rights and Data Protection Responsibilities* (underscoring the debate surrounding data property ownership rights), in RESEARCH ON COMPREHENSIVE NETWORK GOVERNANCE IN THE ERA OF DIGITAL ECONOMY (2019).

¹⁴² See *Data as a Property Right*, YANG 2020, <https://2020.yang2020.com/policies/data-property-right/> [<https://perma.cc/23SA-9PZJ>] (outlining 2020 presidential candidate Andrew Yang's views on data proprietization).

¹⁴³ See Christopher Buccafusco, Jonathan S. Masur & Mark P. McKenna, *Competition and Congestion in Trademark Law*, 102 TEX. L. REV. 437, 448 (2024) (observing that trademark protection purports to protect fair competition).

¹⁴⁴ Jennifer Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1278 (2022) ("[State] trademark and unfair competition laws extend protection against unauthorized uses of a person's identity, most often unauthorized uses of a person's name or likeness. Trademark law primarily protects words, symbols, and designs that indicate the source of products or services.").

¹⁴⁵ *Right of Publicity*, INT'L TRADEMARK ASS'N, <https://www.inta.org/topics/right-of-publicity/> [<https://perma.cc/W56R-Z84H>].

¹⁴⁶ Rothman, *supra* note 144, at 1272 ("Both trademark and unfair competition laws and state right of publicity laws protect against unauthorized uses of a person's identity. Increasingly, however, these rights are working at odds with one another and can point in different directions with regard to who controls a person's name, likeness, and broader indicia of identity. This creates what I call an 'identity thicket' of overlapping and conflicting rights over a person's identity.").

¹⁴⁷ Mandi Phillips, *"What's in a Name? Travis Kelce Seeks Federal Trademark Registration of His Name,"* KLEMCHUK: IDEATE BLOG (Jan. 16, 2024), <https://www.klemchuk.com/ideate/trademark-registrations-and-celebrities> [<https://perma.cc/M92C-N3SN>] ("Many celebrities have successfully secured federal trademark registrations, including former President Donald Trump, former First Lady

trademark in the United States, the name or image must be unique and used in commerce, both of which are often interpreted strictly.¹⁴⁸ Utilizing artificial intelligence to digitally resurrect a deceased celebrity may give rise to a trademark infringement claim, provided there was some type of loss of commercial value that could be established, such as the use of the resurrection to advertise a product. There may be an additional claim under the Lanham Act, which is a federal statute that prevents consumers from being misled into believing that a product is endorsed by a celebrity.¹⁴⁹ With that said, trademark law offers little protection against digital resurrection for the average person.

Copyright law may offer some limited posthumous privacy protection.¹⁵⁰ Copyright attaches to original works, expressed in a fixed medium,¹⁵¹ and the copyright holder has exclusive right to reproduce or distribute copyrighted work.¹⁵² A modern example of the way in which copyright may protect the interests of the deceased is Joyce Maynard, the teen lover of the hermetic author J.D. Salinger, who was permitted to sell the love letters he wrote to her for \$156,500, but never publish the contents.¹⁵³

Relying on copyright law to protect data is problematic for two reasons. First, a great deal of personal data that could be used to digitally resurrect the deceased (such as emails or text messages) is not protected by copyright law. Emails are considered intangible personal property, while text messages are not.¹⁵⁴ There is no question that both emails and text messages can demonstrate the “modicum of originality” needed to qualify for copyright protec-

Melania Trump, Beyonce and Jay-Z, Taylor Swift, Rihanna, Victoria Beckham, Justin Bieber, Bruce Springsteen, Katy Perry, and Kylie Jenner. Recently, NFL tight end Travis Kelce has joined these ranks . . .”). Travis Kelce is seeking federal trademark registration for his name, “Travis Kelce,” his jersey number (“Flight 87”), his Instagram handle (“KillaTrav”), and his catchphrase (“Alright Nah”). *Id.*

¹⁴⁸ See *Application Filing Basis*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/trade-marks/basics/application-filing-basis> [<https://perma.cc/7ZU2-WKLV>] (outlining the various legal bases for filing a trademark and the requirements for each).

¹⁴⁹ See Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1307–08 (2011) (noting that the Lanham Act includes provisions to prevent efforts that would cause confusion about the sponsorship of goods).

¹⁵⁰ See generally Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219 (providing an overview of copyright law).

¹⁵¹ Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 985 (2016).

¹⁵² Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC’Y U.S.A. 1, 2–3 & n.8 (1998).

¹⁵³ Dinitia Smith, *J.D. Salinger’s Love Letters Sold to Entrepreneur Who Says He Will Return Them*, N.Y. TIMES (June 23, 1999), <https://www.nytimes.com/1999/06/23/nyregion/salinger-letters-are-sold-and-may-return-to-sender.html?searchResultPosition=1> [<https://perma.cc/7XP5-YE24>].

¹⁵⁴ Spence M. Howden, Note, *Text Messages Are Property: Why You Don’t Own Your Text Messages, but It’d Be a Lot Cooler If You Did*, 76 WASH. & LEE L. REV. 1073, 1075–80 (2019). Text messages are simply viewed as the product of a contract for services with a cell phone provider. *Id.*

tion.¹⁵⁵ The interest of the author may be modified by the Terms of Service or Terms and Conditions (TOS or TOC, respectively) that have been signed with whatever technology platform is hosting the emails or texts.¹⁵⁶ And while copyright protected works can occasionally be used without the owner's permission due to the Fair Use Doctrine, using copyrighted works to train AI systems is uncharted territory.¹⁵⁷ Using text messages to train algorithmic chatbots may be viewed as derivative or educational, and therefore fair use.¹⁵⁸ Further, copyright law arguably does not give rise to the "right" kinds of rights needed to protect against digital resurrection. Copyright law gives no right to deletion of data, nor does it provide for exclusive use of data.¹⁵⁹

D. Criminal Law

There are no federal laws in the United States that criminalize the production or sharing of deepfake imagery or videos, but there is a growing understanding of the need for such legislation.¹⁶⁰ In January 2024, the No Artificial Intelligence Fake Replicas And Unauthorized Duplications (No AI FRAUD) Act was introduced in Congress.¹⁶¹ The proposed legislation would prohibit anyone from publishing, performing, distributing, or transmitting an unauthorized digital depiction, replica, or clone.¹⁶² The legislation is designed

¹⁵⁵ Cathay Y.N. Smith, *Weaponizing Copyright*, 35 HARV. J.L. & TECH. 193, 227–28 (2021).

¹⁵⁶ Matt Knight, *The Legal Conundrum of Publishing Text Messages*, SIDEBAR SATURDAYS (July 8, 2017), <https://www.sidebarsaturdays.com/2017/07/08/httpwp-mep7vddb-tq-2/> [<https://perma.cc/XBT4-9EV5>] (discussing how Terms of Service can modify the rights of a copyright holder).

¹⁵⁷ For example, in response to class actions filed by authors claiming that their copyrights were violated when protected works were used to train generative AI systems, lawsuit targets insist that use of copyrighted materials amounts to fair use. Blake Brittain, *Lawsuit Says OpenAI Violated US Authors' Copyrights to Train AI Chatbot*, REUTERS (June 29, 2023), <https://www.reuters.com/legal/lawsuit-says-openai-violated-us-authors-copyrights-train-ai-chatbot-2023-06-29/> [<https://perma.cc/Z5GS-MBGJ>].

¹⁵⁸ Roberts, *supra* note 106, at 285.

¹⁵⁹ Grimmelmann & Mulligan, *supra* note 141, at 833, 847.

¹⁶⁰ See Rebecca Delfino, *Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act*, 88 FORDHAM L. REV. 887, 887 (2019); Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 HASTINGS L.J. 293, 293 (2023) (calling for an amendment to the Federal Rules of Evidence); Agnieszka McPeak, *The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood*, 23 VAND. J. ENT. & TECH. L. 433, 433 (2021) (looking at the unique threat presented by deepfakes and the need for the Federal Rules of Evidence to adapt with authentication rules); Jack Langa, Note, *Deepfakes, Real Consequences: Crafting Legislation to Combat Threats Posed by Deepfakes*, 101 B.U. L. REV. 761, 761 (2021) (offering a legislative solution to the problem of deepfakes).

¹⁶¹ See Press Release, Maria Elvira Salazar, House of Representatives, Salazar Introduces the No AI Fraud Act (Jan. 10, 2024), <https://salazar.house.gov/media/press-releases/salazar-introduces-no-ai-fraud-act> [<https://perma.cc/YAL7-7P9Z>].

¹⁶² Katherine Klosek, *No Frauds, No Fakes . . . No Fair Use?*, ASS'N OF RSCH. LIBRS.: ARL VIEWS BLOG, <https://www.arl.org/blog/nofraudsnofakes/> [<https://perma.cc/6FYR-ZSS8>] (Apr. 19, 2024).

to prevent unauthorized cloning services.¹⁶³ It has been described as a bill¹⁶⁴ that is both under and overinclusive in design.¹⁶⁵ There is also a question as to whether or not the legislation will survive legal challenge if passed.¹⁶⁶

In the absence of federal law, states have led the way in criminalizing deepfake videos online, though the focus seems to be criminalizing deepfake pornography.¹⁶⁷ The need to regulate is gaining traction in state legislatures, with more than 407 AI-related bills pending across forty states in February 2024, a six-fold increase from 2023.¹⁶⁸ Missouri's Taylor Swift Act was proposed in February 2024 in response to AI-generated deepfake pornography that went viral in January 2024,¹⁶⁹ and similar bills are also advancing in Illinois, New Jersey, and Ohio.¹⁷⁰ Indiana, Texas, Virginia, and Hawaii have laws that prohibit the sharing of deepfake pornography, with penalties that include imprisonment.¹⁷¹ Florida, South Dakota, and Washington have updated their statutes to include deepfakes in their definition of pornography.¹⁷²

E. State or Uniform Law

The law governing digital assets is a complex web, with potentially overlapping or conflicting rules in state law, federal law, and Terms of Service or Terms and Conditions. Almost all states have enacted some version of RUFA-DAA, developed by the National Conference of Commissioners on Uniform

¹⁶³ Kedhar Sankaraman, *The No AI FRAUD Act: Good Intentions, Flawed Execution*, ACT: THE APP ASS'N (Mar. 6, 2024), <https://actonline.org/2024/03/06/the-no-ai-fraud-act-good-intentions-flawed-execution/> [<https://perma.cc/DR22-CD7K>].

¹⁶⁴ See Elizabeth Nolan Brown, *AI Fraud Act Could Outlaw Parodies, Political Cartoons, and More*, REASON (Jan. 17, 2024), <https://reason.com/2024/01/17/ai-fraud-act-could-outlaw-parodies-political-cartoons-and-more/> [<https://perma.cc/A4DB-EZDX>] (“[The No AI FRAUD Act is] broad enough to include sketch-comedy skits, political cartoons, or those Dark Brandon memes . . . And it doesn’t matter if the intent is not to trick anyone.”).

¹⁶⁵ See Sankaraman, *supra* note 163 (noting that the bill is overly broad and would benefit from more narrow tailoring).

¹⁶⁶ See Klosek, *supra* note 162 (discussing the lack of proper First Amendment considerations in the No AI FRAUD Act).

¹⁶⁷ See Madyson Fitzgerald, *States Race to Restrict Deepfake Porn as It Becomes Easier to Create*, STATELINE (Apr. 10, 2024), <https://stateline.org/2024/04/10/states-race-to-restrict-deepfake-porn-as-it-becomes-easier-to-create/> [<https://perma.cc/6W69-647D>]. Ninety-eight percent of these deepfake videos on the Internet are pornography. *Id.*

¹⁶⁸ See Ryan Heath, *Exclusive: States Are Introducing 50 AI-related Bills Per Week*, AXIOS (Feb. 14, 2024), <https://www.axios.com/2024/02/14/ai-bills-state-legislatures-deepfakes-bias-discrimination> [<https://perma.cc/MD5B-H6T7>] (noting that the amount of active AI-related bills rose from 67 to 407 in the span of a year).

¹⁶⁹ See S.B. 1424, 102nd Gen. Assemb., Second Reg. Sess. (Mo. 2024).

¹⁷⁰ S.B. 976, 221st Leg., Reg. Sess. (N.J. 2024); S.B. 2741, 103d Gen. Assemb., Reg. Sess. (Ill. 2024); H.R. 401, 135th Gen. Assemb., Reg. Sess. (Ohio 2024).

¹⁷¹ Fitzgerald, *supra* note 167.

¹⁷² *Id.*

State Laws.¹⁷³ RUFADAA is designed to provide a legal framework by which a fiduciary may gain online account access and manage digital assets in the event of death or incapacitation.¹⁷⁴ It is the second attempt at a proposed digital assets act, reforming the Uniform Fiduciary Access to Digital Assets Act (UFADAA),¹⁷⁵ which was criticized as offering access to digital assets far too freely.¹⁷⁶ Unlike UFADAA, RUFADAA has been widely adopted by states.¹⁷⁷

RUFADAA has been structured to balance access with respecting the privacy rights of the decedent.¹⁷⁸ There is a three-tier system for access. First, the Custodian (such as a social media platform like Facebook) can create an online tool that allows the user to designate a fiduciary to access or manage the account in the event of their death.¹⁷⁹ The person named through the online tool has authority that supersedes anything else, including testamentary instruments or powers of attorney.¹⁸⁰ Second, if there is no online tool or it has not been used, the user may grant access via estate planning documents.¹⁸¹ Third, if the online tool or estate planning documents do not exist or fail to name someone, TOS/TOC govern.¹⁸² If the TOS/TOC do not provide an answer, RUFADAA provides a set of default rules.¹⁸³

¹⁷³ Only Louisiana has not adopted RUFADAA. PRAC. L. TRS. & ESTS., STATE LAWS REGARDING FIDUCIARY ACCESS TO DIGITAL ASSETS CHART (2025), Westlaw W-006-8402.

