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THE SOCIAL AFTERLIFE

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TABLE OF CONTENTS

I. INTRODUCTION.....	329
II. THE LAWS OF LEGACY.....	335
A. “Legacy” and “Stewardship”.....	335
B. Extant Models of Legacy Stewardship	340
1. Freedom of Disposition.....	342
2. Family Inheritance.....	346
3. Public Domain.....	357
4. Consumer Contract.....	362
III. SYNTHESIZING STEWARDSHIP: THE DECENTERED DECEDENT.....	374
IV. IMPLEMENTING THE DECENTERED DECEDENT.....	381
A. Facilitating Contextual Testation.....	381
B. Promoting Fairness and Loyalty.....	382
C. Disaggregating Compensation from Control.....	383
V. CONCLUSION	386

I. INTRODUCTION

Social life no longer ends at death. With the rise of social media platforms and advances in digital technologies, the challenges of planning a person’s legacy now include far more than traditional questions of inheritance and financial planning. Social media accounts can continue to tweet, share, and interact with friends of the deceased.¹ 3D holograms can show up at family funerals² or appear in the eighth

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1. See, e.g., Madison Malone Kircher, *Facebook Still Wants Your Friends to Engage When You’re Dead*, N.Y. MAG.: INTELLIGENCER (Mar. 5, 2019), <http://nymag.com/intelligencer/2019/03/facebook-memorial-tributes-engage-even-after-death.html> [<https://perma.cc/V3T6-KFRA>] (discussing the option to post “tributes” on memorialized Facebook accounts).

2. See, e.g., Johnny Diaz, *West Palm Company Wants Your Hologram to Speak at Your Funeral*, S. FLA. SUN SENTINEL (July 17, 2015, 3:45 PM), <https://www.sun-sentinel.com/>

installment of a forty-year-old movie franchise.³ And detailed archives of terrible courtships, casual encounters, and late-night curiosities can remain perpetually available to surviving family members.⁴ A person's legacy no longer simply means the valuable assets they leave behind or even how they are remembered in the past tense; instead, it increasingly means how they continue to figure into the present social lives of their families, friends, and fans. Legacy planning, accordingly, is shifting from questions of financial investment and asset management to questions of ongoing emotional and cultural stewardship.

But who stewards our legacy — who plans our social afterlife? Before the rise of social media, legacy decisions were largely made by one of two entities: the decedent or their family. If the decedent executed a will or trust, then ownership and control over their real, personal, and intellectual property (“IP”) would generally pass to the entities of their choosing, subject to whatever parameters the decedent decided to impose on their successors.⁵ If the decedent did not execute a will or trust, then control and ownership would shift to surviving spouses, children, or other blood relatives through intestacy.⁶ Social media, however, has brought two additional stakeholders squarely into the equation: the general public and digital intermediaries. Individuals today inhabit diverse sets of online communities dispersed across the globe, and the terms of engagement with and within these communities are set contractually and mediated technologically by digital intermediaries.

With the rise of social media and the expanding number of stakeholders in a person's legacy, the challenges of legacy stewardship have become both more complex and more widespread. As to the complexity of legacy stewardship, take, for example, the musician Prince's death in 2016. As Prince died without a will, under the laws of intestacy, his

features/fl-hologram-eulogies-businessman-20150717-story.html [https://perma.cc/8UKD-V7W3]; Adrienne Matei, *New Technology Is Forcing Us to Confront the Ethics of Bringing People Back from the Dead*, QUARTZ (Jan. 27, 2017), https://qz.com/896207/death-technology-will-allow-grieving-people-to-bring-back-their-loved-ones-from-the-dead-digitally [https://perma.cc/GBP3-QKTA].

3. See, e.g., Rebecca Hawkes, *From Rogue One's Peter Cushing to Audrey Hepburn: 6 Stars Who Were Digitally Brought Back to Life*, TELEGRAPH (Dec. 20, 2016, 7:20 PM), https://www.telegraph.co.uk/films/0/rogue-ones-peter-cushing-audrey-hepburn-stars-digitally-brought [https://perma.cc/8ZUX-BUQ5].

4. See, e.g., Graham Grenore, *People Divided Over Whether Lurid Details of Married News Anchor's Death Should Have Been Made Public*, QUEERTY (Feb. 25, 2019, 1:02 PM), https://www.queerty.com/people-divided-whether-lurid-details-married-news-anchors-death-made-public-20190225 [https://perma.cc/4JYT-43JY]; Tobias Salinger, *Baptist Pastor Revealed as Ashley Madison User Committed Suicide: Family*, N.Y. DAILY NEWS (Sept. 9, 2015, 12:40 AM), https://www.nydailynews.com/news/national/pastor-revealed-ashley-madison-user-committed-suicide-article-1.2352982 [https://perma.cc/75YF-NBHZ].

5. See LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 3–5 (2009).

6. *Id.* at 46.

six siblings inherited his Paisley Park mansion and turned it into a museum.⁷ Under copyright law, his court-appointed personal representatives (a rotating cast of banks) can renegotiate many of his recording contracts⁸ and ease up on Prince's stringent policing of his music online.⁹ Under Minnesota's digital asset law, Google, Facebook, and Twitter decide what happens to his social media accounts and any material stored on their servers.¹⁰ Under Minnesota's common law right of publicity, it is unclear whether Prince's family decides whether he performs at the Super Bowl¹¹ or whether everyone can freely use his image and likeness.¹²

But legacy stewardship is not solely a problem for the wealthy; the challenges of legacy stewardship increasingly can impact anyone.¹³ For example, in numerous cases where teenagers and young adults have died in recent years, surviving family members have sought access to their digital accounts in order to better understand what precipitated

7. See Daniel Kreps, *Prince Estate: Sister, Five Half-Siblings Named as Heirs*, ROLLING STONE (May 20, 2017, 12:30 AM), <https://www.rollingstone.com/music/music-news/prince-estate-sister-five-half-siblings-named-heirs-193646> [https://perma.cc/NNV4-GZ4J]; Patrick Ryan, *Prince's Paisley Park Museum Opens to the Public*, USA TODAY (Oct. 6, 2016, 7:26 PM), <https://www.usatoday.com/story/life/music/2016/10/06/paisley-park-museum-opening/91675230> [https://perma.cc/TQ4Q-ZRL5].

8. See 17 U.S.C. § 203 (2018); Dionne Cordell-Whitney, *Judge Hands Bank Control of Prince's Estate*, COURTHOUSE NEWS SERV. (Jan. 26, 2017), <https://www.courthousenews.com/judge-hands-bank-control-of-princes-estate> [https://perma.cc/S8KR-XA48]; Britton Payne, *Heirs Go Crazy: Prince's Estate and Copyright's Termination of Transfers*, COPYRIGHT ON! (May 23, 2016), <https://paynebritton.wordpress.com/2016/05/23/heirs-go-crazy-princes-estate-and-copyrights-termination-of-transfer> [https://perma.cc/9VBQ-49L9].

9. See, e.g., *You're Gonna Hear a Lot More Music from Prince — Thanks to This Sony Music Deal*, DIGITAL MUSIC NEWS (June 19, 2018), <https://www.digitalmusicnews.com/2018/06/19/prince-estate-sony-music> [https://perma.cc/6JAB-RCPR] (“Something else to take into consideration is the desire of Prince himself, who was fiercely overprotective of his music. Some fans consider posthumously releasing the music as disrespectful to the artist.”); see also Reply Memorandum in Support of Petition to Permanently Remove Comerica Bank & Trust N.A. as Personal Representative at 31, *In re Estate of Nelson*, No. 10-PR-16-46 (Minn. Dist. Ct. Nov. 17, 2017) (“Comerica also has not properly defended the Estate from unauthorized use of Estate intellectual property.”).

10. See MINN. STAT. §§ 521A.02(9), 521A.04–.06 (2019).

11. See, e.g., Leonid Bershidsky, Opinion, “Undead” Rock Stars Shouldn't Play Stadiums, CHI. TRIB. (Feb. 5, 2018, 4:25 PM), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-rockstars-rock-music-cranberries-delores-ronnie-james-dio-kurt-cobain-0206-story.html> [https://perma.cc/3BPV-F3X9]; Lorena Blas, *Why Prince Fans Are Bashing Justin Timberlake's Super Bowl Halftime Performance*, USA TODAY (Feb. 5, 2018, 2:37 PM), <https://www.usatoday.com/story/life/music/2018/02/04/why-prince-fans-bashing-justin-timberlake-super-bowl-halftime-performance/305817002> [https://perma.cc/7L2V-TYCZ].

12. See *Paisley Park Enters., Inc. v. Boxill*, 299 F. Supp. 3d 1074, 1082 (D. Minn. 2017) (“The Minnesota Supreme Court has not addressed whether the right of publicity survives a person's death.”); Payne, *supra* note 8.