¹⁷⁴ See Elizabeth Sy, Comment, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught Up with Technology*, 32 TOURO L. REV. 647, 670 (2016) (describing how RUFADAA functions).

¹⁷⁵ UFADAA received so much opposition that NetChoice, a trade organization, drafted its own version of model legislation called the Privacy Expectation and Choices Act, or PEAC. Morgan M. Wiener, *Opposition to the Uniform Fiduciary Access to Digital Assets Act*, NAT'L L. REV. (July 21, 2015), <https://natlawreview.com/article/opposition-to-uniform-fiduciary-access-to-digital-assets-act> [<https://perma.cc/5NGN-H62X>].

¹⁷⁶ See Doug Luftman, *What Is RUFADAA—Everything You Need to Know*, TRUST & WILL, <https://trustandwill.com/learn/what-is-rufadaa> [<https://perma.cc/U46B-KZZA>] (noting that criticisms of UFADAA arose due to its broadness and that RUFADAA was altered to provide access only to specific content).

¹⁷⁷ Recent Case, *Ajemian v. Yahoo!, Inc. Massachusetts Supreme Judicial Court Holds that Personal Representatives May Provide Lawful Consent for Release of a Decedent's Emails*, 131 HARV. L. REV. 2081, 2081 n.5 (2018).

¹⁷⁸ See Michael J. Polk, *The Dadbot and the Advent of Digital Asset Planning*, LAW PRAC. TODAY (Dec. 13, 2019), <https://www.lawpracticetoday.org/article/dadbot-advent-digital-asset-planning/> [<https://perma.cc/YUP7-LZZE>] (noting that RUFADAA seeks to protect privacy rights rather than make estate administration easier).

¹⁷⁹ *Id.* (“Facebook uses an online tool to either memorialize or delete a user’s account, depending on the user’s direction. A Facebook user can name a legacy contact to control certain aspects of a user account, (writing a pinned post or changing the profile picture) but not others (requesting or removing friends). The legacy contact, if authorized, can also download the deceased user’s data.”).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ By way of example, RUFADAA only provides access to electronic communications (e.g., emails, text messages, digital chats) if authorized in writing by the user (now the decedent or incapacitated).

Most Americans die intestate, which highlights another practical problem with RUFADAA: big tech's default control.¹⁸⁴ In the absence of estate planning documents, TOS/TOC control. This gives #bigtech implicit governance over the digital afterlife in many default scenarios. This is problematic for several reasons. TOS/TOC are drafted by a company to inure to its own benefit. These terms are often amended and many users click the "agree to terms" box without ever reading or considering terms of use.¹⁸⁵ Researchers have shown that most people completely ignore TOS/TOC.¹⁸⁶ In one study, ninety-eight percent of users missed a provision requiring that the user's firstborn child serve as payment for digital services.¹⁸⁷ Also, it is not uncommon for TOS/TOC to expressly forbid password sharing.¹⁸⁸ There are various statutes that criminalize password sharing under federal law, which were clearly not structured with estate planning in mind.¹⁸⁹

In the absence of an online tool or estate planning instructions, how does #bigtech manage access to online data? Social media companies take one of three approaches with the accounts of the deceased: (1) platforms allow a deceased person's account to be deleted by authorized representatives; (2) platforms allow the account to remain open, and it is operated as though the deceased themselves continues to post; and (3) a limited number of platforms

tated). *See id.* Further, fiduciaries are given access to digital property such as currency, files, and web domains, but electronic communications such as emails and text messages are restricted unless explicit consent is granted by the user through a will, trust, or power of attorney. *See id.* (discussing how RUFADAA functions).

¹⁸⁴ *See How Many Americans Have a Will?*, GALLUP (June 23, 2021), <https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx> [<https://perma.cc/LC48-U6S2>] (finding that only 46% of Americans have a will).

¹⁸⁵ ED BAYLEY, THE CLICKS THAT BIND: WAYS USERS "AGREE" TO ONLINE TERMS OF SERVICE 3 (2009), <https://www.eff.org/files/eff-terms-of-service-whitepaper.pdf> [<https://perma.cc/R6VG-L3NG>]; *see also* Mike Masnick, *Supreme Court Chief Justice Admits He Doesn't Read Online EULAs or Other "Fine Print,"* TECHDIRT (Oct. 22, 2010), <http://www.techdirt.com/articles/20101021/02145811519/supreme-court-chief-justice-admits-he-doesn-t-read-online-eulas-or-other-fine-print.html> [<https://perma.cc/TJ3C-NUMB>].

¹⁸⁶ It is estimated that if someone were to read all of the privacy policies across all of their internet providers, it would take 200 to 250 working hours. Shankar Vedantam, *To Read All Those Web Privacy Policies, Just Take a Month Off Work*, NPR (Apr. 19, 2012), <http://www.npr.org/blogs/alltechconsidered/2012/04/19/150905465/to-read-all-those-web-privacy-policies-just-take-a-month-off-work> [<https://perma.cc/ZW5W-4EF3>].

¹⁸⁷ *See* Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Services Policies of Social Networking Services*, 23 INFO. COMM'C'N & SOC'Y 128, 128 (2020).

¹⁸⁸ Polk, *supra* note 178.

¹⁸⁹ *See* Matthew W. Costello, Note, *The "PEAC" of Digital Estate Legislation in the United States: Should States "Like" That?*, 129 SUFFOLK L. REV. 429, 436–37 (2016) (discussing how state statutes restrict access to emails).

allow the account to be set to memorial status,¹⁹⁰ which does not share any login information or allow content to be changed or modified.¹⁹¹ Managing these options is inconsistent. Facebook, arguably one of the largest cemeteries in the world with more than fifty million deceased users, as of June 2019, has adopted the memorial account approach,¹⁹² with other providers such as Instagram following its lead.¹⁹³

Finally, Section 15 of RUFADAA provides that a digital fiduciary may not use the assets to “impersonate the user.”¹⁹⁴ It has been suggested that RUFADAA be expanded to provide that the digital assets should not be used by a fiduciary to impersonate or recreate the decedent.¹⁹⁵ This suggestion misses the mark. Such an approach would create an opt-in mechanism, which is problematic for the reasons discussed above. Stated simply, it is not ideal for most Americans, and would structurally discriminate against those who are less likely to engage in estate planning—or those who are not white, lower income, lower wealth, and young. The default rules of RUFADAA apply for these individuals. Further, the inconsistency of the default rules is also problematic. The rules treat types of digital assets differently, granting a fiduciary unlimited access to assets such as digital currency, but not permitting the fiduciary access to the content of electronic messages or text messages.

* * *

In summary, privacy rights generally die with the deceased, with some limited interest remaining to protect surviving loved ones. In a minority of states, a

¹⁹⁰ Instagram and Facebook offer memorialization options. See Polk, *supra* note 178 (outlining Meta’s policies on deceased-user accounts). Facebook allow anyone to submit a request to memorialize an account, regardless of their relationship to the deceased. *Id.* Neither TikTok nor X (formerly known as Twitter) offer this option. Both platforms will close and delete the account, or the authorized fiduciary may choose to leave the account open and active. See *How to Contact X About a Deceased Family Member’s Account*, X, <https://help.x.com/en/rules-and-policies/contact-x-about-a-deceased-family-members-account> [<https://perma.cc/8DE4-BXFB>] (discussing X’s policies toward deceased users); see also *Inactive Account Policy*, TIKTOK, <https://support.tiktok.com/en/safety-hc/account-and-user-safety/inactive-account-policy> [<https://perma.cc/3LLW-GEL8>] (outlining TikTok’s policies toward inactive accounts).

¹⁹¹ Memorialization means that photos and videos will remain visible, without the ability to adjust content. Natasha Chu, *Protecting Privacy After Death*, 13 NW. J. TECH. & INTELL. PROP. 255, 260 (2015).

¹⁹² See Barekat, *supra* note 22 (“[T]he number of dead users is projected to exceed the number of living ones before too long; with each passing day, the platform is turning inexorably into a giant ghost ship.”); SISTO, *supra* note 22, at 92 (“[S]ocial networks like Facebook were not designed with the eventual death of their users in mind.”).

¹⁹³ *Report a Deceased Person’s Account on Instagram*, INSTAGRAM HELP CTR., <https://help.instagram.com/264154560391256> [<https://perma.cc/Z7KQ-JKH3>].

¹⁹⁴ REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 6 (UNIF. L. COMM’N 2015).

¹⁹⁵ See Roberts, *supra* note 106, at 296 (arguing that firm boundaries should be put in place around digital resurrection).

descendible right of publicity survives death to protect commercial uses of the name, image, or likeness of the deceased for some period after death. Property law protects some digital assets, but not many, from unauthorized use. Intellectual property law, including trademark and copyright protections, limits the use of some but not most data. There is a growing understanding of the need for laws to criminalize deepfake imagery or videos, though most legislation seems focused on preventing deepfake pornography. And finally, RUFADAA attempts to provide a balanced approach to managing the digital assets of the deceased, though it does little to specifically address digital resurrection.

III. SCAFFOLDING THE LAW OF THE DEAD

Technology has developed without death in mind. The same may be said for many areas of the law, which have evolved to serve the living. In crafting policy pertaining to digital resurrection, we must consider the meaning of death to the living, and the law's role in serving largely non-legal purposes such as preservation, collective memory, sentimentality, and dignity. The law of the deceased—governing a range of issues from succession and inheritance to disposition of human remains—reflects the evolution of five centuries of societal norms. The rights of the deceased are governed by a blend of theoretical frameworks, tailored to balance the interests of the living against those of the deceased, and to sometimes afford dignitary rights and privacy to a person who is now an empty vessel. The United States has codified a moral obligation to treat the remains of the deceased with respect, and in doing so, has legitimized and offered legal protection to our memories of the deceased. This Part considers important principles guiding the law of the deceased as a foundation for shaping a policy framework on the issue of digital resurrection. Section A considers the laws surrounding human remains to better understand how the law has reflected policies of respecting the dead.¹⁹⁶ Section B explores how inheritance law is emblematic of societal norms surrounding the deceased.¹⁹⁷ Section C traces the historical concepts surrounding the law of the dead, identifying the typical trends in legal policy.¹⁹⁸

A. The Law of Human Remains

The law of human remains in the United States is its very own—operational but muddled—and reflects the incoherence of our attitude toward corpses. The dead are not property, but not trash; not a person, but some moral

¹⁹⁶ See *infra* notes 199–241.

¹⁹⁷ See *infra* notes 242–260.

¹⁹⁸ See *infra* notes 261–320.

rights of personhood remain.¹⁹⁹ The *Examination on the Law of Burial*, otherwise known as the *Ruggles Report*,²⁰⁰ is a foundational authority on the law of human remains written in the 1850s when the streets of New York City were being widened and straightened.²⁰¹ This process of street widening disturbed the remains of one hundred people and questions arose as to fair distribution of compensation.²⁰² The rejection of English ecclesiastical law created an obvious void in American common law when it came to human remains.²⁰³ The *Ruggles Report* is the report of a referee appointed by the Surrogate's Court in New York and has no precedential authority, yet it has been given a great deal of weight in cases ultimately heard by the U.S. Supreme Court.²⁰⁴

The *Ruggles Report* sets forth a number of guiding principles in the law of human remains, each of which is considered doctrinal bedrock today: (1) there is “no property” in human remains; (2) the right to bury a corpse and preserve remains is a legal right, and such a right belongs to next of kin in most cases; and (3) the interests of the living trump those of the deceased.²⁰⁵

1. “No Property” in Remains

It is also well established in the United States that “there is no property in human remains.”²⁰⁶ The foundation of this principle is described by Lord Edward Coke and Sir William Blackstone in their property treatise as derived from both secular and ecclesiastic law in Elizabethan England.²⁰⁷ The modern justification for this approach seems to be a desire to prevent commercial use of human remains,²⁰⁸ though in 1891, in *Larson v. Chase*, the Supreme Court of Minnesota held that dead bodies hold a murky quasi-property status.²⁰⁹ This is not to say that there are not those who have argued in favor of full property

¹⁹⁹ See Steve Shapin, *What's Your Dust Worth?*, LONDON REV. BOOKS, https://scholar.harvard.edu/files/shapin/files/shapin_lrbcorpse.pdf [<https://perma.cc/PP84-YHC4>] (reviewing NORMAN CANTOR, *AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER* (2010)) (exploring the relationship between personhood, property, morals, and the dead).

²⁰⁰ SAMUEL BULKLEY RUGGLES, *AN EXAMINATION OF THE LAW OF BURIAL*, IN A REPORT TO THE SUPREME COURT OF NEW YORK (1856).

²⁰¹ TANYA MARSH, *THE LAW OF HUMAN REMAINS* 7 (2015).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 8.

²⁰⁵ See RUGGLES, *supra* note 200, at 58.

²⁰⁶ MARSH, *supra* note 201, at 11.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 50 N.W. 238, 239 (Minn. 1891) (“A dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect.”).

status for human remains. Nevertheless, the position that property status affords complete decision-making authority over dead bodies has not gained traction over the last two centuries.²¹⁰

The weight of legal authority in the United States instead accepts human remains as a type of quasi-property,²¹¹ despite some criticism of the position. Critics of quasi-property status point to *Prosser and Keeton on the Law of Torts*, dismissing this classification as “likely to deceive no one but a lawyer.”²¹² Also, the *Restatement (Second) of Torts* characterizes quasi-property status as nothing more than “a peg upon which to hang damages for the mental distress inflicted upon the survivor.”²¹³ The first cases applying quasi-property status in the United States were decided in 1871 and 1872.²¹⁴

It is generally agreed that the law should prohibit the sale of human remains, particularly when it happens without the consent of the deceased or their representatives, but not all states have laws preventing it.²¹⁵ For example, one Tennessee man—who wanted to sell his remains after death—discovered that he and his next of kin were not allowed to, but that a body broker *could* sell his donated remains.²¹⁶ At the federal level, in 2023, a woman was charged with conspiracy and interstate transport of stolen goods after scheming to steal and sell body parts obtained from the Harvard Medical School morgue.²¹⁷ Although human remains are not goods under property law, there is no federal statute prohibiting the sale of human remains, so prosecutors had to settle for this charge.²¹⁸ Further, the lack of federal regulation on the matter has resulted

²¹⁰ Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 HASTINGS L.J. 291, 332–34 (2020).

²¹¹ Note, *The Right to Dispose of the Body by Will*, 15 HARV. L. REV. 64, 64 (1901).

²¹² See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984).

²¹³ RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (AM. L. INST. 1979).

²¹⁴ It is widely reported that the first case to apply quasi-property status to human remains is *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227 (1872), but research shows that it may be an 1871 opinion that has not survived. Rogers, *supra* note 210, at 308.

²¹⁵ One tongue-in-cheek estimate values your disaggregated parts at \$551,473. Tanya Chen, *This Is How Much Your Body Parts Are Actually Worth*, BUZZFEED (Mar. 12, 2014), https://www.buzzfeed.com/tanyachen/this-is-how-much-your-body-parts-are-actually-worth?utm_term=.jdE50nmYA#.vrqWax476 [<https://perma.cc/X9R5-224H>]; Abby Patkin, *Is It Legal to Sell Human Remains? Harvard Morgue Scandal Raises Questions*, BOSTON.COM (June 16, 2023), <https://www.boston.com/news/crime/2023/06/16/is-it-legal-to-sell-human-remains-harvard-morgue-scandal-raises-questions/> [<https://perma.cc/XF8S-EX9Y>]. Patkin further notes that scientists found more than 450 skulls for sale on eBay from 2012 to 2013, before eBay banned the sale of human remains. *Id.*

²¹⁶ Kristin Hugo, *Can You Sell Your Body When You Die? This Man Wants to Try*, NEWSWEEK (Feb. 5, 2018), <https://www.newsweek.com/can-you-sell-your-body-when-you-die-man-wants-try-795085> [<https://perma.cc/NP2B-GWS9>].

²¹⁷ Patkin, *supra* note 215.

²¹⁸ *Id.* Professor Tanya Marsh notes, “[The Harvard Medical School morgue case] is surprising because I haven’t found any precedent of human remains being treated as ‘goods’ within the meaning

in a robust market²¹⁹ for human remains that have been donated for training, education, or research.²²⁰

The legal rules protecting remains are certainly practical, but they also embody community norms—specifically, a desire to treat the deceased with dignity and respect. Most states criminally prohibit sexual activity with a corpse.²²¹ While corpses cannot marry or vote,²²² and medical privacy is significantly eroded by death, we do respect the wishes of the dead when it comes to property distribution and organ donation.²²³ And though the law struggles with balancing boundaries, there is no question that the law recognizes posthumous rights for the decedent that amount to some level of moral standing.²²⁴

2. The Legal Right to Bury

The *Ruggles Report* suggests that “the right to bury a corpse and to preserve its remains . . . is a legal right,” and “in the absence of any testamentary disposition, [that right] belongs exclusively to the next of kin.”²²⁵ Further, in 2004, in *National Archives & Records Administration v. Favish*, the U.S. Supreme Court held that the rights of next of kin to control remains are firmly established.²²⁶

of the federal statute [prohibiting interstate transport of stolen goods]. In fact, it is a longstanding common law principle in the United States that human remains are not property.” *Id.*

²¹⁹ The Consensual Donation and Research Integrity Act of 2023 has been brought before Congress but not yet enacted. See Press Release, Gus Bilirakis, House of Representatives, Bilirakis, Fletcher, Murphy and Tillis Introduce Bipartisan, Bicameral Bill to Stop Brokering of Body Parts, Preserve Integrity of Organ Donation Process (June 26, 2023), <https://bilirakis.house.gov/media/press-releases/bilirakis-fletcher-murphy-and-tillis-introduce-bipartisan-bicameral-bill-stop> [<https://perma.cc/ESZ3-QYS3>] (discussing how the Act would create standards that are not currently in existence).

²²⁰ John Shiffman, Reade Levinson & Brian Grow, *A Business Where Human Bodies Were Butchered, Packaged and Sold*, REUTERS (Dec. 27, 2017), <https://www.reuters.com/investigates/special-report/usa-bodies-business/> [<https://perma.cc/W3BH-MEL6>].

²²¹ Three states (Louisiana, Missouri, New Mexico) and the District of Columbia do not have laws on the books. See generally Kim D. Ricardo, *Necrophilia: A New Social-Harm Taxonomy of U.S. Laws*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 351 (2021) (surveying the laws of states relating to necrophilia). Justifications for criminalizing necrophilia vary widely, with some states framing the conduct as a social injury to living family members, others characterizing it as a form of sexual assault, and still others including it in a category of crimes against nature (including sodomy and bestiality). *Id.*

²²² Some decedents do vote. When a person votes by mail, mails the absentee ballot, and then dies, her vote is still counted. Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 779–80 (2009).

²²³ *Id.* at 764–65.

²²⁴ *Id.* at 764.

²²⁵ RUGGLES, *supra* note 200, at 58. See generally MARSH, *supra* note 201.

²²⁶ 541 U.S. 157, 168 (2004).

It is also believed that the living are able to dictate what happens to their remains after death. While this is generally the case,²²⁷ it is certainly not an absolute.²²⁸ The common law does not permit a decedent to provide binding instructions as to how their remains should be handled.²²⁹ There are states that have overridden this by statute, either granting such a right to the decedent or allowing next of kin or a named representative to select the method of disposition.²³⁰ In some states, next of kin or the named representative make any decision as to disposition, unconstrained by any instructions left by the decedent.²³¹ In other states, next of kin or the named representative may only ignore instructions in specific circumstances, such as reasonableness or cost.²³²

There is an argument that, within the boundaries of the law, the wishes of the deceased regarding remains should be absolute. To the extent that life is shaped by experiential and critical interests, the living have no experiential interests in their corpse (or an interest that relates to one's experience and state of mind), but they certainly have critical interests (which relate to judgments about what makes a quality life).²³³ An interest in donating one's organs after death is a critical interest. Critical interests arguably survive death, insofar as we would like to make critical judgments about postmortem events.²³⁴ A refusal to systemically honor critical interests would arguably have a community impact, with everyone knowing that their interests will not survive their own death. There is a dignitary interest in honoring the wishes of the deceased. If the interests of the dead are thwarted, it is not a harm for the dead, but it is arguably a harm to the living who wish to be a member of a society that honors the deceased but knows that their own interests will also be thwarted. Furthermore, any

²²⁷ Caitlin Doughty, *You Can't Keep Your Parents' Skulls*, THE ATLANTIC (Sept. 4, 2019), <https://www.theatlantic.com/science/archive/2019/09/why-you-cant-display-your-relatives-skull/597307/> [<https://perma.cc/4RA3-XHTQ>] ("In theory, people get to decide what happens to their body after death. In reality, it is near impossible to get legal permission to display a relative's skeleton.").

²²⁸ Smolensky, *supra* note 222, at 764–65 ("The law also strives to honor a decedent's wishes and to protect his interests because society has chosen, within limits, to adhere to the principle of autonomy. This is why courts often consider a decedent's wishes when determining the disposition of his corpse or property. Of course there are legal limits to autonomy, even for the living, and the law is constantly struggling with the exact boundaries of these limits." (footnote omitted)).

²²⁹ Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER'S ADVISOR 197, 247–48 (2013).

²³⁰ *Id.* at 248.

²³¹ See generally MARSH, *supra* note 201 (exploring the law of human remains).

²³² See Young, *supra* note 229 (discussing the exceptions to the legal duty to adhere to a decedent's wishes).

²³³ See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 201–02 (1993) (explaining the difference between experiential and critical interests, and the impact of these interests on life).

²³⁴ See Young, *supra* note 229, at 213–14 (noting that a living person's posthumous rights are grounded in a critical interest the living have in the treatment of their bodies after death).

legal infirmity that exists because of their inexistence is resolved if we “subsume the lingering presence of each dead person . . . under the course of his or her quondam life.”²³⁵ In other words, the dead continue to shape the existence of the living through possessions and memory.²³⁶ The argument would then follow, however, that the decedent with no possessions or loved ones does not have the postmortem rights of the decedent who does. Suffice it to say, there is no clear agreement as to whether the deceased are or should be rights or interest holders.

3. The Living Supersede the Deceased

Another well-established foundational principle to be derived from the law of human remains is that the interests of the living shall always supersede those of the dead.²³⁷ This principle is generally used as justification for disinterment of graves to make way for urban expansion, with two rationales both tethered to the passage of time undergirding the principle: (1) as time passes, “our memory of [the deceased] fades,” and (2) after many years, there are fewer people living to assert any interest over protection or preservation.²³⁸

The rights of the deceased, to the extent that any exist, are time limited.²³⁹ The law of human remains seems to distinguish between the freshly dead and the long dead. By way of example, a museum display of ancient remains draws far less ire than more recent exhibitions of plastinated human cadavers.²⁴⁰ To this end, the state of Hawaii passed a law prohibited the display of those deceased for less than eighty years, with eighty years being chosen as a person’s approximate life span.²⁴¹ The less time that has passed since someone’s death, the more likely that the wishes of the deceased will be honored.

B. The Law of Inheritance

The law of inheritance invariably influences other areas of the law because it stands as an embodiment of society’s norms concerning the treatment of death. And though society benefits from a decedent having broad freedom

²³⁵ Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CANADIAN J.L. & JURIS. 29, 49 (2001).

²³⁶ Young, *supra* note 229, at 218.

²³⁷ See Tanya D. Marsh, *When Dirt and Death Collide: Legal and Property Interests in Burial Places*, 30 PROB. & PROP., Mar./Apr. 2016, at 59, 62.

²³⁸ Alida B. Soileau, *Quasi-Property No More: “Human Heritage” as a New Legal Status for the Dead*, 74 S.C. L. REV. 111, 119 (2022) (quoting MARSH, *supra* note 201, at 10).

²³⁹ Smolensky, *supra* note 206, at 789.

²⁴⁰ See Neda Ulaby, *Origins of Exhibited Cadavers Questioned*, NPR (Aug. 11, 2006), <https://www.npr.org/2006/08/11/5637687/origins-of-exhibited-cadavers-questioned> [<https://perma.cc/T2T5-EDB2>] (discussing the turmoil surrounding exhibits of plastinated bodies).

²⁴¹ HAW. REV. STAT. § 327-38 (2024).

of disposition over their property, society also benefits from proscriptive and prescriptive restrictions placed on that freedom.²⁴² The decedent may be using their estate plan to pull proverbial levers through pecuniary incentives or disincentives, without the ability to think through all the social costs. There is a concern that the decedent is making decisions based on imperfect information that are not fully reasoned and then borne by the living.²⁴³ There is also a moral hazard problem implicit with deferring to every wish of the decedent, as those wishes may impose costs on the living that are not reasonable.²⁴⁴ To the extent that the decedent behaves irresponsibly, he or she bears none of the emotional or financial costs of the mess left behind.²⁴⁵

Indeed, there is a compelling argument to be made that the law of inheritance is designed to maximize social welfare.²⁴⁶ We see important prescriptions in the form of protecting payment to creditors and preventing (generally) disinheritance of a surviving spouse.²⁴⁷ Proscriptions overriding the control of the dead hand include the rule against perpetuities, which limits the decedent's freedom of disposition because the main actor is unable to make prudent decisions when so much time has passed that there is no way to weigh benefits and costs.²⁴⁸

The law of inheritance also disfavors encumbrances inhibiting alienability while also allowing the decedent to extinguish rights in property to render it indescendible.²⁴⁹ In most instances, a decedent is allowed to prevent the transfer of a property interest at their death.²⁵⁰ There are times that a decedent may wish to be buried in expensive jewelry or may request property be destroyed.²⁵¹ Wishes may be disregarded, particularly when the request of the decedent is not to the benefit of society.²⁵² It is not uncommon, for example,

²⁴² See Glover, *supra* note 24, at 429–30 (discussing the positive and negative impacts the freedom of disposition has on societal welfare).

²⁴³ See *id.* at 438 (positing that restrictions on the freedom of disposition solve concerns about whether the decedent lacks full information).

²⁴⁴ See *id.* (arguing that regulation can solve the moral hazard problem inherent within an uncumbered freedom of disposition).

²⁴⁵ Adam J. Hirsch, *Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 639 (1989).

²⁴⁶ See Glover, *supra* note 24, at 413 (“[T]he law prohibits certain types of transfers. For instance, the donor cannot condition a testamentary gift in a manner that incentivizes the donee to engage in illegal activity.”).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 431.

²⁴⁹ Bartholomew, *supra* note 10, at 1610. *But see* Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311, 332 (2017) (describing lobbying efforts in state legislatures to overturn statutory rules against perpetuities).

²⁵⁰ Bartholomew, *supra* note 10, at 1610.