13. See, e.g., Natalie M. Banta, *Minors and Digital Asset Succession*, 104 IOWA L. REV. 1699, 1710 (2019) [hereinafter Banta, *Minors and Digital Asset Succession*] (“Now, most minors have at least something of value to distribute among family and friends or to delete according to their wishes.”).

their untimely deaths.¹⁴ Even though these surviving family members would likely inherit all real, personal, and intellectual property, they nonetheless needed to obtain court orders to compel social media gatekeepers to provide access to the content stored on their servers.¹⁵ Social media platforms have been reluctant to reveal to families the potentially intimate communications between the decedent and other community members.¹⁶

As new laws, new technologies, and new stakeholders alter the landscape of legacy stewardship, it is becoming increasingly important for scholars and lawmakers to bring together the various laws of legacy and reassess the qualities that define effective stewardship. Intellectual property, trusts and estates, and Internet law often intersect at death, yet scholarly dialogue across these doctrinal divisions has been relatively scarce.¹⁷ As a result, each area of law has its own internal theories about

14. See, e.g., *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1205–06 (N.D. Cal. 2012); *In re Coleman*, 96 N.Y.S.3d 515, 516 (N.Y. Sur. Ct. 2019); Jaya Narain, *Vigil of Tears for Death-Plunge Muslim Model Beauty*, DAILY MAIL (Dec. 22, 2008, 6:50 AM), <https://www.dailymail.co.uk/news/article-1100022/Vigil-tears-death-plunge-Muslim-model-beauty.html> [<https://perma.cc/PPR8-T788>]; Scott Roxborough, *Parents Have Right to Access Dead Daughter's Facebook Account, German Court Rules*, HOLLYWOOD REP. (July 12, 2018, 4:35 AM), <https://www.hollywoodreporter.com/news/parents-have-right-access-dead-daughters-facebook-account-german-court-rules-1126529> [<https://perma.cc/UMS4-AKU7>]; see also *Ajemian v. Yahoo! Inc.*, 84 N.E.3d 766, 768 (Mass. 2017) (concerning a family's request to access the decedent's email account); *In re Scandalios*, No. 2017-2976/A, 2019 WL 266570, at *1 (N.Y. Sur. Ct. Jan. 19, 2019) (concerning a widowed spouse's petition to access the decedent's digital family photos); *In re Estate of Serrano*, 54 N.Y.S.3d 564, 565–66 (N.Y. Sur. Ct. 2017) (concerning a widowed spouse's request to access the decedent's Google account “to ‘be able to inform friends of his passing’ and ‘close any unfinished business etc.’”).

15. See, e.g., Rebecca G. Cummings, *The Case Against Access to Decedents' E-mail: Pass-word Protection as an Exercise of the Right to Destroy*, 15 MINN. J.L. SCI. & TECH. 897, 898–99 (2014) (discussing Order to Produce Information, *In re Estate of Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. Mar. 4, 2005)); Philip Oltermann, *Facebook Told to Grant Grieving Mother Access to Daughter's Account*, THE GUARDIAN (July 12, 2018, 9:45 AM), <https://www.theguardian.com/world/2018/jul/12/facebook-told-grant-grieving-mother-access-daughters-account> [<https://perma.cc/QLC6-W249>].

16. See, e.g., Oltermann, *supra* note 15 (“[Facebook feels for] the family. At the same time we have to ensure that personal exchanges between people on Facebook are protected. We represented a different position in this dispute, and the drawn-out court case shows how complex the matter is in legal terms.”).

17. Important work that explores some of these intersections include Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 928–31 (2016) [hereinafter Banta, *Death and Privacy*] (comparing the lack of postmortem privacy protections in most areas of law with the protections that can exist in some intellectual property laws); Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 CARDOZO L. REV. 1099, 1101–04 (2017) [hereinafter Banta, *Digital Feudalism*] (arguing for a privacy interest in digital assets based in part on theories that justify copyright ownership); Lilian Edwards & Edina Harbinja, *Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World*, 32 CARDOZO ARTS & ENT. L.J. 83, 118 (2013) (recognizing potential conflicts between control of social media data and ownership of the copyright in that data); David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 543 (2014) (analyzing certain ownership rights, including over some digital assets and intellectual property, that do not descend postmortem); Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253,

why postmortem decision-making authority might vest in a different decision-maker — the family, the market, the public, or the decedent — but there exists no organizing principle that would allow the various laws of succession to adapt together to the growing challenges of legacy stewardship. This Article fills that gap. It synthesizes the laws of legacy, examines the competing theories of stewardship that animate them, and develops a much-needed framework for effectively stewarding the social afterlife.

This Article identifies four models of stewardship that traditionally have dominated the laws of legacy.¹⁸ Under the “freedom of disposition” model dominant in the laws of wills and trusts, decedents themselves are thought to be best-suited to decide about their own legacy and to appoint fiduciaries who will effectively carry out their wishes.¹⁹ Under the “family inheritance” model, which structures copyright law’s inheritance rules as well as intestacy law, surviving family members are the proper surrogate decision-makers due to their ongoing emotional and financial connections to the decedent.²⁰ Under the “public domain” model, which underlies the publicity rights laws in a number of states, the general public should decide how decedents should be represented in the cultural artifacts they leave behind.²¹ Under the “consumer contract” model, reflected in the forty-plus digital asset laws that states have passed since 2016,²² intermediaries such as social media platforms can best tailor their postmortem policies to the needs and expectations of the customers who sign up for their services.²³

256–59 (2017) [hereinafter Subotnik, *Artistic Control*] (analyzing deceased authors’ attempts to control posthumous use of their work in light of evolving theories underlying both copyright and succession laws); Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 111–14 (2006) [hereinafter Tritt, *Liberating Estates*] (identifying conflicts between copyright and succession law).

18. A fifth potential model might be the “court supervision” model, arguably most visible in complex intestacies like Prince’s, in which judges are seen as being in the best position to balance the many competing stakeholders in a person’s legacy. Nonetheless, although courts are often asked to play a considerable role in mediating the interests of various stakeholders, the author is unaware of any body of law in the United States that places *primary* stewardship decisions in the hands of judges instead of the decedent, families, consumer contracts, or the public domain.

19. See FRIEDMAN, *supra* note 5, at 46–47; see also Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12 (1992) (referring to the “father knows best” theory of estate planning).

20. See Andrew Gilden, *IP, R.I.P.*, 95 WASH. U. L. REV. 639, 646–47, 702–03 (2017).

21. See, e.g., JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 98–112 (2018) (summarizing arguments against a postmortem publicity right).

22. See *Fiduciary Access to Digital Assets Act, Revised*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecd22&tab=groupdetails> [<https://perma.cc/Z8MC-7VET>].

23. See REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 4 (UNIF. LAW COMM’N 2015) [hereinafter RUFADAA] (“[A] direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.”).

Although existing laws concerning legacy stewardship are conflicting and messy, the independent experiences of each area do provide useful data points for constructing a coherent theory of legacy stewardship moving forward. For example, the laws of wills and trusts show that although individuals sometimes make detailed plans for their own afterlife, they also don't bear the costs of bad decisions.²⁴ Intellectual property laws show that although family members often care deeply about how their loved one is remembered,²⁵ they might be far less familiar with their loved one's various social and cultural circles than they think.²⁶ Internet law shows that although Facebook might know a lot about its users' privacy preferences,²⁷ Facebook's legal and commercial interests may overwhelm its loyalty to deceased members.²⁸ Each of the existing stewardship models has its wisdom, but, as this Article shows, none sufficiently captures the actual lived experience of individuals in the digital context nor the evolving challenges of legacy stewardship.

This Article accordingly synthesizes the strengths and weaknesses of the existing stewardship models in order to develop a new one: the "Decentered Decedent." Particularly in the digital environment, individuals live heterogeneous lives in a wide diversity of social contexts, and stewardship decisions about any particular context should reflect the norms and expectations of the communities who occupy that context. This means taking a step away from a basic tenet of traditional estate planning — centralizing all inheritance decisions in a core set of documents — and embracing a broader web of context-specific decision-making. No one individual, including the decedent, will ever be able to fully appreciate the legacy stakes in all of a decedent's social contexts. Although scholarship on digital assets law has critiqued the

24. See, e.g., Michael Paulson, *A Black Actor in "Virginia Woolf"? Not Happening, Albee Estate Says*, N.Y. TIMES (May 21, 2017), <https://nyti.ms/2rHeR4v> [<https://perma.cc/5RP8-RAAS>] (summarizing Edward Albee's opposition to "nontraditional casting in productions of 'Virginia Woolf'"); see also Subotnik, *Artistic Control*, *supra* note 17, at 256 ("As the initial stewards of their own work, authors do not always make farsighted decisions.").

25. See Gilden, *supra* note 20, at 676.

26. See, e.g., Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1827 (2009) ("Genetic connection is no guarantee of literary sensitivity or historical responsibility."); cf. *In re Estate of Kuralt*, 15 P.3d 931, 932 (Mont. 2000) (involving a dispute over inheritance of decedent's land, wherein the court noted "Kuralt and Shannon desired to keep their relationship secret, and were so successful in doing so that even though Kuralt's wife, Petie, knew that Kuralt owned property in Montana, she was unaware, prior to Kuralt's untimely death, of his relationship with Shannon").

27. James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149 (2009) ("Facebook knows an immense amount about its users.").

28. See Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 498 (2019).

diminished role of families and traditional testation in the digital context,²⁹ this Article argues, by contrast, that the laws of legacy should move away from trying to center all decision-making in the decedent, the family, the general public, or powerful market actors. The laws of legacy have in some ways stumbled into a system that de facto places decision-making in a variety of stakeholders but not in a way that reflects a coherent theory of stewardship. This Article develops such a theory.

Part II examines the main areas of law that govern a person's legacy and evaluates the four primary models of stewardship that emerge from them. Part III integrates the wisdom of the existing stewardship models into a new model — the Decentered Decedent — that better reflects the insights of contemporary scholarship on privacy and digital identity. Part IV provides some suggestions on how to incorporate the Decentered Decedent into the laws of legacy. Part V concludes.