²⁵¹ *Id.*

²⁵² Roberts, *supra* note 106, at 295 (“It could be difficult to protect against an instance in which a fiduciary goes against the decedent’s express wishes . . . [with] no immediate recompense So,

for a decedent to leave instructions to destroy their cat or dog at death—with mixed results as to whether a court will enforce the provision, as public sympathy usually runs contrary to destruction of animals.²⁵³ It is also not uncommon for artists and authors to request that work be destroyed. Author Franz Kafka insisted that the executor of his estate burn all of his unpublished works upon his death.²⁵⁴ The executor disregarded the wishes of the deceased and published many manuscripts, including *The Trial* and *The Castle*.²⁵⁵ It has been suggested that Kafka's fame as a literary giant is largely due to the fact that his testamentary wishes were ignored.²⁵⁶ The requests of Vladimir Nobokov that any unfinished novel at the time of his death remain unpublished, and Ernest Hemingway that his letters remain unpublished, were similarly disregarded.²⁵⁷ Despite each ignoring the testator's requests, the fiduciaries managing the estates of Kafka, Nobokov, and Hemingway faced no legal consequences.²⁵⁸

There are obvious tensions between the law's deference to the wishes of the decedent and limits placed upon that deference. This tension arises out of the law of inheritance ultimately having to serve the living and maximize social welfare.²⁵⁹ The notion that the law of inheritance ultimately serves the living is consistent with the United States' adherence to Lockean theories of property.²⁶⁰

when assigning a digital fiduciary, one must select a person they are confident will follow through with their requests after death.”).

²⁵³ Frances Carlisle, *Destruction of Pets by Will Provision*, 16 REAL PROP. PROB. & TR. J. 894, 894–95 (1981); see also Rachid Haoues, *1980 Flashback: The Legal Battle for a Dog's Life*, CBS NEWS (June 18, 2015), <https://www.cbsnews.com/news/the-greatest-dog-sido-1980-will-animal-rights/> [<https://perma.cc/HS3G-XJFH>] (discussing the public sentiment surrounding a pet execution provision in a California will); Mary Randolph, *Will Provisions That Order Animals Destroyed*, DOG L., https://doglaw.hugpug.com/doglaw_077.html [<https://perma.cc/EL64-VCKZ>] (explaining the legal approach to will provisions that seek to kill pets).

²⁵⁴ Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 273 (2009).

²⁵⁵ *Id.*

²⁵⁶ Max Brod, Kafka's legatee, smuggled many of the manuscripts to Israel when he fled the Nazis in 1938 and was never sued. Aron Heller, *Long-Lost Franz Kafka Works Could Emerge After Messy Legal Battle*, PBS (Apr. 17, 2019), <https://www.pbs.org/newshour/arts/long-lost-franz-kafka-works-could-emerge-after-messy-legal-battle> [<https://perma.cc/864H-7GTD>]. In fact, his secretary, Esther Hoffe, sold the original manuscript of *The Trial* through Sotheby's in 1988 for \$1.8 million. *Id.*

²⁵⁷ Banta, *supra* note 151, at 956–57.

²⁵⁸ See *id.* (noting how no one with standing challenged these actions).

²⁵⁹ See Glover, *supra* note 225, at 454 (discussing the tension between inheritance law and the goal of maximizing social welfare).

²⁶⁰ See Leslie Kendrick, *The Lockean Rights of Bequest and Inheritance*, 17 LEGAL THEORY 145, 145 (2011) (noting that the dependents of the decedent supersede the importance of bequests under Locke's theory of property).

C. *Contemplating Theoretical Status*

Honoring the deceased is often paradoxically courageous and complicated, but rich in moral meaning—whether the product of love or obligation. It is nonetheless difficult to situate honoring the deceased within the structure of the law. This Section offers a descriptive analysis of existing theoretical statuses within the law of the dead. This descriptive analysis connects the past to the present, by revealing important throughlines from existing legal frameworks that may otherwise go unnoticed in developing policy on the law of digital resurrection. The law of the dead has deeply considered concepts such as the autonomy of the deceased, potential exploitation of the deceased, and concepts of ownership, by drawing from theories of commodification, quasi-property, and quasi-personhood. Exploring the borders of these theories, and the way in which they stand in tension, may assist policymakers to address the complex issues surrounding the law of digital resurrection in a thoughtful, principled, and consistent way.

1. Commodification

For this conversation, commodification may be defined in terms of three characteristics: (1) objectification, or being “severed” from “personhood”; (2) fungibility, or the notion that something is interchangeable and not terminally unique; and, (3) valuation, both in terms of relativity (to other fungible commodities) and monetization.²⁶¹ Interestingly, both physical remains (and the corpse) and digital remains (or online identity) and personal information can be honored as important and non-fungible, with value that is not reducible to money or money’s worth.²⁶²

The commodification of digital assets is alive and well. Digital assets are tokenized, converting real-world assets into fungible or non-fungible tokens on blockchain platforms. Digital assets such as crypto art, digital trading cards, and virtual real estate are being bought, sold, and traded like traditional collectibles. Companies are issuing security tokens representing ownership in digital assets such as equity, real estate, and investment funds. Personal data is being collected, analyzed, and sold to advertisers, marketers, and researchers.

While it may be convenient to classify digital remains as property due to how clearly property law determines ownership, emails only sometimes re-

²⁶¹ Marjorie M. Shultz, *Questioning Commodification*, 85 CALIF. L. REV. 1841, 1844 (1997) (reviewing MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996)).

²⁶² See Nicholas J. Nugent, *The Unpropertied Internet*, 110 CORNELL L. REV. (forthcoming 2025) (manuscript at 56) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4682448 [<https://perma.cc/VLN6-RL8K>] (arguing that internet data is now essential to personhood).

ceive protection under copyright law and are not considered property.²⁶³ The personal data of the deceased is a digital asset mostly without an intrinsic value, stored electronically, and easily duplicated and distributed. This data is part of a digital identity around which there are few established laws or standardized practices in the United States. There are also no laws to prevent commodification of this data. In stark contrast is the law of human remains, with strict regulations in place designed to (theoretically) prevent commodification due to dignitary concerns.²⁶⁴

One philosopher said that memory is the connection between the living and the deceased, and the former controls and holds the latter.²⁶⁵ From the perspective of commodification, the question is whether personal data of the deceased, an asset without an inherent value, should be recognized as possessing a value that is not monetary—and drawing upon the law of human remains, should be respected through notions of moral personhood. The same ethical implications, including respect for the deceased, cultural heritage, and exploitation of the deceased for profit, exist when dealing with the deceased's remains—whether those remains are in physical or digital form.²⁶⁶ The problem is that control of policy by #bigtech is shaping a marketplace distanced from personhood, rather than one focused on dignitary concerns and respecting memory.

Consumers are frequently making choices that they cannot necessarily oversee regarding the collection of their data. Commodification of deceased persons' data would leave the controller of the data with an absolute right to retain access and continue to process the information. A quasi-property approach, afforded to human remains and discussed below, would potentially protect individual (and the deceased's) rights.

2. Quasi-Property Law

The weight of legal authority in the United States accepts the notion that while there is a “no property in human remains” rule, a quasi-property approach confers certain rights onto next of kin to control disposition of the re-

²⁶³ HARBINJA, *supra* note 134, at 173.

²⁶⁴ Our desire to insist that human remains is a market that resists commodification has resulted in us ignoring the fact that a commodified market does indeed exist for human remains in the United States. Human remains trafficking has exploited body donation programs for decades, with little to no regulatory attention, and profits are made on the sale of intact and disaggregated remains today. *See* LOIC WACQUANT, *COMMODYING BODIES 3* (Nancy Scheper-Hughes & Loic Wacquant eds., 2002) (noting that the sale of body parts continues to this day).

²⁶⁵ *See generally* GUSTAV THEODOR FECHNER, *THE LITTLE BOOK OF LIFE AFTER DEATH* (Mary C. Wadsworth trans., 1904).

²⁶⁶ Rhetoric matters, and “[t]he way we conceive of things matters to who we are.” RADIN, *supra* note 261, at 89, 93.

mains.²⁶⁷ The dead have historically been regarded as *nullius in bonis*, or nobody's property.²⁶⁸ In 2014, in *Keller v. Finks*, the District Court for the Central District of Illinois held that a "deceased person has no rights within our constitutional scheme."²⁶⁹ Regardless, next of kin of the decedent are recognized to have a proprietary interest in the physical remains of the decedent. The quasi-property rights of next of kin come in the form of a "sacred trust" that imposes rights of disposition²⁷⁰ or "duties to perform towards [the corpse] arising out of our common humanity,"²⁷¹ but generally do not provide for rights of use, transfer, profit, and destruction.²⁷² Federal courts have rejected the view that the dead have substantive fundamental rights, but have been somewhat more open to next of kin claims that family have been deprived of property interests in the deceased.²⁷³ Further, a quasi-property right was expanded by the Uniform Anatomical Gift Act as concerns organ donation, but only because there is a compelling societal interest in organ donation.²⁷⁴

The quasi-property status of human remains is increasingly relevant in a world where data privacy for the living is also being viewed by some as a quasi-property right. Neither the United States nor the EU have explicitly established a property scheme to protect consumer data,²⁷⁵ but some argue that the EU's right to be forgotten, recognized through the GDPR, has implicitly cast data as an asset and therefore property.²⁷⁶

As with physical property, individuals have a vested interest in protecting their data and determining how it may be shared. The EU's right to be forgotten is a fundamental right that allows a user to move data from one platform to

²⁶⁷ Ellen Stroud, *Law and the Dead Body: Is a Corpse a Person or a Thing?*, 14 ANN. REV. L. & SOC. SCI. 115, 118 (2018) (observing that a will governs the disposition of property, not human remains, and individuals other than the decedent can "exercise a limited amount of control over what happens to a corpse, but courts and scholars continue to sort out what that quasi-property right entails").

²⁶⁸ Ela A. Leshem, *Dead Bodies as Quasi-Persons*, 77 VAND. L. REV. 999, 1010 (2024). Leshem argues that there is status anxiety over human remains as property, in part because corpses cannot be fully owned. *See id.*

²⁶⁹ No. 13-03117, 2014 WL 1283211, at *6 (C.D. Ill. Mar. 31, 2014).

²⁷⁰ Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 946 (1997).

²⁷¹ *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 242–43 (1872).

²⁷² *See generally* Leshem, *supra* note 268 (exploring the quasi-property status of the deceased).

²⁷³ Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471, 1487 (2020).

²⁷⁴ *See generally* Leshem, *supra* note 268 (breaking down the societal interests that impact the treatment of the deceased).

²⁷⁵ *See* Jacob M. Victor, Comment, *The EU General Data Protection Regulation: Toward a Property Regime for Protecting Data Privacy*, 123 YALE L.J. 513, 515 (2013) ("The [GDPR] takes the unprecedented step of, in effect, creating a property regime in personal data, under which the property entitlement belongs to the data subject and is partially alienable.").

²⁷⁶ *See id.* (arguing that the GDPR easily allows for data to be handled under a property approach).

another, and potentially destroy the data.²⁷⁷ There are three elements undergirding the argument that the GDPR creates a property regime:²⁷⁸ (1) a consumer has a “clear entitlement[] to their own data”; (2) “even after [data] is transferred,” there is a “burden that ‘runs with’ it”; and (3) the remedies protecting the data are grounded in property law.²⁷⁹ Suffice it to say that privacy practitioners have accepted that personal data may be regulated similar to property categorized as an asset.²⁸⁰

The intersection of evolving quasi-property rights in personal data for the living and the treatment of human remains highlights a shifting understanding of ownership, control, and respect for individual autonomy and interests. The throughline revealed by the law of the dead is that a sacred trust exists between the living and the deceased, with an emphasis upon protecting common humanity, such that data afforded no legal status (or personal data of the deceased) may nonetheless be treated with dignity and receive some basic protections.

3. Quasi-Personhood

It is well settled that quasi-property law applies to give some protections to the deceased, while withholding others. Quasi-personhood status arguably fills the void between personhood and mere property, and it explains the dead having a subset of dignitary interests that are associated with moral personhood.²⁸¹ Concepts of personhood may explain why we make moral distinctions when applying property law.²⁸² The law in the United States is, at best, uneven with regard to physical remains, but it is clear that there is a dignitary interest that treats a corpse as more than property, medical waste, or animal carcasses,²⁸³ with legal protections²⁸⁴ to ensure remains are not physically or visually

²⁷⁷ See *id.* at 513 (noting that the right to be forgotten enables data users to exercise control over the storage of their data).

²⁷⁸ Paul Schwartz rejects “the Blackstonian concept of property as ‘sole and despotic dominion’ over a thing,” and instead views “property as a bundle of interests to be shaped through legal attention to . . . inalienabilities, defaults, rights of exit, damages, and institutions.” Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2059–60 (2004).

²⁷⁹ Victor, *supra* note 275, at 515.

²⁸⁰ Lee Poskanzer, Sharon Hartung & Jennifer Zegel, *The Birth of Postmortem Privacy*, IAAP (June 22, 2021), <https://iapp.org/news/a/the-birth-of-postmortem-privacy> [<https://perma.cc/GH88-XECY>] (“Privacy practitioners should take note of an individual’s digital assets as an emerging asset class. A general definition of digital assets boils down to identifying them ‘as an electronic record that individuals have a right or interest [in].’ It usually does not include an underlying asset or liability, unless that asset or liability is itself an electronic record.”).

²⁸¹ Leshem, *supra* note 268, at 1059.