II. THE LAWS OF LEGACY

Legacy is a concept that permeates both legal and cultural conversations about death, but it has not previously been embraced as a potential unifying doctrinal category. This Part first examines the diverse meanings of “legacy” and how social media has altered the parameters of legacy stewardship. It then examines the main doctrinal areas that shape a person's legacy and uncovers four main theories of stewardship that appear throughout the laws of legacy.

A. “Legacy” and “Stewardship”

The term “legacy” is pervasive. In a wide range of discussions regarding a deceased person's memory, reputation, work, or property, the term “legacy” repeatedly emerges. For example, Martin Luther King, Jr.'s children have described themselves as “guardians of King's legacy” and have referred to the royalties from his copyrighted works as “a ‘modest legacy’ for his family.”³⁰ When Prince's siblings contested some of the executor's music licensing decisions, they emphasized, “Prince was beloved throughout the world for his artistic genius and one-of-a-kind personality. He spent much of his life fighting to control

29. See Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 *FORDHAM L. REV.* 799, 803 (2014) [hereinafter Banta, *Inherit the Cloud*] (“[I]f a testator's testamentary intent concerning digital assets is unknown, the beneficiaries' desires and needs should receive preference over the service provider's default policy of prohibiting descendibility.”).

30. See Gilden, *supra* note 20, at 673–74.

his own destiny and legacy.”³¹ Numerous news articles have emphasized the importance of planning for your “digital legacy”³² or “e-legacy”;³³ this involves issues ranging from ensuring postmortem access to online bank accounts and cryptocurrencies³⁴ to deciding which photos and video messages to leave behind for loved ones.³⁵ Numerous digital estate planning services have launched to address these complex and nuanced legacy concerns.³⁶ Moreover, Facebook has tellingly named its postmortem planning tool “Legacy Contact,”³⁷ and one of the most popular obituary websites is Legacy.com.³⁸

31. Reply Memorandum in Support of Petition to Permanently Remove Comerica Bank & Trust N.A. as Personal Representative at 42, *In re Estate of Nelson*, No. 10-PR-16-46 (Minn. Dist. Ct. Nov. 17, 2017) (“There is no doubt that this Estate is one of most [sic] unique and important estates in Minnesota history. . . . There is little doubt that Prince, who famously wrote ‘slave’ on his face as part of his fight to free himself from corporate control of his art, would have fought like the Petitioners to protect his legacy.”).

32. Alethea Lange, *Everybody Dies: What Is Your Digital Legacy?*, CTR. FOR DEMOCRACY & TECH. (Jan. 23, 2015), <http://cdt.org/blog/everybody-dies-what-is-your-digital-legacy> [<https://perma.cc/8FP8-TMWN>] (“[A]s people with longer and more nuanced digital histories (stored across huge numbers of online accounts) reach the end of their lives we will have to decide how to define our digital legacy.”).

33. Nathan J. Dosch & Joseph W. Boucher, *E-Legacy: Who Inherits Your Digital Assets?*, WIS. LAW. (Dec. 1, 2010), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=83&Issue=12&ArticleID=1907> [<https://perma.cc/4ZGN-5NDJ>].

34. See Constance Gustke, *Plan Your Digital Legacy, and Update Often*, N.Y. TIMES (Nov. 11, 2015), <https://nyti.ms/1OF5zzi> [<https://perma.cc/T5HA-5URQ>].

35. Bruce Horovitz, *Leaving Behind a Digital Legacy for Loved Ones*, CNN (July 13, 2017, 9:37 AM), <https://www.cnn.com/2017/07/13/health/digital-time-capsule-legacy-partner/index.html> [<https://perma.cc/AV8H-BZ7G>] (“‘Easing the pain of loss is about more than financial issues,’ said Holt. ‘There is an emotional legacy, too, and certain things I want to tell people I’m leaving behind.’”).

36. See, e.g., Edina Harbinja, *Post-Mortem Privacy 2.0: Theory, Law, and Technology*, 31 INT’L REV. L. COMPUTERS & TECH. 26, 35–37 (2017); Noam Kutler, Note, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1649, 1655 (2011); Katie Petrillo, *Long-Time User Loves Multi-Device Access and Digital Legacy Planning*, LASTPASS BLOG (Feb. 27, 2017), <https://blog.lastpass.com/2017/02/long-time-user-loves-multi-device-access-and-digital-legacy-planning.html> [<https://perma.cc/7QJU-MJ6D>].

37. Jed R. Brubaker & Vanessa Callison-Burch, *Legacy Contact: Designing and Implementing Post-Mortem Stewardship at Facebook*, in CHI 2016: PROC. 34TH ANN. CHI CONF. ON HUM. FACTORS IN COMPUTING SYSTEMS 2908, 2908 (2016).

38. See Kimberly Falconer et al., *Grieving in the Internet Age*, 40 N.Z. J. PSYCHOL. 79, 83 (2011); Melissa Jayne Kinsey, *The Winner of the Online Death Marketplace: When It Comes to Obituaries, Digital Memorials, and More, Legacy.com Is the Champ*, SLATE (Dec. 1, 2017, 9:44 AM), <https://slate.com/technology/2017/12/legacy-com-has-cornered-the-market-on-death-online.html> [<https://perma.cc/HG7W-QP58>].

These diverse examples of the term “legacy” signal that legacy is not only conceptually rich but also slippery in meaning.³⁹ According to one lay dictionary, “legacy” has two distinct definitions of note⁴⁰:

- (1) a gift by will especially of money or other personal property: BEQUEST; She left us a *legacy* of a million dollars.
- (2) something transmitted by or received from an ancestor or predecessor or from the past; the *legacy* of the ancient philosophers.⁴¹

In the examples above, these two definitions swirl together. When planning your digital legacy, you need to think both about how the wealth stored in online accounts will transfer to others upon your death and about what precisely the interpersonal message is that you will “transmit[] . . . from the past.” Dr. King’s legacy is both his historical symbolism as a civil rights hero and the valuable assets he left for his family. Prince’s family wants to fortify Prince’s memory as an artistic genius and also reap the financial windfall of his vast catalog of work.

Despite the diverse and layered meanings of legacy in culture and commerce, the *legal* treatment of legacy has typically focused largely on the economic, wealth-transmitting aspect of legacy creation. According to Black’s Law Dictionary, “legacy” in the common law tradition has a unitary, financial meaning: “[a] gift by will, esp. of personal property and often of money.”⁴² In accordance with this solely financial meaning, the traditional goal of estate planning has been to assist a personal representative in collecting all the decedent’s assets and distributing them in a way that pays off creditors and provides for desired beneficiaries as efficiently as possible.⁴³ In other words, good estate planning means lowering transaction costs and maximizing the value

39. See Elaine Kasket, *Social Media and Digital Afterlife*, in *DIGITAL AFTERLIFE: DEATH MATTERS IN A DIGITAL AGE* 27, 35 (Maggi Savin-Baden & Victoria Mason-Robbie eds., 2020) (arguing that legacy is a word that “overflows with meanings and forms” and “may be tangible or intangible, financial or sentimental, material or digital”).

40. A third definition — “a candidate for membership in an organization (such as a school or fraternal order) who is given special status because of a familial relationship to a member” — is generally irrelevant to this Article’s subject matter, though it might suggest the potential financial and cultural stakes of stewardship. *Legacy*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/legacy> [<https://perma.cc/Z7LB-4PC3>].

41. *Id.*; see also Jed R. Brubaker et al., *Stewarding a Legacy: Responsibilities and Relationships in the Management of Post-Mortem Data*, in *CHI 2014: CONF. PROC. 32ND ANN. ACM CONF. ON HUM. FACTORS IN COMPUTING SYSTEMS* 4157, 4157–66 (2014) (“The term legacy is compelling — it speaks to the symbolic significance of these data in addition to their value.”).

42. *Legacy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

43. See Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 *CARDOZO L. REV.* 2579, 2586, 2595 (2011) [hereinafter Tritt, *Limitations of an Economic Agency Cost Theory*].

of the estate for devisees, heirs, and creditors.⁴⁴ Much case law *outside* of the estate planning context implicitly recognizes that there is a cultural aspect of legacy — for example, voting rights counter the legacy of racial discrimination;⁴⁵ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980⁴⁶ (commonly known as CERCLA) addresses the environmental legacy of polluting industries;⁴⁷ and asylum law reflects the “founding legacy of our nation” as a refuge for religious outsiders.⁴⁸ Nonetheless, the noneconomic aspects of legacy creation often remain on the sidelines within the case law, practice, and scholarship directly addressing postmortem decision-making.⁴⁹

Moreover, because legacy has been legally important primarily for its capacity to transfer wealth across generations, there is no practical need for the vast majority of decedents to execute a will, settle a trust, or go through the probate process. Recent studies on estate planning in the United States reveal that a majority of the population does not have a formal estate plan,⁵⁰ and that the legal practice of trusts and estates has largely existed within the realm of the wealthy. According to Naomi Cahn and Amy Zietlow, “Trusts and estates practice is oriented to serve the archetypal individual who needs financial planning: a person who is upper middle class — or wealthy — and is seeking to dispose of assets upon death (and can pay legal bills).”⁵¹ The cost of hiring an attorney and/or going through probate proceedings is often not justified where the decedent did not die with much, if any, material wealth.⁵² For most surviving families, the main question is how to transfer objects with great sentimental, but not great pecuniary, value. These objects might include a family member’s jewelry or clothing or

44. See Robert H. Sitkoff, *An Agency Cost Theory of Trust Law*, 89 CORNELL L. REV. 621, 630, 648–49 (2003).

45. See, e.g., *Tigrett v. Cooper*, 855 F. Supp. 2d 733, 739, 759 (W.D. Tenn. 2012); see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006).

46. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2018)).

47. See, e.g., *Bernstein v. Bankert*, 702 F.3d 964, 969, 973 (7th Cir. 2012).

48. See, e.g., *Shi v. U.S. Att’y Gen.*, 707 F.3d 1231, 1236 (11th Cir. 2013).

49. See Tritt, *Limitations of an Economic Agency Cost Theory*, *supra* note 43, at 2606–07 (arguing that trust settlors “are more than wealth maximizers”).

50. See, e.g., *More than Half of American Adults Don’t Have a Will, 2017 Survey Shows*, CARING.COM, <https://www.caring.com/caregivers/estate-planning/wills-survey/2017-survey> [<https://perma.cc/3R24-4G6C>].

51. Naomi Cahn & Amy Zietlow, “Making Things Fair”: *An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325, 328 (2015).

52. See *id.*

photographs — what might be deemed emotional legacies.⁵³ The distribution of such emotional legacies have been addressed almost entirely informally in the shadow of the formal laws of trusts and estates.⁵⁴

The shift of much economic and cultural activity onto social media platforms, however, has required a broader universe of actors to consider the formal laws of legacy. With almost everyone leaving a digital footprint behind, estate planning pulls into its orbit social and emotional questions about what should happen to a person's writings, photos, and videos, regardless of the pecuniary value of those items. Deciding how these emotional legacies should be transferred, or if they should be transferred at all, can no longer be done entirely informally, as it could in the past; instead of residing in an old filing cabinet, they are now hosted by a variety of intermediaries who are unlikely to be subject to the familial norms that have guided emotional legacy questions in the past.⁵⁵ Resolving disputes among social media platforms, family members, and the decedents' many online contacts is far more likely to require formal legal intervention.⁵⁶

As postmortem decision-making becomes increasingly focused on noneconomic issues, the traditional touchstones of good estate planning — reducing transaction costs and maximizing estate value — do not transfer easily into figuring out how a person should live their social afterlife.⁵⁷ Should a Facebook page be memorialized or deleted? Should the decedent's unpublished fan fiction be deleted, published in unfinished form, or finished by their fellow fans? What should happen to flirty photos stored on a Tinder profile? A personal representative chosen largely for their financial acumen is unlikely to be particularly skilled at answering these questions. Moreover, different stakeholders may hold vastly different opinions, and "objective" measures of good legacy stewardship — as opposed to value maximization — are unlikely to be readily available.⁵⁸

53. *Id.* at 341 (referring to such objects as "emotional inheritance").

54. *Id.* at 330 ("Private arrangements were made with awareness, albeit imperfect knowledge, of the law.") (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979)).

55. See Johan David Michels et al., *Beyond the Clouds, Part 2: What Happens to the Files You Store in the Clouds When You Die?* 16 (Queen Mary Univ. of London, Sch. of Law, Legal Studies Research Paper No. 316, 2019), <https://ssrn.com/abstract=3387398> [<https://perma.cc/CMR4-HTEA>] ("[W]hen heirs inherit the deceased's paper letters, these could also reveal sensitive information about third parties. However, in that case, there is no service provider that acts as an intermediary . . .").

56. See, e.g., Banta, *Minors and Digital Asset Succession*, *supra* note 13, at 1710.

57. Brubaker et al., *supra* note 41, at 4158 ("In contrast to heirlooms and possessions that are amenable to ownership, symbolic legacies more commonly necessitate stewardship — someone to manage and maintain the marker on behalf of the deceased."); David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 540, 593–94 (2017) ("We assume that everyone wants to convey their land, stocks, cash, and heirlooms to someone else after death, but the same does not necessarily hold for digital assets.").

58. See Edwards & Harbinja, *supra* note 17, at 88–89.

Emotional and cultural legacies accordingly do not require planning; they require *stewardship*.⁵⁹ Unlike traditional questions of planning and inheritance, which require choosing a particular beneficiary and tailoring investment decisions based on the characteristics of that beneficiary,⁶⁰ stewardship is the active, ongoing art of managing the relationship between that person, their family, and the many stakeholders who interact with the person and their digital trail.⁶¹ Picking a legacy steward involves identifying those entities who are most attuned to the social, emotional, *and* financial needs of the relevant stakeholders and who can navigate stakeholder conflicts with minimal social, emotional, and financial cost.

The remainder of this Article examines what effective legacy stewardship entails in light of the evolving tensions between decedents, social media platforms, surviving families, and decedents' broader social networks. Although there exists no unified conceptual approach to legacy stewardship, each of the primary areas of law that have confronted legacy stewardship contain useful data points that can be brought to bear on the question of who is best suited to confront the shifting and widening landscape of postmortem decision-making. The remainder of this Part brings together the various laws of legacy and surveys the multiple theories of stewardship that appear within them.

B. Extant Models of Legacy Stewardship

The legal dimensions of legacy stewardship are not contained solely within the umbrella of laws that fall within the law school "trusts and estates" curriculum. The traditional, asset-focused estate planning discussed in the previous Section could largely be contained within the laws of will, trusts, and intestacy, with some consultation of tax and IP lawyers for high-value or celebrity estates. The increased digitization of social and economic life, however, has meant that the center of gravity of estate planning has shifted away from trusts and estates. For many issues surrounding a person's cultural legacy, effective legacy stewardship triggers questions core to either copyright law — such as, under

59. See J.C. Buitelaar, *Post-Mortem Privacy and Informational Self-Determination*, 19 ETHICS & INFO. TECH. 129, 139 (2017) ("As the shift to the digital continues, careful stewardship of digital content, which can, in some sense, be said to be a rich reflection of you, is more and more necessary.").

60. Brubaker et al., *supra* note 41, at 4157 ("Framing digital legacies in terms of inheritance privileges notions of ownership, however, digital legacies are more than just collections of digital assets. . . . [T]he process of bequeathing objects can act as more than a reflection of relationships, it can be constitutive of them.").

61. *Id.* at 4158 ("Stewards act as mediators for the wishes of the deceased and their data, as well as moderators of the actions, needs, and requests of other survivors. As such, stewards are accountable to multiple parties . . . who all have varying claims to . . . the deceased's data and profile post-mortem.").

what conditions should the decedent's creative works be disseminated? — or publicity rights laws — under what conditions should the decedent's name and likeness be exploited? Moreover, the private law of social media — in particular, the terms of service that govern each platform — have tremendous influence on how images and likenesses move within and across platforms. This growing contractual power of social media platforms — along with considerable uncertainty as to who may legally consent on behalf of the deceased — has prompted most states to pass digital asset laws to address control over a decedent's digital trail.

Legacy, accordingly, is largely constructed by four areas of law: trusts and estates, copyright, publicity rights, and digital assets laws. First, trusts and estates sets the traditional rules by which all forms of property interests are transferred from one generation to the next, whether by will, trust, or intestate succession. Second, copyright law governs the rights to control the reproduction, distribution, performance, and display of nearly all forms of creative expression. Although copyright interests are largely subject to state inheritance laws,⁶² federal law provides a number of special rules governing the succession of copyright.⁶³ Third, publicity rights govern the right to use a person's name, image, or likeness for purposes of trade or advertising. Publicity rights vary greatly among states — in some states, the rules of inheritance for publicity rights differ from other property interests;⁶⁴ in other states, publicity rights are treated identically to any other property interest;⁶⁵ and in still other states, there are no postmortem publicity rights at all.⁶⁶ Finally, the vast majority of states have enacted the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), which governs the interplay between a website's terms of service, a decedent's estate planning documents, and data privacy laws to the extent that they affect access and control over a decedent's online digital assets.⁶⁷

62. See 17 U.S.C. § 201(d)(1) (2018) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").

63. See 17 U.S.C. §§ 203, 304(c)–(d).

64. See, e.g., 765 ILL. COMP. STAT. 1075/15 (2020) ("The rights under this Act are property rights that are freely transferable . . . by intestate succession *only to an individual's spouse, parents, children, and grandchildren* . . ." (emphasis added)).

65. See, e.g., IND. CODE § 32-36-1-16 (2019) ("The rights recognized under this chapter are property rights, freely transferable and descendible, in whole or in part . . .").

66. See, e.g., *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989) ("[A]s to those plaintiffs who are successors-in-interest, they have no cause of action under [New York] Civil Rights Law §§ 50, 51, as the statutory rights created by said law do not survive death.").

67. As of April 9, 2020, forty-five states have enacted RUFADAA, while three states and the District of Columbia have introduced RUFADAA legislation. See *Fiduciary Access to Digital Assets Act, Revised*, *supra* note 22. California has passed a digital assets law that is highly similar to RUFADAA. Michael T. Yu, *Towards a New California Revised Uniform*

Rather than separately march through the details of each of these four areas of law, this Section instead focuses on the implicit theories of legacy stewardship that appear throughout these four areas. Trusts and estates, copyright, publicity rights, and digital assets laws each tend to respectively prioritize the decedent, the family, the public, and the market, and this Section surfaces and names the four theories of stewardship that appear, to varying degrees, throughout the laws of legacy. It explains the particularities of each area of law only to the extent necessary to understand why that area of law chooses a certain entity to tackle the challenges of legacy stewardship.

1. Freedom of Disposition

When identifying who is the best person to make decisions about how a person lives on after they die, perhaps the most obvious candidate is the actual decedent. Many people care greatly about how they are remembered and how their lifetime work will influence the well-being of the people and communities they care about.⁶⁸ Moreover, when trying to figure out what to do with a decedent's home, wardrobe, photographs, or business concerns, empirical studies have shown that surviving decision-makers care quite a bit about what the decedent wanted.⁶⁹ If decedents care about their own legacy, and survivors care about the wishes of the decedent, then the laws of legacy should accordingly do all they can to surface and effectuate the postmortem preferences of the deceased.