²⁸² See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

²⁸³ Stroud, *supra* note 267, at 117 (“The human corpse is a thing, a material object—a messy, maybe dangerous, perhaps valuable, often useful, and always tangible thing—and the law has much to

abused²⁸⁵ or violated.²⁸⁶ The law situates human remains in a liminality somewhere between thing and person.²⁸⁷ And though courts and legislatures regularly reference the dignity owed to corpses, it is defined nowhere.²⁸⁸

This liminality is seen in the few cases in which the privacy interests of the deceased are protected. As discussed in Part I, this evolving treatment of privacy with personal data has not been extended to the deceased. The right to privacy is personal and extinguishes when a person ceases to be alive.²⁸⁹ It is not against the law for police officers to use the fingerprint of the deceased to attempt to unlock cell phones²⁹⁰ or for a medical examiner to take a blood sample from a corpse at an accident site because the deceased do not have any expectation of privacy.²⁹¹ The ubiquitousness and invasiveness of technology has raised new concerns, however, that the manipulation or dissemination of personal information will result in exploitation that impacts the stake of the living in honoring and mourning the deceased.²⁹² Decades ago, it would have

say about such things. But the dead human body is also something very different: It is also my father, and my friend, perhaps my child, and some day, me.”).

²⁸⁴ *Id.* at 121 (observing that a fair amount of “dead body law” has developed through custom rather than legislation).

²⁸⁵ It is possible to harvest the tattooed skin from your deceased loved one, send the skin to lab in Ohio, and they will preserve the skin and mount it as artwork. *See* Claire Woodcock, *People Are Preserving Dead Relatives’ Tattoos and Turning Them into Art*, VICE (June 29, 2022), <https://www.vice.com/en/article/n7zv3k/people-are-preserving-dead-relatives-tattoos-and-turning-them-into-art> [<https://perma.cc/KZ6U-EHJG>]. There is a question as to whether this process violates existing state criminal “abuse of corpse” laws that outlaw excision of tissue from human remains. *Id.* These laws create “criminal penalties for treating human remains in a way [that is considered] disrespectful.” *Id.*

²⁸⁶ *See* Leshem, *supra* note 268, at 1042 (discussing the unauthorized touching of a body).

²⁸⁷ *Id.* at 1058.

²⁸⁸ “Human dignity is a fundamental value in many legal systems,” but it is extraordinarily difficult to define. ROGER BROWNSWORD, *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY* 1–22 (Marcus Duwell et al. eds., 2015). Some define it from the perspective of “empowerment” (extending individual choice) and others from that of “constraint” (to impose limits on individual choice). *Id.*

²⁸⁹ *See* David Hamill, *The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity*, 25 J. C.R. & ECON. DEV. 833, 835 (2011) (noting that the right to privacy dies with the decedent).

²⁹⁰ Kathryn Varn, *Cop Used Dead Man’s Finger in an Attempt to Access His Phone. It’s Legal, But Is It Okay?*, TAMPA BAY TIMES (Apr. 21, 2018), https://www.tampabay.com/news/publicsafety/Cops-used-dead-man-s-finger-in-attempt-to-access-his-phone-It-s-legal-but-is-it-okay-_167262017/ [<https://perma.cc/ZPL6-AHM9>]; Thomas Brewster, *Yes, Cops Are Now Opening iPhones with Dead People’s Fingerprints*, FORBES (Mar. 22, 2018), <https://www.forbes.com/sites/thomasbrewster/2018/03/22/yes-cops-are-now-opening-iphones-with-dead-peoples-fingerprints/> [<https://perma.cc/L2BM-PM6G>]; *see also* Danny Lewis, *Police Request 3D-Printed Copy of a Dead Man’s Finger to Unlock His Smartphone*, SMITHSONIAN (July 22, 2016), <https://www.smithsonianmag.com/smart-news/police-want-3d-print-copies-dead-mans-fingers-unlock-his-smartphone-180959883/> [<https://perma.cc/WE8Y-PV8K>].

²⁹¹ Varn, *supra* note 290.

²⁹² *See* Hamill, *supra* note 289, at 859 (discussing the possibility of exploitation of the deceased without some management of internet data).

been rare to see a grisly or horrific death or decapitation photo, whereas one can use the Internet to see one hundred such photos before breakfast if they are so inclined. Consequently, many states have enacted statutes that restrict accessing or publishing autopsy photos.²⁹³

Further, there are times when the courts protect the privacy rights of the decedent in order to limit harm to the deceased's loved ones. While quasi-property approaches do not operate to provide the deceased with a common law right to privacy in tort law, quasi-personhood approaches sometimes do. Courts have been sympathetic to claims from family members that may be considered so intrusive that they violate the personal dignity of the deceased. In 1998, in *Reid v. Pierce County*, the Washington Supreme Court found that the immediate relatives of a deceased person had a protectable privacy interest in autopsy photos that were displayed by defendants at cocktail parties.²⁹⁴ Similarly, in 2010, in *Catsouras v. Department of California Highway Patrol*, the court held that police officers photographing a decapitated woman at an accident scene and emailing the photos to friends and family, with the photos ultimately leaking to the Internet, violated a common law privacy right.²⁹⁵ In 1912, in *Douglas v. Stokes*, the California Court of Appeals held that parents had a privacy interest in a photo of their deceased conjoined twin boys, due to suffering and humiliation endured after the photo was released.²⁹⁶ In 2023, Los Angeles County paid Vanessa Bryant almost \$30 million to settle an invasion of privacy lawsuit filed over the sharing of graphic photos taken of a deceased Kobe Bryant and his daughter Gianna at the site of their helicopter crash.²⁹⁷ Courts also extended some notion of decedent privacy to the family of the decedent in refusing to release NASA Challenger audiotapes or recordings of 9/11 victims making emergency calls.²⁹⁸

The dignitary interest is blurred in these cases, with the decedent's privacy interest inextricably intertwined with that of next of kin.²⁹⁹ Whether or not the dead can be harmed is a matter of lively philosophical debate—but is a well settled “no” from the perspective of most legal claims grounded in tort.

²⁹³ *Id.* at 835.

²⁹⁴ 961 P.2d 333, 335, 343 (Wash. 1998). In *Reid*, a medical examiner's office kept a scrapbook of autopsy photos placed on display at cocktail parties. *Id.* Plaintiffs were allowed to maintain an action for common law invasion of privacy, not because the deceased had a protectable privacy interest in the photos, but because the immediate relatives of the deceased were held to have a protectable privacy interest. *Id.* at 340.

²⁹⁵ 104 Cal. Rptr. 3d 352, 358–94 (Ct. App. 2010).

²⁹⁶ 149 S.W. 849, 849 (Ky. Ct. App. 1912).

²⁹⁷ Jonathan Abrams, *Vanessa Bryant Settles Helicopter Crash Photos Lawsuit for \$28.85 Million*, N.Y. TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/sports/basketball/vanessa-bryant-kobe-helicopter-crash-lawsuit.html> [https://perma.cc/36SN-3Z37].

²⁹⁸ Banta, *supra* note 151, at 974–75.

²⁹⁹ *Id.* at 975.

Nevertheless, courts agree that living relatives of the deceased are sometimes harmed. Courts have protected family members of the decedent through tort law from disclosure that would cause humiliation or anguish³⁰⁰ in a way that is unprecedented under common law but seems to be justified almost entirely on a dignitary basis.³⁰¹ The law defining death is often driven by a desire to protect and honor the memory of the deceased.³⁰² To the extent that “every act of remembering inscribes an individual in multiple social frames,”³⁰³ it is possible for digital resurrection to damage the individual and collective memory of the deceased.³⁰⁴ And thus, although the deceased would not have a right to privacy at common law after death, the reality is that the deceased possesses certain moral rights grounded in quasi-personhood theory enforced through the protection of his family.³⁰⁵

There is also arguably a dignitary concern when the remains of the decedent are violated for generative purposes. Technology now allows the body of a deceased male to be used to father children: postmortem semen retrieval (PMSR)³⁰⁶ is a medical procedure whereby semen³⁰⁷ is extracted from the de-

³⁰⁰ Professor Banta provides a useful example: A man uploaded “a picture of himself holding a gun to his mouth” to his Facebook profile, and then he subsequently died by suicide. *Id.* at 978. Although Facebook “refused to give the family access to the man’s account,” it did eventually delete the photo from its platform. *Id.*

³⁰¹ *See id.* at 975 (exploring the dignitary basis for protecting the decedent).

³⁰² *Id.*

³⁰³ Gregor Feindt et al., *Entangled Memory: Toward a Third Wave in Memory Studies*, 53 *HIST. & THEORY* 24, 24 (2014).

³⁰⁴ As described above, Kanye West paid for his wife Kim to view a hologram of her deceased father at her fortieth birthday. *See Kanye West Gives Kim Kardashian Birthday Hologram of Dead Father*, *supra* note 51. The hologram delivered the message, “You married the most, most, most, most, most genius man in the whole world.” *Id.* Now that Kim has been dragged through a public and messy divorce from Kanye West, does this birthday hologram reshape or taint the memory of her father?

³⁰⁵ It is worth mentioning that there is a “Rights for Robots” movement that seems very “fringe” at first glance—this notion that personhood would be extended to digital personas or robots. *See* Kurt Marko, *Robot Rights—a Legal Necessity or Ethical Absurdity?*, *DIGINOMICA* (Jan. 3, 2019), <https://diginomica.com/robot-rights-a-legal-necessity-or-ethical-absurdity> [<https://perma.cc/G9G7-U7K2>] (describing the ethical conundrums surrounding the robot rights movement). But we have a system in the United States where we extend personhood to corporations in certain contexts (e.g., capacity to sue and be sued, own property, incur debt). *Id.* There are limits on constitutional rights, but we have nonetheless already granted personhood to a non-human. *See id.*

³⁰⁶ Any postmortem use of gametes (harvested during life or after death) speaks to the use of remains for generative purposes. PMSR is being discussed in this Article because it involves a violation of the deceased’s remains to which the deceased did not consent. When the living cryopreserves gametes harvested during their life, implied consent for use after death is less of a stretch because there was clearly an intent to have children at some point. Schiff, *supra* note 270, at 950 (“It is reasonable to assert that people who cryopreserve their gametes constitute a subset of the population holding potentially different expectations than many who have not done so.”).

³⁰⁷ Postmortem retrieval of sperm or ova is possible. There is only one published account of postmortem ova retrieval, in Israel in 2011. Kristine S. Knaplund, *Assisted Reproductive Technology: the Legal Issues*, 28 *PROB. & PROP.* 48, 50 (2014).

ceased,³⁰⁸ ideally within twenty-four to thirty-six hours following death.³⁰⁹ Those who support and oppose PMSR both offer arguments centering on respecting the dead. Supporters insist that most people desire to have children and it satisfies the interests of the deceased in perpetuating their genes.³¹⁰ Opponents focus upon dignitary concerns and emphasize a deep-seated desire to respect the dead.³¹¹ And though it may be argued that family members who allow procreative use of physical remains (using PMSR) are doing so out of self-interest, PMSR is also driven by grieving and a reverence for the deceased.³¹²

To date, no state in the United States has enacted a law that addresses the legality of PMSR or consent standards that should apply.³¹³ Next of kin generally decide on issues such as organ donation and death care, but with PMSR, courts or hospitals are additionally forced to think about issues of presumed consent.³¹⁴ Similar issues around presumed consent arise when discussing the generative use of personal data of the decedent. Just as PMSR removes the ability for a deceased to control the contours of their life, so too generative use

³⁰⁸ In 2009, a college student was assaulted and beaten to death outside of a bar in Texas. *Texas Judge Allows Collection of Dead Son's Sperm*, SAN DIEGO UNION-TRIB. (Aug. 29, 2016), <https://www.sandiegouniontribune.com/sdut-dead-son-sperm-040809-2009apr08-story.html> [<https://perma.cc/JD64-2JMA>]. His mother requested that the hospital board harvest sperm from her legally brain-dead son and the hospital declined. *Id.* His mother filed a petition with probate court the next day, claiming that he wanted to have three sons one day and had even named the hypothetical children. *Id.* Travis County Probate Judge Guy Herman approved the request. *Id.* This case is not an isolated example. In 2019, a twenty-one-year-old West Point cadet unexpectedly died in a skiing accident. *Parents of Dead West Point Cadet Retrieve His Sperm*, NBC NEWS (Mar. 5, 2019), <https://www.nbcnews.com/news/asian-america/parents-dead-west-point-cadet-retrieve-his-sperm-n979316> [<https://perma.cc/4JD9-PKNG>]. A California court ordered a medical center to retrieve his sperm for his parents. *Id.*

³⁰⁹ The most common approach for extraction is with a syringe, called Minimally Invasive Epididymal Sperm Aspiration (MIESA). See Samuel Hoy Brown VII, *Life After Death: How the Widespread Implementation of Postmortem Sperm Retrieval Can Redefine Procreative Liberty*, 83 LA. L. REV. 877, 882 (2023) (defining MIESA and explaining the costs). The average cost of MIESA is \$3,000 for the procedure itself, plus storage costs of roughly \$100 to \$500 per year. *Id.* at 890.

³¹⁰ Kathryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 303, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1395&context=uclf> [<https://perma.cc/4QMQ-GNGW>].

³¹¹ *Id.* at 301.

³¹² See Jenny Morber, *The Moral Maze of Using a Dead Man's Sperm*, BBC (May 19, 2016), <https://www.bbc.com/future/article/20160518-the-moral-maze-of-using-a-dead-mans-sperm> [<https://perma.cc/5FGZ-P9RB>] ("It gave me a sense of hope that he wasn't going to be gone forever, that I was going to be able to have a piece of him that was still alive. Just for me. My very own little piece of my Mike.").

³¹³ Brown, *supra* note 309, at 885.