This "freedom of disposition" model is the primary animating principle of trusts and estates law.⁷⁰ An individual has extremely wide leeway in selecting a personal representative, choosing their successors and beneficiaries, and placing highly restrictive strings on the individuals to whom they provide property and/or power. For example, in every state but Louisiana, an individual may choose to entirely disinherit their children,⁷¹ and a decedent may condition inheritance on a

Fiduciary Access to Digital Assets Act, 39 LOY. L.A. ENT. L. REV. 115, 116–17 (2019) ("The California legislature modeled the California RUFADAA after the Uniform Law Commission's Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) retaining (and slightly revising) the provisions addressing digital assets at the user's death, but deleting the provisions addressing digital assets while the user is alive.").

68. See generally RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010) (surveying legal mechanisms for individuals to control their posthumous reputation and cultural influence); David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 65–66 (2012).

69. See, e.g., Brubaker et al., *supra* note 41, at 4161.

70. See ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 4–5 (10th ed. 2017).

71. *Id.* at 556 ("In all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent. Unlike that for a spouse, there is no requirement that a testator leave any property to a child, not even the proverbial one dollar.").

particular individual marrying someone of a particular religion or having a particular education.⁷² If someone wants a distinctly Jewish,⁷³ Ivy League,⁷⁴ or White Supremacist legacy,⁷⁵ or a legacy as a miserly patriarch,⁷⁶ the freedom of disposition will generally respect this choice. Even areas of trusts and estates law that seem highly protective of family members, such as intestacy⁷⁷ or pretermitted children rules,⁷⁸ are meant to approximate what the decedent likely would have wanted, had they exercised their freedom of disposition.⁷⁹

The freedom of disposition should be robust, under prevailing trusts and estates theory, because it incentivizes productive lifetime activities — i.e., if you couldn't have any say over what happens to your small business or your unpublished manuscript postmortem, you'd be much less likely to invest time, money, and energy *inter vivos*.⁸⁰ And you'd be much more likely to destroy your hard work in anticipation of death.⁸¹ Moreover, given the complex and delicate relationships triggered by questions of death and inheritance, trusts and estates law will often presume that “father knows best” and empower the decedent to make key decisions about what happens when they're gone.⁸² Succession and stewardship decisions should be tailored to the particular circumstances of the various stakeholders, and the decedent is likely best positioned to consider those varied circumstances.⁸³ For example, a child familiar with the family business is likely a better candidate for managing that business than other siblings, and a child with a deep appreciation for jazz music is likely a decent candidate for handling the

72. See, e.g., *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 826 (Ohio Ct. Com. Pl. 1974).

73. See *In re Estate of Feinberg*, 919 N.E.2d 888, 891 (Ill. 2009).

74. See *President and Fellows of Harvard Coll. v. Jewett*, 11 F.2d 119, 120 (6th Cir. 1925).

75. See *Evans v. Abney*, 396 U.S. 435, 436 (1970).

76. See Ian Holzhauser, *The 23-Word Coolidge Will — A Blunt Inheritance*, NAGLE OBARSKI PC (Oct. 10, 2019), <https://nagleobarski.com/the-23-word-coolidge-will-a-blunt-disinheritance-2> [<https://perma.cc/6ZCM-S92T>].

77. Intestacy laws provide the default rules of inheritance in the absence of an estate plan and are meant to indicate the probable intent of the average testator. They generally give top priority to the surviving spouse and children, followed by more remote surviving blood relatives. See SITKOFF & DUKEMINIER, *supra* note 70, at ch. 2.

78. Pretermitted children rules provide an inheritance for children in situations where the decedent executed a will, subsequently had one or more children, and then never went back and amended their will. In all states but Louisiana, if the decedents truly want to disinherit later-born children, they are permitted to do so. See *id.* at ch. 8.

79. See Richard F. Storrow, *Family Protection in the Law of Succession: The Policy Puzzle*, 11 NE. U. L. REV. 98, 127 (2018).

80. See Banta, *Digital Feudalism*, *supra* note 17, at 1142 (“Individuals have an incentive to make sure that this information held in their e-mail or social networking accounts is treated in the way they wish.”).

81. See Lior J. Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 830 (2005).

82. See Hirsch & Wang, *supra* note 19, at 12.

83. See Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 111 (2015) [hereinafter Subotnik, *Living Dead*].

decedent's vast library of jazz recordings.⁸⁴ The freedom of disposition accordingly is generally embraced as the best method of fostering "intelligent estate planning": the distribution of assets in a way that best reflects both the desires of the decedent and the needs of the living.⁸⁵

The freedom of disposition model, however, has a number of significant limitations and drawbacks. Most significantly, the vast majority of individuals don't exercise it. As mentioned above, the majority of decedents die without a formalized estate plan, either because of the perceived costs of creating a will or trust⁸⁶ or because of their discomfort with expressly considering issues surrounding death.⁸⁷ Furthermore, strict formalities requirements in many states can trip up individuals trying to execute their own estate plans without a lawyer.⁸⁸ As attractive as a freedom of disposition model might be, there inevitably will be at least some practical impediments to fully relying on it.

Moreover, even if a decedent actually exercises their freedom of disposition, there are some serious flaws with a "father knows best" approach. First, father often can't anticipate a wide variety of cultural, technological, or psychological changes that might occur postmortem. For example, instructions to a trustee that a play or movie be cast only with actors of a particular race or sexuality have become increasingly problematic over time.⁸⁹ Additionally, most decedents did not anticipate new technologies that would allow them to act in movies long after

84. See Tritt, *Liberating Estates*, *supra* note 17, at 127 ("Special assets, like family business interests, may need to be given to family members with specialized knowledge, business experience or interest, while providing assets of equivalent value, but of a different character, to the other family members.").

85. See Subotnik, *Living Dead*, *supra* note 83, at 111; Tritt, *Liberating Estates*, *supra* note 17, at 126 ("Proponents of [the intelligent estate planning] rationale believe that when individuals are responsible enough to take the time to write a thought-out Will or testamentary substitute, it is presumed that individuals more often than not will know better how to dispose of their property than the state.").

86. See *2020 Estate Planning and Wills Study*, CARING.COM, <https://www.caring.com/caregivers/estate-planning/wills-survey> [<https://perma.cc/5R5K-8ESU>] ("When asked why they have put off estate planning, an increasing number of people are saying [sic] citing a lack of education or the cost of estate planning as their main reason.").

87. See *More than Half of American Adults Don't Have a Will, 2017 Survey Shows*, *supra* note 50. For example, Aretha Franklin was frequently advised to formally execute a will but kept putting it off. Amy Lieu, *Aretha Franklin Didn't Leave a Will, so Family Has Work to Do*, *Lawyers Say*, FOX NEWS (Sept. 2, 2018), <https://www.foxnews.com/entertainment/aretha-franklin-didnt-leave-a-will-so-family-has-work-to-do-lawyers-say> [<https://perma.cc/K644-BV9X>].

88. See, e.g., *LegalZoom Will Held Invalid Due to Lack of Compliance with Statute of Wills*, MAYA MURPHY (July 9, 2013), <http://www.mayalaw.com/2013/07/09/legalzoom-will-held-invalid-due-to-lack-of-compliance-with-statute-of-wills> [<https://perma.cc/R7NF-UNKL>].

89. See, e.g., Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 325–27 (2005) (noting negative aspects of George Gershwin's estate's requirement that any stage performances of *Porgy and Bess* be cast with almost exclusively black performers); David D. Kirkpatrick, *A Writer's Tough Lesson in Birthing 'a Parody*, N.Y. TIMES (Apr. 26, 2001), <https://www.nytimes.com/>

they die,⁹⁰ and a dedicated, well-informed steward at the time of the decedent's death might not adapt well to the cultural and technological changes that arise over the ensuing decades.⁹¹

Second, father sometimes really doesn't know best; accordingly, it is important to avoid placing too much control in the hands of the dead.⁹² A major problem with entrusting legacy stewardship to decedents themselves is that decedents don't have to live with the consequences of bad decisions they make.⁹³ Numerous authors, including Franz Kafka and Michel Foucault, forbade the publication of their unfinished works, and numerous other authors, including George Orwell and W.H. Auden, have forbidden their estates from cooperating with biographers.⁹⁴ These decedents may have been crystal clear about how they wanted their legacy stewarded, but these directives (even if enforceable⁹⁵) come at the expense of the historical record and the knowledge base of the general public.⁹⁶ Moreover, even if the decedent really wants their spouse or children to steward their legacy, the decedent will never know how well-suited their loved one actually is for the job. As Eva Subotnik has argued, in these circumstances, the freedom of disposition "must yield to the needs of the living."⁹⁷ Lastly, the sub-

2001/04/26/books/a-writer-s-tough-lesson-in-birthin-a-parody.html [https://perma.cc/YLB5-3Q8K] ("Among other disputes, Mr. Conroy said, the executors insisted that his story include no miscegenation or homosexuality and that Scarlett could not die."); Blake Morrison, *Up in Smoke: Should an Author's Dying Wishes Be Obeyed?*, THE GUARDIAN (Mar. 10, 2018, 5:00 AM), <https://www.theguardian.com/books/2018/mar/10/up-in-smoke-should-an-authors-dying-wishes-be-obeyed> [https://perma.cc/59KB-87PV] (stating that Samuel Beckett's nephew has "opposed the use of music, casting of women and 'injection' of race in *Waiting for Godot*, or imposed bans on them"); Paulson, *supra* note 24.