³¹⁴ Morber, *supra* note 298 (discussing how the tangled legal position of the United States regarding PMSR leads sperm to be treated differently from other decisions usually made by next of kin).

of personal data for digital resurrection without the deceased's consent violates the dignity and wishes of the decedent.³¹⁵

Ignoring technology and advancement by refusing to address the legality of PMSR is particularly interesting in the context of digital resurrection and the development of generative AI. AI leverages neural networks to recreate thought patterns and idiosyncrasies that create startlingly accurate recreations that continue to learn and evolve over time.³¹⁶ Over time, the digital clone created by AI may decreasingly resemble the deceased. An evolving "digital offspring" is even more likely to be considered derivative as time passes, increasing the likelihood that the interest of the deceased is considered diminished.³¹⁷ And though there is a robust common law tradition that recognizes the right to bodily integrity as fundamental, PMSR offers an example of law not keeping pace with technology in a way that is generative but arguably violative.³¹⁸

It is also clear that quasi-property frameworks alone fail to justify our protection of certain basic rights of the deceased in any legally intelligible way, and notions of quasi-personhood serve as an important backstop. The law recognizes the deceased as having certain basic rights in addition to the right of bodily integrity, including the right to dignified interment and unjustified disturbance after interment.³¹⁹ These rights are designed to protect memory, enforce will, and respect spirituality.³²⁰ Carrying this forth to the law of digital resurrection, the deceased does not have a right to privacy at common law after death, but there are moral rights grounded in quasi-personhood theory that may be worth enforcing for the protection of loved ones.

³¹⁵ See Schiff, *supra* note 270, at 944–45 (noting that PMSR “recasts the content and contours of the deceased’s life” and deprives the decedent of the opportunity to be “the conclusive author of a highly significant chapter of his or her life”).

³¹⁶ Masaki Iwasaki, *Digital Cloning of the Dead: Exploring the Optimal Default Rule*, 15 *ASIAN J.L. & ECON.* 1, 2 (2023).

³¹⁷ Imagine the world without the many great derivative works, such as *West Side Story* (from *Romeo and Juliet*, by Shakespeare), *Apocalypse Now* (*Heart of Darkness*, by Joseph Conrad), *10 Things I Hate About You* (*The Taming of the Shrew*, by Shakespeare), *Sons of Anarchy* (*Hamlet*, by Shakespeare), *House M.D.* (from *Sherlock Holmes*, by Arthur Conan Doyle), *Pride and Prejudice and Zombies* (from *Pride and Prejudice*, by Jane Austen), *A Thousand Acres* (*King Lear*, by Shakespeare), *Rent* (*La Bohème*, by Giacomo Puccini, Luigi Illica, and Giuseppe Giacosa—which itself is based on a novel by Henri Murger), *Miss Saigon* (*Madam Butterfly*, also by Giacomo Puccini, Luigi Illica, and Giuseppe Giacosa), and *Clueless* (*Emma*, by Jane Austen).

³¹⁸ See Smith, *supra* note 273, at 1475 (discussing how the common law traditionally treats the dead as having rights).

³¹⁹ *Id.*

³²⁰ *Id.*

IV. TOWARD SOLUTIONS

Since the Clinton-Gore administration, there has been a bipartisan agreement to make a “regulatory oasis” around big tech and start-up companies.³²¹ We now find ourselves at a crossroads because the data of the deceased is almost entirely unregulated, and #bigtech is shaping a marketplace that is arguably distanced from personhood. Developing ethical and legal guardrails for the use of AI after death requires a careful balancing of impact on the living versus interests of the deceased. Yet most legislative proposals seem to be treating death as a mere afterthought, rather than a legally significant event. Framing the problem, we see that the stakes are very different for AI recreation of the living versus resurrection of the deceased.³²² The foundational policy articulated in this Article establishes a paradigm for regulating the law of digital resurrection that is consistent with the deceased’s existing legal rights and associated obligations, applying themes from the law of the dead.

This Part crafts a solution that provides a minimal level of control over the source of the digital resurrection (input data) rather than the outcome (the digital clone). Distinguishing non-commercial from commercial resurrection, this Part also provides guidance on future regulation of commercial resurrection. Section A outlines a helpful paradigm within which the law of digital resurrection should be couched.³²³ Section B proposes a right to delete personal data to provide the deceased with more control over their digital legacy.³²⁴ Section C balances the possible legal framework against the problems of dead hand control.³²⁵ Section D rounds out the legal framework by advocating for an expanded, strengthened right of publicity.³²⁶

A. *Shaping a Facilitative Paradigm*

In matters of the dead, it is often said that the purpose of the law is to facilitate rather than regulate.³²⁷ This facilitative goal is usually met through def-

³²¹ Rob Reich, Mehran Sahami & Jeremy M. Weinstein, *Democracy Is Losing Its Race with Disruption*, THE ATLANTIC (Sept. 5, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/democracy-is-losing-its-race-with-disruption/619983/> [https://perma.cc/R6U-3TQN].

³²² Abusive use of digital technology for stalking and harassment, as a general matter, is an issue for the living. In the context of artificial intelligence and recreative technology, it is a very different problem when abuse is happening through a digital recreation (of the living) versus a digital resurrection (of the deceased). For more on digital abuse of the living, see generally Thomas E. Kadri, *Networks of Empathy*, 2020 UTAH L. REV. 1075.

³²³ See *infra* notes 327–340 and accompanying text.

³²⁴ See *infra* notes 341–366 and accompanying text.

³²⁵ See *infra* notes 367–386 and accompanying text.

³²⁶ See *infra* notes 387–391 and accompanying text.

³²⁷ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003).

erence to the expressed intention of a decedent, and restricting the decedent's freedom through regulation typically happens to maximize social welfare.³²⁸ With this in mind, any framework to regulate digital resurrection should be shaped by three important principles: (1) consumer rights concerning digital resurrection should not be defined or exercised through estate planning, (2) the law should be focusing on the source rather than outcome, and (3) commercial versus non-commercial digital resurrection should be addressed differently.

First, empowering the deceased to make lifetime decisions through estate planning is a structurally inequitable and anachronistic approach that maximizes social welfare only for those who do estate planning.³²⁹ Thus, although privacy scholars have long debated the merits of opt-in versus out-out approaches to privacy protection for individuals, the choice is of particular significance for the deceased. It is estimated that more than sixty percent of Americans die without a valid will in effect.³³⁰ Data demonstrates a correlation between those with wealth dying testate and those without wealth dying intestate.³³¹ Wealth accumulation ties to age, and so it is unsurprising that those with a valid will are more likely to be older. And because wealth inequality cuts along race and gender lines, it is also unsurprising that women and racial minorities are less likely to die with a valid estate plan in effect.³³² Any policy that relies upon estate planning to make a choice operates to the disadvantage of the historically marginalized, who are far less likely to draft the documents during lifetime that are required to opt in.³³³ It also ignores the access to justice problem in the United States, which profoundly impacts lower income, women, multiracial, and Black Americans.³³⁴

Importantly, the United States is a death-denying society. Indeed, it is a luxury to be so distanced from the reality of death that it may be shuffled out

³²⁸ Glover, *supra* note 24, at 413.

³²⁹ Dr. Debra Bassett, a digital afterlife consultant in the United Kingdom, has proposed the idea of a do-not-reanimate order modeled off a do-not-resuscitate order, to be included in a person's will. Percy, *supra* note 54. It is uncertain as to whether these types of testamentary provisions will or should be anything more than advisory. *See id.*

³³⁰ Lorie Konish, *67% of Americans Have No Estate Plan, Survey Finds. Here's How to Get Started on One*, CNBC (Apr. 11, 2022), <https://www.cnbc.com/2022/04/11/67percent-of-americans-have-no-estate-plan-heres-how-to-get-started-on-one.html> [<https://perma.cc/Z98N-S9EK>].

³³¹ Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WIS. L. REV. 295, 298. Across all demographic categories, intestacy correlates to less wealth. *Id.*

³³² *See generally id.* (charting the impacts of race and gender lines on intestacy).

³³³ *See generally id.* (discussing trends of opt-in succession planning in marginalized communities).

³³⁴ *See* Zachary Willis & Kelsey Montague, *New Study Reveals the Full Extent of the Access to Justice Crisis in America*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 24, 2021), <https://iaals.du.edu/blog/new-study-reveals-full-extent-access-justice-crisis-america> [<https://perma.cc/HSM8-B5AX>].

of sight. Individual behavior is notably different when it comes to death and estate planning due to the emotional and sensitive nature of these topics. The thought of planning for one's own passing and considering the distribution of assets can be daunting and morbid for many individuals. It is a process that forces the individual to confront their own mortality. Avoidance of any conversation related to death, coupled with the access to justice problem, leads to individuals neglecting this important facet of financial planning.

We can do better in a technology-based world. Any modern framework should recognize a lack of accessibility as an obstacle to fairness and protect the rights of the most vulnerable through approaches that do not depend upon hiring an attorney and executing an estate plan.

Further, to the extent that we wish to provide dignitary or privacy rights to the decedent to control non-commercial digital resurrection, the right should be used to restrict access to data rather than focusing on the outcome. Generative AI is rapidly advancing, and a digital resurrection today will look and behave differently from one next year. It is not yet necessary to recognize postmortem privacy rights.³³⁵ This should not cause us to step away from regulating, but it does mean that regulatory evasion will be substantially lowered through regulation of source material over outcome, particularly when the outcome is rapidly evolving.

Finally, commercial versus non-commercial digital resurrection deserves separate treatment for several reasons.³³⁶ It is impossible in one article to resolve the opposition to publicity rights as a threat to free speech, and drawing AI and the dead into the conversation is an article unto itself.³³⁷ Rights of publicity arise through state tort law to prevent unauthorized appropriation of someone's persona or identity, creating important economic interests in the deceased that warrant separate treatment from non-commercial use of AI for purposes such as grieving. And although other scholars have used the incoherence of the law of the dead as an excuse to draw upon the less coherent areas of the law of privacy to create a postmortem right of privacy, providing some moral standing to the decedent is not a justification for drawing privacy rights into the realm of the dead when simpler options arguably exist. Restraint is particularly important given three relevant underlying issues: (1) the nature of

³³⁵ At least two scholars disagree and suggest that it is time to consider postmortem privacy rights, not simply for commercial uses, but for all uses. See Anita L. Allen & Jennifer E. Rothman, *Postmortem Privacy*, 123 MICH. L. REV. 287, 288 (2024) (arguing that the right to privacy for the deceased ought to be recognized soon in broad contexts).

³³⁶ See *id.* (differentiating between a postmortem right of privacy for commercial and non-commercial purposes and proposing that both are protected).

³³⁷ See Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse*, 78 MD. L. REV. 899, 899 (2019) (addressing the tension between free speech and rights of publicity, and raising issues addressed by new technologies).

the data used for digital resurrection is often collective and non-rivalrous; (2) time-limitations of privacy rights are required because the freshly dead and the long dead are differently situated;³³⁸ and (3) public sentiments lean in favor of overregulation to protect the dignity of the deceased, regardless of whether it is manageable.

The latter has recently become apparent. Although many legislatures are responding to a public sentiment to protect private citizens against the unauthorized use of digital clones, it is important to identify what exactly needs to be protected, and to narrowly tailor regulation to support innovation.³³⁹ Digital resurrection for commercial reasons is done with different intention and for different needs than non-commercial digital resurrection. The former allows for entertainment or endorsement by deceased celebrities, who may be more reliable and less prone to scandal when they are unalive, leading to a staggering growth in the marketplace that should be regulated separately. Non-commercial digital resurrection is generally for the purpose of legacy or remembrance.³⁴⁰

B. A Right to Delete

This Article proposes a solution whereby the decedent would have control over the input rather than the outcome. Put simply, the deceased may exert control over digital legacy through the right to deletion of data but may not exert broader rights over non-commercial digital resurrection through estate planning.³⁴¹ Digital resurrection by or through AI requires the personal data of the deceased, and the amount of data that we are storing online is increasing exponentially with each passing year.³⁴² It has been said that data is the new uranium,³⁴³ extraordinarily valuable and potentially dangerous.³⁴⁴ A right to delete will provide the decedent with a time-limited right for deletion of personal data.

³³⁸ Time-limiting privacy rights for the deceased, if warranted, is a conversation for another article.

³³⁹ To the extent that culture is dynamic and evolves along with disruptive technology, fear of change and loss can result in entrenchment and opposition that sometimes defies common sense. Calestous Juma, *When People Become Innovation's Greatest Threats*, THE CONVERSATION (July 17, 2016), <https://theconversation.com/when-people-become-innovations-greatest-threats-62502> [<https://perma.cc/H48K-MWFS>].

³⁴⁰ There is generally no nefarious purpose underlying the digital resurrection of a middle-aged mother from Iowa with no public profile.

³⁴¹ Rights over commercial digital resurrection are considered *infra* Part IV.D.

³⁴² J.H. HARRINGTON, DIGITAL REMAINS: DEATH, DYING & REMEMBRANCE IN THE TECH GENERATION 78 (2020). Four out of five smartphone users check their phones within fifteen minutes of waking, “and among these people, nearly 80% reach for their phones before doing anything else.” *Id.* at 106.

³⁴³ Mary Branscombe, *Data Deletion: Your Data Strategy's Best Defense*, CIO (July 3, 2019), <https://www.cio.com/article/220315/data-deletion-your-data-strategys-greatest-defense.html> [<https://perma.cc/32KT-DLM8>]. Capturing personal data empowers predictive purchasing algorithms to antic-

The agency to shape one's legacy is predominantly held by the living.³⁴⁵ Take for example a person with embarrassing letters in their shoebox. The most effective way to prevent the sharing of a shoebox of letters is, during lifetime, to destroy it. If instructions are left at death to destroy the letters, the instructions may not be honored.

The nature of data as an asset is far different from the letters. Absent publication, letters will likely have only a handful of readers; publication of the letters first requires contemplation, reflection, and editing. If those same letters were stored as data online, the letters could be blasted through cyberspace in mere seconds and read by millions before breakfast.