90. See Dave Itzkoff, *How Rogue One Brought Back Familiar Faces*, N.Y. TIMES (Dec. 27, 2016), <https://nyti.ms/2izH2hy> [https://perma.cc/S893-GEPL].

91. Aidan Moher, *Shockingly, Christopher Tolkien Hates the Lord of the Rings Films*, DRIBBLE INK (July 16, 2012), <http://aidanmoher.com/blog/2012/07/news/christopher-tolkien-on-the-lord-of-the-rings-film-trilogy> [https://perma.cc/5W4M-YXY7].

92. See FRIEDMAN, *supra* note 5, at 46; MADOFF, *supra* note 68, at 154–55.

93. See Hirsch & Wang, *supra* note 19, at 13; David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1704 (2009) ("[S]ince the settlor may be dead when a trust becomes effective, a testamentary instrument . . . raises the specter of moral hazard."); Subotnik, *Artistic Control*, *supra* note 17, at 282.

94. Morrison, *supra* note 89.

95. The executors of the Kafka and Foucault estates famously refused to uphold the decedent's instructions. See Banta, *Death and Privacy*, *supra* note 17, at 956; Subotnik, *Artistic Control*, *supra* note 17, at 265; Morrison, *supra* note 89.

96. See Banta, *Death and Privacy*, *supra* note 17, at 957 ("Of course, if a decedent is of such public stature that her personal materials would carry historical significance, the societal value of preservation and disclosure could override personal privacy."); Subotnik, *Living Dead*, *supra* note 83, at 111 ("[I]ntelligent estate planning does not presume that individuals are in the best position to judge the needs of their loved ones against the needs of members of society at large.").

97. Subotnik, *Artistic Control*, *supra* note 17, at 259.

stantial body of undue influence case law demonstrates that legacy decisions do not always fully embody the wisdom of the father, but sometimes reflect the self-interested desires of those around him.⁹⁸

The freedom of disposition model focuses stewardship questions on the individual whose legacy is being stewarded, and it defers to their vision of the good afterlife. The decedent is likely the only individual who is fully aware of the web of relationships they have cultivated during their life and can custom-tailor their legacy stewardship to the varied needs, interests, and skillsets of those who will survive them. But decedents' families, communities, and culture will inevitably evolve in ways that the decedents could not have anticipated, and placing decision-making authority too firmly in the hands of the deceased risks subjecting the living to the sometimes-unusual whims of those who have long passed.

2. Family Inheritance

Whereas the freedom of disposition model places postmortem decision-making in the hands of the now-deceased, an alternative model places decision-making squarely in the hands of the living individuals who are most closely intertwined with the decedent. Under the "family inheritance" model, stewardship flows from one's familial relationship with the decedent: spouse, child, parent, sibling, or other more remote blood or adoptive relatives.

There are a few reasons we might want to place stewardship responsibilities on family members, even if their preferences might be at odds with what the decedent wanted. First, family relationships are often structured around economic dependency, and the death of a family member will often have significant material consequences for spouses, children, parents, and potentially other relations.⁹⁹ Where there is a potentially valuable economic component to a person's legacy, the surviving economic unit should be able to make decisions that accord with that unit's ongoing needs. A decedent may not be able to foresee financial challenges or potential new revenue sources that emerge several years after their death. To the extent that the family unit is the primary means by which our political system privatizes welfare and well-being,¹⁰⁰ a family inheritance model best buttresses this private welfare model.

98. See, e.g., *Estate of Lakatos*, 656 A.2d 1378, 1381–82, 1385 (Pa. Super. Ct. 1995) (finding undue influence of a single, elderly woman by a younger male friend); *Estate of Russey*, No. 12-18-00079-CV, 2019 WL 968421, at *6 (Tex. App. Feb. 28, 2019) (finding undue influence of a woman "during a period of physical and emotional weakness").

99. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 242 (2001).

100. See, e.g., Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 416–18 (2005).

A second reason to place stewardship in the hands of the family is the deep psychological and emotional attachments that surviving family members often have to the deceased. Information about the deceased can sometimes directly include information about the living, so a story about the decedent ultimately can't be told without revealing information about their survivors.¹⁰¹ Accordingly, a legacy is not just an ongoing narrative about a particular individual; that individual's legacy is deeply intertwined with their surviving family members' sense of self and personal narratives.¹⁰² As much as mourning has been framed as a process of "moving on" from a relationship, contemporary approaches to mourning emphasize the importance of establishing "continuing bonds" between the living and the deceased.¹⁰³ In previous work, I have documented numerous example of family members describing their stewardship in terms of this ongoing connection.¹⁰⁴ By actively stewarding a loved one's legacy, family members can actively process a loss and place *themselves* into an intergenerational narrative.¹⁰⁵ Family members have not just an economic incentive to make decisions about the deceased; they also have psychological and emotional incentives to diligently steward the name and reputation of a person they are inextricably linked to.

Because intestacy statutes prioritize familial relationships over other relationships, family members *de facto* wield tremendous power over legacy stewardship; nonetheless, intestacy statutes are probably best characterized as a weak form of a family inheritance model. Intestacy laws are meant to approximate what the average testator likely

101. See Banta, *Death and Privacy*, *supra* note 17, at 971–74 (summarizing a "family privacy exception" to describe the practice of courts protecting family members' privacy concerning the death of a relative); Alberto Lopez, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, 24 GEO. MASON L. REV. 183, 224 (2016) (summarizing cases that protect the privacy of survivors); Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1649 (2011) (arguing that potential heirs should have a right to prevent destruction of a decedent's digital assets).

102. Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 275–76 (2016) (arguing that intergenerational transfers create "a legacy that connects that individual to her survivors and allows her to live on after death"); Shelly Kreiczler-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. TR. & EST. L.J. 495, 521 (2012) ("The giver connects to her future by bequeathing her property while the receiver has an interest in belonging and in having roots, and the property reaffirms the receiver's place in the world."); *see also* Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895) ("A privilege may be given the surviving relatives of a deceased person to protect his memory . . . to prevent a violation of their own rights in the character and memory of the deceased.").

103. Gilden, *supra* note 20, at 686, 700.

104. *See generally id.* (discussing the Sinatra, Hendrix, Gaye, and Tolkien estates).

105. *See* Kreiczler-Levy, *supra* note 102, at 504–05.

would have chosen had they exercised their freedom of disposition;¹⁰⁶ where the decedent did not expressly decide how their legacy should be stewarded, the legislature fills the gaps based on empirical evidence of how most people have made such decisions in the past.¹⁰⁷ Intestacy laws, however, are not a strong example of the family inheritance model because they can largely be overruled by the decedent themselves. Although children will often inherit their parents' entire estate through intestacy law, parents can override these defaults and completely disinherit their children.¹⁰⁸ In most areas of succession law, the freedom of disposition takes precedence over the family.¹⁰⁹ Nonetheless, the family-focused nature of intestacy law, which governs the majority of decedents, reflects a normative commitment by state legislatures to keep wealth and control within the traditional family.¹¹⁰

There are other important pockets of trusts and estates law that even more strongly adhere to a family inheritance model. Most prominent is the spousal elective share; in almost every separate property jurisdiction, a surviving spouse cannot be entirely disinherited.¹¹¹ Instead, a surviving spouse can elect to take a set fraction of the value of the decedent's estate, traditionally one-third, regardless of how much or little was left to them.¹¹² The elective share is typically justified based upon some combination of economic dependency and partnership: a surviving spouse often invested their own labor into marital assets, and they shouldn't be fully divested of the fruits of their labor, particularly where disinheritance would result in financial distress.¹¹³ Similarly, most states' probate laws allow a judge some discretion to set aside the family homestead or a portion of the decedent's estate during the probate process where there are dependent spouses and children.¹¹⁴ These provisions don't necessarily give surviving family members *control* over a particular asset, with the potential exception of

106. See SITKOFF & DUKEMINIER, *supra* note 70, at 65 ("[T]he primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent.").

107. *See id.*

108. *See id.* at 519 ("A property owner may disinherit her blood relations, including her children, if that is her desire.").

109. *See id.*

110. *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1094-95 (1990).

111. Among separate property states, only Georgia lacks a spousal elective share. *See* Kristi L. Barbre, *Death and Disinheritance in Georgia: Reconciling Year's Support and the Elective Share*, 4 J. MARSHALL L.J. 139, 140 (2011). In community property states, each spouse has a property interest in one half of the property acquired during marriage; accordingly, the surviving spouse can't be "disinherited" because they already own half of the community property outright. SITKOFF & DUKEMINIER, *supra* note 70, at 519.

112. SITKOFF & DUKEMINIER, *supra* note 70, at 519.

113. *See* Tritt, *Liberating Estates*, *supra* note 17, at 135.

114. *See* Storrow, *supra* note 79, at 116-20.

the family home, but they do recognize that the family is entitled at the very least to a stake in the economic component of a decedent's legacy.