Celebrities and public figures may leverage digital recreation and resurrection for commercial benefit, and with this economic interest often comes a team of professionals to curate digital data and scans to maximize the value of any digital clones.³⁴⁶ Conversely, the average person places data online without much contemplation.³⁴⁷ The amount of data stored online increases year after

ipate marketplace need, but also allows artificial intelligence to recreate human interaction on an increasingly unprecedented scale. *See id.* (discussing the predictive value of data).

³⁴⁴ "When I die, please delete my browser history" is a common (or not uncommon) request when someone is contemplating their demise. One Norwegian internet browser company has created a feature called "Fake My History," which will replace any questionable browsing history with a new, clean version after two weeks of inactivity. Patrick Curtin, *Clean Up Your Dirty Past with 'Fake My History' from Opera GX*, OPERA BLOG (July 27, 2023), <https://blogs.opera.com/desktop/2023/07/clean-up-your-dirty-past-with-fake-my-history-from-opera-gx/> [<https://perma.cc/YNT3-CS4Y>]. The fake but plausible virtuous browsing history may include web searches for "local volunteerism," "reducing my carbon footprint," and "meditating for world peace." *Id.*; *see also* Sydel Brown, *If I Die First, Please Delete My Browser's History*, MEDIUM: CANDOUR (May 7, 2019), <https://medium.com/candour/if-i-die-first-please-delete-my-browsers-history-3d6d6e5d724b> [<https://perma.cc/8V92-3M85>] (describing the writer's pact with a friend to delete the other's browser history upon death); Kim Komando, *You Can Set Google to Delete All Your Info After You Die*, KIM KOMANDO (Aug. 31, 2019), <https://www.komando.com/news/set-google-to-delete-all-your-stuff-after-you-die/> [<https://perma.cc/WL9P-PWDA>].

³⁴⁵ Gustav Theodor Fechner argued in *The Little Book of Life After Death* that memory is the connection between the living and the deceased, and the former controls and holds the latter. FECHNER, *supra* note 265, at 39.

³⁴⁶ *See* Roberts, *supra* note 106, at 283 (describing the protections against commercial uses of likeness afforded to celebrities).

³⁴⁷ *See The Zettabyte World: Securing Our Data-Rich Future*, DELL TECHS. (Sept. 30, 2020), <https://www.dell.com/en-us/perspectives/the-zettabyte-world-ebook/> [<https://perma.cc/7BTE-7V73>] (noting that the amount of data produced by 2025 will approximate 175 Zettabytes worth); UBS Ed. Team, *How the Data Universe Could Grow More Than 10 Times from 2020 to 2030*, UBS (July 28, 2023), <https://www.ubs.com/us/en/wealth-management/insights/market-news/article.1596329.html> [<https://perma.cc/Y7VC-YSXK>] (discussing the unprecedented scale of data production since the COVID-19 pandemic). The amount of data that we are storing online is increasing exponentially with each passing year. UBS Ed. Team, *supra*. The two Zettabytes of data (or 250 billion DVDs) generated in 2010 compares to 147 Zettabytes in 2024 and is projected to grow tenfold from 2020 to 2030. *Id.*; *see The Zettabyte World: Securing Our Data-Rich Future*, *supra* (explaining Zettabytes).

year, often without regard to privacy rights or potential abuses.³⁴⁸ This norm has shaped organically, as reliance upon smart phones and computers has increased.

Privacy and dignity are related concepts. Privacy is interested in protecting human dignity through control over information dissemination, and the law of human remains is concerned about protecting dignity through the appropriate or respectful treatment of the remains of the deceased.³⁴⁹ Privacy interests have not been extended posthumously at common law, but the ability to accumulate vast quantities of data without intentionality also did not exist at common law. A posthumous right to deletion provides the estate fiduciary with the opportunity to sort through what they may need prior to destroying personal data—given that the relationship between personal data and the fiduciary managing the estate of the decedent is, at best, a complicated one. When the decedent maintains a secret bank account to support an extramarital partner, the account itself may be classified as a digital item (carrying its own value), the communications are personal data (not carrying inherent value), and efficient resolution of the estate may require access to both.

The right to deletion of data has never been federally formalized in the United States. A right to deletion may nonetheless follow in the footsteps of the EU's right to be forgotten, which provides a valuable opportunity for better control of data via a system that some argue is quasi-propertyization of personal data.³⁵⁰ In fact, the European Court of Human Rights held in 2021 that the right to be forgotten could extend to the deceased.³⁵¹ Although there is no equivalent federal right to be forgotten in the United States, states are enacting

³⁴⁸ See Danielle K. Citron, *A Poor Mother's Right to Privacy: A Review*, 98 B.U. L. REV. 1139, 1141 (2018) (reviewing KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017)) (outlining how data storage practices impact individuals and lead to abuses).

³⁴⁹ Dignity law touches upon almost every area of substantive law and is becoming its own respected areas of study. It is outside of the scope of this Article to define what dignity does or should mean, outside of the narrow examination in this Article related to the deceased. See generally ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* (2012) (explaining the constitutional recognition of dignity rights); ERIN DALY & JAMES R. MAY, *DIGNITY LAW: GLOBAL RECOGNITION, CASES, AND PERSPECTIVES* (2020) (illustrating the varied scope of dignity law); MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2018) (tracing the history of dignity law); MICHAEL RUPNIEWSKI, *HUMAN DIGNITY AND THE LAW: A PERSONALIST THEORY* (2023) (reassessing the relationship between dignity law and agency); JAMES R. MAY & ERIN DALY, *ADVANCED INTRODUCTION TO HUMAN DIGNITY LAW* (2020) (breaking down the facets of dignity law); GEORGE P. SMITH II, *DIGNITY AS A HUMAN RIGHT?* (2018) (examining the connection between dignity, human rights, and state laws); GINEVRA LE MOLI, *HUMAN DIGNITY IN INTERNATIONAL LAW* (2021) (exploring dignity law in the international law context).

³⁵⁰ See Harbinja, *supra* note 138, at 238.

³⁵¹ Federica Casarosa, *The (Posthumous) Exercise of the Right to Be Forgotten*, MEDIA L. (Feb. 21, 2023), <https://www.medialaws.eu/rivista/the-posthumous-exercise-of-the-right-to-be-forgotten/> [<https://perma.cc/ET74-7V9P>].

right to be forgotten legislation.³⁵² Concern about retention and use of data has risen to the point that California enacted the Delete Act in October 2023 (effective January 1, 2024), becoming the first state to provide an accessible deletion mechanism for living consumers to delete personal information held by data brokers in one step.³⁵³ It is not clear from the text of the bill whether the legislation will only apply to living consumers, or whether deletion will also be available for the deceased.³⁵⁴

A right to deletion for the deceased may be grounded in the same quasi-property, quasi-personhood theories that shape other dignitary rights for the deceased. The law of human remains offers positive legal protection for the memory and the dignity of the deceased and derives from deeply held cultural beliefs.³⁵⁵ These laws are said to act in the interest of the deceased, but actually operate to benefit the living—those not yet departed can trust in the protection of their dignity after death, and that of their next of kin. Applying the law of human remains allows us to step within a quasi-property and quasi-personhood framework, justifying the deletion of the digital assets on the basis of respect for the deceased. This online data is arguably part of a “digital identity” of the decedent, and the personal representative or digital fiduciary of the deceased should be afforded a period of time to request deletion of all data stored on the site.

Importantly, a right to deletion for the deceased may be defended regardless of whether the same right exists for the living, and provides protections not otherwise afforded by tort or property law. Privacy rights die with the decedent and an action in tort will not protect abuses of data.³⁵⁶ Extending priva-

³⁵² See Michael Buckbee, *Right to Be Forgotten: Explained*, VARONIS, <https://www.varonis.com/blog/right-to-be-forgotten> [<https://perma.cc/3AYX-JADA>] (June 6, 2022) (discussing states seeking to legislate a right to be forgotten).

³⁵³ *CPA Applauds Governor Newsom for Approving the California Delete Act*, CAL. PRIV. PROT. AGENCY (Oct. 11, 2023), <https://cpa.ca.gov/announcements/2023/20231011.html> [<https://perma.cc/5J3V-DVUS>].

³⁵⁴ It is unclear from the text of the legislation if this right will be extended to the deceased. See generally S.B. 362, Cal. Legis., 2023–24 Reg. Sess. (Cal. 2023) (outlining the right to be forgotten but not explicitly extending it to the deceased).

³⁵⁵ Napoleon’s penis has been the subject of gossip for more than two centuries, because his corpse was allegedly defiled when his penis was severed, given to a priest, and smuggled to Corsica. *The Twisted Journey of ‘Napoleon’s Privates,’* NPR (July 2, 2008), <https://www.npr.org/2008/07/02/92126411/the-twisted-journey-of-napoleons-privates> [<https://perma.cc/4T44-JJN9>]. It was placed on display in New York in 1927. *Id.* An American urologist, Dr. John Lattimer, bought the penis with the intention of removing it from the eyes of society and public mockery. *Id.* It has remained in his family in suburban New Jersey ever since, which speaks to the inherent belief that even a despot deserves dignity in death. See *id.*; Michelle Young, *A Replica of Napoleon’s Penis Was on Display in NYC for a Few Hours*, UNTAPPED N.Y. (Oct. 23, 2015), <https://untappedcities.com/2015/10/23/a-replica-of-napoleons-penis-was-on-display-in-nyc-for-a-few-hours/> [<https://perma.cc/B4E4-BWDC>].

³⁵⁶ See Harbinja, *supra* note 138, at 237 (noting that the property regime, unlike the tort regime, does not require a showing of harm).

cy rights to the deceased is problematic because a tort suit requires a damage claim to be sustainable, and U.S. law is solidly grounded in the notion that a corpse is unharmed by an invasion of privacy.³⁵⁷ Property law also offers less than satisfactory options as digital assets account for a wide variety of assets, and three important data sources (social media posts, emails, messaging) are unlikely to be considered property.³⁵⁸

Intensive data collection processes have been “techwashed” with collection and retention of far more data and for longer than is objectively necessary. Data brokers sell personal information that includes information such as addresses, spending habits, location information, and employment status.³⁵⁹ It is possible for deletion options to be mandated structurally or incorporated into TOS/TOC. Google developed its Inactive Account Manager (IAM) in April 2013, to allow users to share all or part of their account information³⁶⁰ after a period of inactivity selected by the user.³⁶¹ The user will name a trusted contact, and after the period of inactivity, the identity of the trusted contact will be verified, and information will be shared or deleted.³⁶² A concern with the Google IAM is that the transfer of online data to a trusted contact may result in a data transfer to someone other than digital fiduciaries or beneficiaries named in a will. This is not really a problem for those familiar with the law of succession, as it is regularly seen with will substitutes that conflict with testamentary instruments.

Code architecture is not naturally occurring. It is always built and never found, which means that the online environment can be structured to promote certain values while detracting from others.³⁶³ A legislated right to deletion will force development of technological solutions to postmortem management. The right to deletion would pressure tech companies into prioritizing the creation of technology to allow for postmortem data management, spurring important technological development in an area that would be otherwise largely ignored. This will also provide basic rights to users who are otherwise bound by TOS/TOC that they rarely read and have no ability to negotiate. Ideally, the

³⁵⁷ *See id.*

³⁵⁸ These assets are not considered property so long as copyright does not attach. *See generally id.* (discussing the copyright rules and protections).

³⁵⁹ Sergio Flores & Cinthia Pasillas, *A New State Law Is Giving You More Power Over Your Online Personal Data*, NBC SAN DIEGO (Oct. 12, 2023), <https://www.nbcsandiego.com/nbc-7-responds-2/a-new-state-law-is-giving-you-more-power-over-your-online-personal-data/3325396/> [<https://perma.cc/AQE6-T7YD>].

³⁶⁰ HARBINJA, *supra* note 134, at 199.

³⁶¹ The four options available are three months, six months, twelve months, or eighteen months of inactivity. *About Inactive Account Manager*, GOOGLE ACCT. HELP, <https://support.google.com/accounts/answer/3036546?hl=en> [<https://perma.cc/EV33-JCUV>].

³⁶² HARBINJA, *supra* note 134, at 199.

³⁶³ Mark Verstraete, Jane R. Bambauer & Derek E. Bambauer, *Identifying and Countering Fake News*, 73 HASTINGS L.J. 821, 838–39 (2022).

right to deletion would prompt technology companies to develop a clearly articulated plan on how data of deceased or inactive users will be maintained or archived, as part of the business model rather than as an afterthought.

The right to deletion would ideally, from the perspective of estate administration, provide for a term of deletion within twelve months. Estate administration ranges from six months to several years, depending on state law and the complexity of the estate.³⁶⁴ The twelve-month timeframe allows the living to manage grief and open administration of the estate before having to address data management issues.

The rights of the living should control over the interests of the deceased,³⁶⁵ as preservation of memory and access to information are fundamentally important to society.³⁶⁶ That said, the change in medium does not give rise to a societal right or immediately place the decedent into public domain. Put simply, the personal representative of the decedent has the right to destroy all physical letters and photographs saved by the decedent; merely storing personal information in the Cloud should not grant societal archival rights. A limited right of deletion within a twelve-month window balances the interests of society against the rights of the deceased.

C. Constraining the Dead Hand

Creating a right beyond data deletion, to curtail unauthorized non-commercial digital resurrection, creates unnecessary complexity that overreaches and places the interests of the deceased over those of the living.³⁶⁷ Such an approach would run contrary to the weight of more than a century's worth of law and policy drawing from the law of the dead.³⁶⁸

The law of inheritance, succession, and human remains emphasizes a clear preference for the living, and favors the free alienability of wealth, prop-

³⁶⁴ See *Wills and Estates: The Probate Process*, AM. BAR ASS'N (Sept. 17, 2012), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/probate_howlong/ [<https://perma.cc/QH6F-QB6H>] (stating that estate administration takes six to nine months on average); PAULA A. MONOPOLI, AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS 49 (2003) (noting that the average length of estate administration is eighteen months).