Intellectual property laws contain provisions that squarely place surviving family members in the role of steward. Although copyright interests are generally transferrable by contract, gift, will, or trust,¹¹⁵ the Copyright Act grants surviving spouses, children, and grandchildren an *inalienable* right to terminate an author's lifetime transfers and claim both ownership and control over the author's writings, photographs, music, recordings, and artwork.¹¹⁶ During a five-year window beginning thirty-five years after a particular transfer to a third party, family members (who are able to form sufficient consensus¹¹⁷) can claw back that transfer, regardless of whether this is what the decedent would have wanted.¹¹⁸ The prototypical example of the termination right is a renegotiation of an unfavorable publishing or recording contract where the author ended up being more successful than anticipated.¹¹⁹ In these circumstances, the termination provision gives authors and their families the ability to renegotiate for better terms with fuller information about the market value of a creative work. The termination right counters the unequal bargaining power that often shifts remuneration away from artists and their families and towards corporate intermediaries.¹²⁰

But copyright empowers families outside of the contract renegotiation context — it can allow them to substantially alter the decedent's carefully considered estate plan. For example, if the author placed their copyright interests in an inter vivos trust or assigned their interests to a charitable foundation or celebrity loan-out corporation¹²¹ — common ways of addressing postmortem succession — their excluded spouses,

115. 17 U.S.C. § 201(d)(1) (2018).

116. *Id.* § 203.

117. *See id.* § 203(a)(1) (“[T]he termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.”).

118. *See id.* § 203(a)(3).

119. *See, e.g.,* Ian Courtney, *R&B Singer James Mtume Sues Sony Over Song Rights*, CELEBRITYACCESS ENCORE (July 5, 2018, 5:01 PM), <https://celebrityaccess.com/2018/07/05/rb-singer-james-mtume-sues-sony-over-song-rights> [<https://perma.cc/8VUV-FXQ5>].

120. *See* Lydia Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1345–46 (2010).

121. *See* Tonya Evans, *Statutory Heirs Apparent: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefiting Transfers*, 119 W. VA. L. REV. 297, 300–01 (2016) (“The 1976 Copyright Act limits a creator's testamentary freedom by expressly empowering Statutory Heirs to terminate decedent's lifetime copyright transfers . . . [including to an] entity like a charitable organization, into her own grantor or asset protection trust, or to someone who does not qualify as a Statutory Heir.”).

children, and grandchildren can terminate these plans and reclaim copyright for themselves.¹²² Additionally, the termination right can potentially allow the families of open-source developers to terminate open-source licenses, possibly pulling the rug out from underneath communities of programmers who have relied on the free availability of the code at issue.¹²³ Many artists expressly choose to place stewardship decisions over their work in the hands of a charitable foundation, a trusted business associate, or in a community of fellow creators, but copyright's termination right allows surviving families to take the helm of legacy stewardship.¹²⁴

A similar family inheritance model is present under some states' publicity rights laws. Although most states treat publicity rights like any other alienable property interest,¹²⁵ in some states the right to consent to the use of a decedent's name or likeness resides solely with a circumscribed list of family members. In Virginia, for example, if someone wishes to use the "name, portrait, or picture" of a deceased person for advertising or trade purposes, they must obtain the written consent of "the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian."¹²⁶ Even if a decedent domiciled in Virginia wanted a close friend to make decisions about the commercial use of their likeness, or if they assigned their postmortem merchandising rights to a licensing company, their surviving spouse or closest blood relatives would have the ultimate say over how the decedent's image appears in commercial settings. These alienability restrictions ensure that family members who are likely closely bound to the decedent, both economically and emotionally, are not brushed aside by more powerful outsiders, but they also significantly limit the decedent's freedom of disposition.

In the digital assets context, the family inheritance model has gained some traction. In 2014, the Uniform Law Commission ("ULC") adopted its initial Fiduciary Access to Digital Assets Act ("FADAA"), which was passed in the state of Delaware. FADAA states that the personal representative of an estate — which, due to intestacy law, will usually be a surviving spouse or child — "may exercise control over

122. See, e.g., *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1111–14 (9th Cir. 2015) (describing efforts by some of Ray Charles' children to terminate copyright assignments benefitting his charitable foundation, notwithstanding separate cash legacies that were created for them in lieu of inheriting Charles' copyright interests).

123. See Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEG. 359, 407–10 (2010).

124. See Evans, *supra* note 121, at 304.

125. See Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 186 (2012).

126. VA. CODE ANN. § 8.01-40 (2019). In other states, the publicity rights statute limits the universe of individuals who may inherit via intestacy. See, e.g., FLA. STAT. § 540.08(1)(c) (2018); 765 ILL. COMP. STAT. 1075/15 (2020); KY. REV. STAT. ANN. § 391.170(2) (West 2020).

any and all rights in digital assets and digital accounts of an account holder” and “shall have the same access as the account holder,” even if a platform’s terms of service indicate to the contrary.¹²⁷ Although, as discussed more fully below,¹²⁸ the ULC has significantly revised FADAA after pushback from privacy advocates and tech companies, several legal scholars have supported a substantial family role in the stewardship of digital assets.¹²⁹ Moreover, several European jurisdictions have adopted a family inheritance model for digital assets — online communications at least presumptively pass to family members like any physical letters or other offline communications would.¹³⁰

Although surviving family members might be good candidates for legacy stewardship due to their strong emotional and economic attachments to the deceased, these same strong attachments can often get in the way of fair and effective stewardship. Effective stewardship requires due consideration of the interests of all relevant stakeholders, yet the emotional or economic attachments of family stewards tend to eclipse those of other stakeholders.¹³¹ This has been the primary critique that scholars have lodged at family-run IP estates. Numerous estates, such as those of George Gershwin,¹³² James Joyce,¹³³ and Martin Luther King, Jr.,¹³⁴ have been criticized for exerting a tight stranglehold on uses and adaptations of the decedents’ work, frustrating the efforts of scholars, journalists, filmmakers, and musicians to build from them. At times, this familial control over an artist’s legacy seems motivated by the family’s financial interests. The King Estate “seek[s] fees indiscriminately,”¹³⁵ and has permitted some questionable commercial uses

127. See DEL. CODE ANN. tit. 12, §§ 5004–5005 (2020).

128. See *infra* Section II.B.4.

129. See, e.g., Banta, *Death and Privacy*, *supra* note 17, at 931 (“[L]iving family members should have a claim in controlling or accessing a decedent’s digital assets.”); James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIAMI L. REV. 385, 415 (2014) (“The FADA Act does not overturn these well-established fiduciary concepts. Instead, it clarifies that modern digital assets and accounts are within the scope of well-established fiduciary powers and authority.”).

130. See, e.g., Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be the Potential Alternatives*, 10 SCRIPTED 19, 26 (2013).

131. See Brubaker & Callison-Burch, *supra* note 37, at 2910 (observing that effective stewardship requires acting “for the deceased, rather than as the deceased”); cf. Elizabeth Scott & Ben Chen, *Fiduciary Principles in Family Law*, in OXFORD HANDBOOK OF FIDUCIARY LAW 227, 240 (Evan Criddle, Paul Miller & Robert Sitkoff eds., 2019) (recognizing that adult children named as their parents’ guardians have greater potential for conflicts of interests because they “usually no longer live with their parents and have their own interests and concerns”).

132. Arewa, *supra* note 89, at 323–27.

133. Spoo, *supra* note 26, at 1781.

134. David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 545–46 (2010); Jennifer Rothman, *The Market in Dead People*, REASON (May 10, 2018, 7:30 AM), <https://reason.com/2018/05/10/the-market-in-dead-people> [<https://perma.cc/SM9B-NY6M>].

135. Olson, *supra* note 134, at 545.

of King's image, for example in a Dodge car commercial,¹³⁶ while denying permissions for important films and documentaries.¹³⁷ At other times, familial control seems largely motivated by a nostalgic, emotional connection between the steward and the works at issue. The J.R.R. Tolkien Estate viewed the film adaptations of the Tolkien books as "reduc[ing] the aesthetic and philosophical impact of the creation to nothing."¹³⁸ Notwithstanding the wide cultural acclaim for the films and the huge associated revenue streams, the films were nonetheless, in the eyes of the Tolkien Estate, examples of "prostituting art" that it fought at every turn.¹³⁹ In previous work, I have emphasized that the death of a celebrity gives rise to "parallel mourning" processes among families and fans; during the time that the families of celebrities are trying to privately process the loss of a close loved one, they often discount the broader universe of fans who very publicly process their loss through extensive sharing of the celebrity's image and work.¹⁴⁰

Even outside the celebrity context, the strong and complex emotional attachments between family members can eclipse the interests of other potential stakeholders. For example, in recent disputes over family access to deceased social media users' accounts, surviving family members have requested access to the decedents' social media accounts — and the information such accounts reveal — in order to help them process their loved ones' deaths.¹⁴¹ However, families may not be able to access information about the decedent without simultaneously obtaining private information about the numerous third parties that the decedent communicated with. Although the plight of surviving families might seem to support disclosure of the decedent's emails and messages, such familial interest comes at the expense of the privacy interests of the decedent's broader web of online contacts.¹⁴²

In the legal contexts in which the family inheritance model predominates, families are generally prioritized because of their financial relationship with the decedent; they are *not* prioritized because of their

136. See Rothman, *supra* note 134.

137. See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1212–13 (11th Cir. 1999); Timothy B. Lee, *The Crazy Reason Selma Doesn't Use the Actual Words from MLK's Speeches*, VOX (Jan. 13, 2015, 4:50 PM), <https://www.vox.com/2015/1/13/7540027/selma-copyright-king-speeches> [<https://perma.cc/4ALR-A2JW>]; see also Arewa, *supra* note 89, at 321 (noting that the George Gershwin Estate has "tended to authorize performances that gave the most promise of financial return or favorable publicity, with less regard for quality or integrity").

138. Gilden, *supra* note 20, at 670.

139. *Id.* at 671.