³⁶⁵ See *Eyerman v. Mercantile Tr. Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (“A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society.”).

³⁶⁶ Santiago Cascardo, *The Post Mortem Right to Be Forgotten*, REPSAN (May 24, 2024), <https://www.repscan.com/en/blog/the-post-mortem-right-to-be-forgotten/> [<https://perma.cc/U78B-7DFM>].

³⁶⁷ Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824) (“Can one generation bind another, and all others, in succession forever? I think not. The Creator has made the earth for the living, not the dead. Rights and powers can only belong to persons, not to things, not to mere matter, unendowed with will.”), in THOMAS JEFFERSON: WRITINGS 1490, 1493 (Merrill D. Peterson ed., 1984).

³⁶⁸ See Subotnik, *supra* note 28, at 312–13, (concluding that dead hand control by a decedent artist must yield to the needs of the living.).

erty, and ideas.³⁶⁹ The degree to which the public domain of information could potentially be ravaged through boilerplate will provisions instituting blanket prohibitions on use of technology should not be ignored.³⁷⁰ Mass data accumulation is recent (taking place over the past two decades). This data by its nature is plural, porous, and difficult to redact, floating in and out of interactions due to a general lack of clear boundaries.³⁷¹

Further, the right of the living to remember the deceased and find meaning in death should be honored as foundational. Endowing a charity, erecting a statue, creating death mementos, listening to saved voicemails, smelling an old sweater, watching home movies, and gazing upon photos should arguably always be available to those who have loved and lost.³⁷² Feeding text messages and emails into existing AI platforms such as ChatGPT and asking the AI to respond in the voice of the deceased is simply a change in degree, not in kind.³⁷³

The application of technology is new, but the legal issues most certainly are not. More than a century ago, the City of New York wished to erect a statue to honor the philanthropy of Mary Hamilton Schuyler.³⁷⁴ The family objected on the grounds that she was a very private person who would not want a statue erected in her honor. The court reasoned that protection of the dead really matters in the context of the living, and the family of the deceased would not be harmed by the statue.³⁷⁵ In a sense, we allow the deceased to become property

³⁶⁹ Simmons, *supra* note 118, at 643 n.6.

³⁷⁰ See William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 83 (2005) (“Over-protecting intellectual property is as harmful as under protecting it. Creativity is impossible without a rich public domain.”).

³⁷¹ See Kate Mannell, *Plural and Porous: Reconceptualizing the Boundaries of Mobile Messaging Group Chats*, 25 J. COMPUTER MEDIATED COMMUN. 274, 285 (2020) (arguing that group chats have boundaries that are porous and plural).

³⁷² ALLISON, *supra* note 47, at 3 (“The status of the dead is at once liminal and precarious, and caring for the dead depends on those still living who embark upon doing so at the site of the corpse. This entails a relationship between the living and the dead conducted around the material remnants of the deceased.”).

³⁷³ See Pearcy, *supra* note 54 (describing the experience of Sunshine Henle, who fed text messages with her mother into ChatGPT).

³⁷⁴ *Schuyler v. Curtis*, 42 N.E. 22, 22 (N.Y. 1895).

³⁷⁵ See *id.* at 26. The dissenting opinion noted that the erection of the statue violated a sacred right to privacy:

The theory of the case . . . is not that of a mere protection to wounded feelings, but the protection of a right which those who represent the deceased have to her name and memory, as a family heritage, and which had not become the public property. Why is that not a legal and an exclusive interest, and why are its possessors not entitled to be protected by the law from a notoriety which invites public criticism of the memory and reputation of the deceased relative?

Id. at 28 (Gray, J., dissenting).

of the public by setting aside all privacy considerations. The line in the sand is likely whether the commercial use of the persona or the likeness of the deceased should be protected, which will be considered below.

Focusing on the law of digital resurrection emphasizes the way in which death impacts digital reproduction of the living far differently. The living are permitted to make plans that may or may not be enforced when they are deceased. Enforceability hinges upon the reasonableness of the plans, the law of the state in which enforcement would take place, and circumstances which may or may not exist when the estate planning is drafted. Allowing the living to include a sweeping stricture to opt out of non-commercial digital resurrection ignores the inherent non-rivalrous nature of data and runs contrary to foundational policies governing rights of the deceased in controlling that which is not inheritable property. Further, a legal right for the dead extending beyond deletion faces three insurmountable practical dilemmas because of the nature of data and death: (1) non-excludability, (2) enforceability, and (3) constitutionality.

First, an important feature of digital production is that it is almost always collective in some way, rendering it impossible to exclude a party from access where concurrent access exists.³⁷⁶ Data is non-rivalrous, and more than one person can have concurrent possession of the same data. It does not always have clear borders, and it is sometimes unclear where the data of one person ends and that of another person begins, as with a group text chain or a social media post with user comments.³⁷⁷ Data is forged, maintained, or stored on networks or platforms and human and nonhuman infrastructures.³⁷⁸ Unlike other forms of property, this creates problems of possession. It also becomes difficult to exclude others from using the information, which is often relatively low-cost to access and share.³⁷⁹ In a text conversation between two people, giving one person the right to restrict the conversation inherently treads on the rights of the other. It becomes difficult to draw borders around shared data that can be used to resurrect the deceased. To the extent that data is shared, the deceased should only have control over the data in their own possession.

The second obstacle is one of enforceability. A dead person does not suffer reputational harm or damage from non-commercial digital resurrection that would give rise to an action by the estate under existing law. It is problematic to calculate damages for an unauthorized, non-commercial digital resurrection of the deceased, particularly when the resurrection causes no harm to the de-

³⁷⁶ KNEESE, *supra* note 1, at 65.

³⁷⁷ *See id.* (questioning the boundaries of data ownership).

³⁷⁸ *See id.* at 66 (describing the network of commercial platforms and platform owners storing data).

³⁷⁹ *See id.* at 188 (outlining how data companies can harvest available data to create their online avatars of the individual); *see also* HARBINJA, *supra* note 134, at 11 (discussing the amount of digital content posted).

ceased. Damages used in this way would be for the purpose of deterrence rather than for compensatory purposes (to make the decedent whole), which begs the question of whether there is a more effective approach to regulation. Further, an interest in innovation and public use arguably outweighs legal rights extending further than those available today to protect against non-commercial resurrection. Although this Article contemplates the way in which the law of human remains may influence law and policy on digital resurrection, the latter may also have a profound impact on norms and policy within the law of human remains.

The third issue is one of constitutionality. The No AI FRAUD Act introduced in Congress in January 2024 would potentially provide the deceased with an enforceable right to opt out³⁸⁰ of unauthorized digital depictions, but such an approach has been sharply criticized by the American Civil Liberties Union for treading upon a wide swath of First Amendment protected speech, such as the right to create AI duplicates for commentary, satire, news, and so forth.³⁸¹ The current language of the legislation would go so far as to create penalties of up to \$50,000 for creating a meme with someone's face, unless the image was licensed.³⁸² The legislation creates an intellectual property right that is so broad that there is no safety valve for fair use.³⁸³

In many ways, the California Delete Act (signed into law in October 2023)³⁸⁴ is a model piece of legislation that provides consumers with the right

³⁸⁰ See Mike Masnick, *Was the NO AI FRAUD Act Written by a Fraudulent AI? Because Whoever Wrote It Is Hallucinating*, TECHDIRT (Jan. 23, 2024), <https://www.techdirt.com/2024/01/23/was-the-no-ai-fraud-act-written-by-a-fraudulent-ai-because-whoever-wrote-it-is-hallucinating/> [<https://perma.cc/JN4V-PU32>] (describing the right of publicity created by the No AI FRAUD Act); Brown, *supra* note 164 ("So just how broad is this bill? For starters, it applies to the voices and depictions of all human beings 'living or dead.' . . . These definitions go way beyond using AI to create a fraudulent ad endorsement or musical recording. They're broad enough to include reenactments in a true-crime show, a parody TikTok account, or depictions of a historical figure in a movie. They're broad enough to include sketch-comedy skits, political cartoons, or those Dark Brandon memes. They're broad enough to encompass you using your phone to record an impression of President Joe Biden and posting this online, or a cartoon like *South Park* or *Family Guy* including a depiction of a celebrity. And it doesn't matter if the intent is not to trick anyone.").

³⁸¹ Letter from Am. C.L. Union et al. to Rep. Darrell Issa, Chair of the Subcomm. on Cts., Intell. Prop., and the Internet & Rep. Hank Johnson, Ranking Member of the Subcomm. on Cts., Intell. Prop., and the Internet (Feb. 1, 2024), https://cdt.org/wp-content/uploads/2024/02/Coalition-Letter-NO-AI-Fraud-Act-_NO-FAKES-Act-2.1.2024-.pdf [<https://perma.cc/ETL2-QS7Q>].

³⁸² *Id.*

³⁸³ See Klosek, *supra* note 162 (arguing that the Act does not include sufficient First Amendment protections).

³⁸⁴ See Marty Swant, *WTF Is California's Proposed 'Delete Act'?*, DIGIDAY (Aug. 24, 2023), <https://digiday.com/media-buying/wtf-is-californias-proposed-delete-act/> [<https://perma.cc/98UY-JTMS>].

to request that their data be deleted.³⁸⁵ The legislation requires that businesses put “an accessible data deletion mechanism” in place by 2026.³⁸⁶ The problem with this legislation, as with much state legislation currently in process and the reason for this Article, is its uncertain application to the deceased.

D. A Fortified Right of Publicity

Although the deceased should have a right to request deletion of input material, the outcome should not be regulated in cases of non-commercial digital resurrections at this time. With the living, there is the very real potential for harassment and harm of a living person through deepfake technology.³⁸⁷ This harmful use of generative AI, to create unauthorized duplications, does not exist for the deceased. So while it is important to address and limit potential harm, this must be weighed against the potential to chill authorized speech. It is unclear as to what would constitute an injury to the dignity after death, and vague dignitary concerns leave open the potential for abuse.³⁸⁸ Further, existing law protects the privacy interests of the loved ones of the deceased from outrageous or harmful digital resurrections of the deceased.³⁸⁹ This Article does not foreclose the possibility of limitations in the future but does suggest that it is too early to limit non-commercial duplication.

Distinguishing commercial from non-commercial appropriations in this Article is not an attempt to duck First Amendment concerns with limiting non-commercial appropriations, building upon an (incorrect) argument that commercial speech is not subject to First Amendment protection.³⁹⁰ It is impossible to resolve in one article the opposition to publicity rights as a threat to free speech, and drawing artificial intelligence and the dead into the conversation deserves attention as an article unto itself.³⁹¹ This Article carves out speech-restrictive implications of preventing the living from resurrecting the deceased for personal, non-commercial reasons as a potentially relevant topic for most estate planners,

³⁸⁵ David Navetta et al., *California’s Delete Act—Key Takeaways for Data Brokers*, COOLEY (Oct. 16, 2023), <https://cdp.cooley.com/californias-delete-act-key-takeaways-for-data-brokers/> [<https://perma.cc/489N-JYAN>].

³⁸⁶ *Id.*

³⁸⁷ See *Hearing on Artificial Intelligence & National Security Before the H. Comm. on Energy & Com.*, 116th Cong. 24 (2019) (statement of Danielle Citron, Professor of Law, University of Maryland) (discussing the impacts that false pornographic images can have on a person’s life).

³⁸⁸ See Bartholomew, *supra* note 10, at 1619 n.177 (expressing skepticism about extending dignitary concerns too broadly beyond the grave for a right of publicity).

³⁸⁹ See *id.* at 1620 (“[T]he law is already geared to address shocking or outrageous digital uses of the dead.”).

³⁹⁰ See Dogan, *supra* note 10, at 1217 n.271 (discussing how the First Amendment issue is not solved by isolating the right of publicity to commercial speech).

³⁹¹ See Kadri, *supra* note 337 (addressing the tension between free speech and rights of publicity, and raising issues created by new technologies).

and sets aside commercial appropriations of the decedent's likeness, identity, or persona as an area deserving adjunctive treatment. Further, the goal of this Article is not to argue that a federal right of publicity should be created, although there may be some value in shining a light upon the inconsistent patchwork of state laws governing the right of publicity. If technology has reached the point that the nonconsensual appropriation of name, image, and likeness for commercial purposes is problematic, it may be time to legislate a federally protected right of publicity. If (or when) this time comes, this Article emphasizes the importance of treating the right of publicity for a decedent as more than a mere afterthought amended onto the right of publicity for the living.

CONCLUSION

The digital resurrection conversation is timely, and the stakes are high. Digital resurrection through generative AI will allow for immersive interactive experiences with the dead that are almost indistinguishable from experiences with the living. This Article takes an obvious and necessary approach by centering the dead in a conversation where the deceased is the main actor. Death is a legally significant event giving rise to different interests and entitlements, and the deceased user should not be an afterthought for #bigtech or policymakers. Framing the problem, we see that the stakes are very different for AI recreation of the living versus resurrection of the deceased. This Article establishes a paradigm for the regulation of the law of digital resurrection grounded in the law of the dead—drawing upon quasi-property and quasi-personhood treatment of the deceased to resist commodification and acknowledge dignitary concerns, while also recognizing technological innovation as a neoliberal economic driver that requires solutions grounded in sustainability, equity, and benevolence. Regulation within this space should confer consumer rights through more accessible pathways than estate planning, focus on source rather than outcome, and distinguish commercial from non-commercial resurrection.