140. See *id.* at 693–95.

141. See, e.g., *Ajemian v. Yahoo!, Inc.*, 84 N.E.3d 766, 768 (Mass. 2017); *In re Estate of Serrano*, 54 N.Y.S.3d 564, 565 (N.Y. Sur. Ct. 2017); Order to Produce Information, *In re Estate of Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. Mar. 4, 2005).

142. See Lopez, *supra* note 101, at 225.

cultural competency.¹⁴³ The elective share is largely about ensuring that a surviving spouse receives a fair amount of the decedent's estate, not that the spouse retains control over any particular asset. The copyright termination right is a way to protect surviving families from economic exploitation; it has never been justified on the basis that spouses and children are particularly knowledgeable about artistic communities over whom they suddenly hold leverage. As phrased by Robert Spoo, "[g]enetic connection is no guarantee of literary sensitivity"¹⁴⁴ For example, the Marvin Gaye Estate has been heavily criticized for its successful litigation against the creators of the hit song "Blurred Lines," which was "inspired by" and had a similar "rhythmic and harmonic footprint" to Gaye's song "Got to Give It Up."¹⁴⁵ The Gaye Family's position, as argued by several scholars, was out of sync with the iterative and highly referential nature of music composition in Gaye's field.¹⁴⁶

This deficit in cultural competency not only is a problem for celebrity estates, but also can impact stewardship in any creative community that does not include a decedent's surviving family members. For example, there are many online communities built around a set of shared interests and collaborations (e.g., fan fiction websites, wikis, or open source code repositories), and outsiders to these communities are unlikely to be attuned to the expectations of any particular community

143. In a slightly different context, Alex Boni-Saenz has explored the use of "sexual advance directives," whereby an individual appoints a proxy to provide sexual consent on their behalf in the event they acquire a cognitive disability. Alexander Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1 (2016). Although a family member might be the most likely person to be named as a proxy, Boni-Saenz notes that it may be difficult for a spouse or child to consent to their spouse/parent's new sexual partner, even if it is in the best interest of that spouse/parent. *Id.* at 46. Even if a spouse or child might be well-equipped to handle financial matters, they may be poorly equipped for the challenges of sexual, emotional, or psychological stewardship. *See id.* at 36.

144. Spoo, *supra* note 26, at 1827.

145. Toni Lester, *Blurred Lines — Where Copyright Ends and Cultural Appropriation Begins — The Case of Robin Thicke Versus Bridgeport Music and the Estate of Marvin Gaye*, 36 HASTINGS COMM. & ENT. L.J. 217, 222, 230–31 (2014); Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity: What the "Blurred Lines" Team Copied Is Either Not Original or Not Relevant*, SLATE (Mar. 12, 2015, 12:27 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/_blurred_lines_verdict_is_wrong_williams_and_thicke_did_not_infringe_on.html [<https://perma.cc/PS4X-U58Q>].

146. *See, e.g.,* Lester, *supra* note 145, at 225–29; Joseph M. Santiago, *The Blurred Lines of Copyright Law: Setting a New Standard for Copyright Infringement in Music*, 83 BROOK. L. REV. 289, 310 (2017); Ben Challis, *Blurred Lines: The Difference Between Inspiration and Appropriation*, WIPO MAG. (Sept. 2015), https://www.wipo.int/wipo_magazine/en/2015/05/article_0008.html [<https://perma.cc/6G3S-UXG9>]. Professor Arewa has similarly criticized the George Gershwin Estate for preventing composers from engaging in the type of musical borrowings from Gershwin's work that Gershwin himself had made from earlier compositions. *See* Arewa, *supra* note 89, at 317–18.

when one of its members exits.¹⁴⁷ A family member who suddenly has access to the decedent's contribution to that community — for example, a partially-written Hermione Granger adventure or a GitHub project — may be forced to make a decision about deleting, publishing, transferring, or finishing a collaborative project that they know next to nothing about.¹⁴⁸

Although individuals have always shared different information in different contexts (e.g., home, work, church, sports teams) and modulated their behaviors to what is deemed proper in that context,¹⁴⁹ the Internet has placed individuals into contexts that may be truly shocking to family members. Individuals quite often have lives online, or facilitated by the Internet, that are in serious tension with their public-facing family lives.¹⁵⁰ Many openly heterosexual people have used the Internet to explore their same-sex desires outside the purview of their families.¹⁵¹ Many married people have used the Internet to pursue affairs

147. On the creative norms in these communities, see, for example, Magnus Bergquist & Jan Ljungberg, *The Power of Gifts: Organizing Social Relationships in Open Source Communities*, 11 INFO. SYSTEMS J. 305, 305–06 (2001); Casey Feisler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 729 (2008); and Christian Pentzold, *Imagining the Wikipedia Community: What Do Wikipedia Authors Mean When They Write About Their "Community"?*, 13 NEW MEDIA & SOC'Y 704, 706 (2011).

148. See Subotnik, *Living Dead*, *supra* note 83, at 95 ("These successors may not have played any role in the creation of the underlying work itself, or have any particular relationship to it, but they are now in a position to control its exploitation and adaptation in the marketplace."); cf. Lopez, *supra* note 101, at 226 ("Disclosing the contents of a decedent's digital accounts provides the raw data, but cannot convey the situational context in which that data was created . . .").

149. See *infra* Part III; see also Lopez, *supra* note 101, at 228 ("[I]nformation that a decedent freely offered to one party may not have been intended for any other party; privacy is contextual."). See generally ERVING GOFFMAN, *PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) (explaining techniques of "impression management," whereby social actors control what information is made available to particular audiences).

150. See Edwards & Harbinja, *supra* note 17, at 92 ("[T]he privacy interests of the deceased might not be co-existent with the desires of the surviving family in all cases . . ."); Michael A. DeVito et al., *"Too Gay for Facebook": Presenting LGBTQ+ Identity Throughout the Personal Social Media Ecosystem*, 2 PROC. ACM ON HUM.-COMPUTER INTERACTION 44:1, 44:9–10 (2018) (discussing efforts by an LGBTQ+ mother to wall off aspects of her social media life from her children); Michels et al., *supra* note 55, at 14 ("[D]igital files might reveal things they had concealed from their family, such as sexual preferences or religious beliefs.").

151. See Tim Capon, *Report Reveals How KTLA Anchor Chris Burrous Died at a Grindr Hook-Up*, GAY STAR NEWS (Feb. 24, 2019), <https://www.gaystarnews.com/article/report-reveals-how-ktla-anchor-chris-burrous-died-at-a-grindr-hook-up> [<https://perma.cc/U585-FJED>]; Danny M. Lavery, *Help! Should I Tell My Friend's Widow That He Cheated?*, SLATE (Feb. 22, 2019, 12:00 PM), <https://slate.com/human-interest/2019/02/should-i-tell-my-friends-widow-he-was-gay-and-cheated-advice.html> [<https://perma.cc/4E2H-YTPZ>]; Frédéric Martel, *Grindr, Blackmail and Confession: The Life of a Gay Seminarian*, IRISH TIMES (Mar. 2, 2019, 6:00 AM), <https://www.irishtimes.com/culture/books/grindr-blackmail-and-confession-the-life-of-a-gay-seminarian-1.3808475> [<https://perma.cc/L9AE-9JC3>]; John Stark, *I Had an Affair with My Straight, Married Neighbor. Then His Wife Emailed Me.*, HUFFINGTON POST (Mar. 12, 2019, 8:15 AM), https://www.huffpost.com/entry/affair-married-man_n_5c866e97e4b0ed0a0015a3a6 [<https://perma.cc/2N7N-DLYL>].

behind their spouses' backs.¹⁵² Many people have explored sexual fantasies online that would likely provoke intense disgust if discovered by a spouse, parent, or child.¹⁵³ Even if a deceased spouse never acted out, for example, a violent sexual or cannibalistic fantasy,¹⁵⁴ discovering and reading their communications on a hardcore fetish website likely would be extremely difficult for the surviving spouse to stomach.¹⁵⁵ Similarly, in the aftermath of a large data breach of the affair website AshleyMadison.com, several surviving spouses learned that their deceased spouse had opened an account. The result was, in the words of one commentator, "doubly grieving widows."¹⁵⁶ Privacy research has shown that many, if not most, individuals do not want their families to have full access to their private online communications and accounts after they die,¹⁵⁷ and it is far from clear that surviving families are better off with presumptive access to and control over a decedent's digital trail.¹⁵⁸

Finally, in addition to problems with objectivity and familiarity, family stewardship frequently suffers from coordination problems. Particularly where a decedent died intestate, stewardship decisions often are divided among children, siblings, and/or surviving spouses. These individuals often have very different views over how to craft the decedent's legacy. For example, in the aftermath of Prince's death, his six siblings and half-siblings (not all of whom are related to each other) have divided on nearly every major decision about how Prince's estate

152. Tom Lamont, *Life After the Ashley Madison Affair*, THE GUARDIAN (Feb. 27, 2016, 7:05 PM), <https://www.theguardian.com/technology/2016/feb/28/what-happened-after-ashley-madison-was-hacked> [<https://perma.cc/3VPH-PGT9>]; see also Irina Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207, 223–24 (2019).

153. See OGI OGAS & SAI GADDAM, A BILLION WICKED THOUGHTS: WHAT THE INTERNET TELLS US ABOUT SEXUAL RELATIONSHIPS ix–xvi (2011); Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 419 (2017).

154. See *United States v. Valle*, 807 F.3d 508, 512 (2d Cir. 2015); Thea Johnson & Andrew Gilden, *Common Sense and the Cannibal Cop*, 11 STAN. J. C.R. & C.L. 313, 315 (2015).

155. See Bruce Golding, *Teary Wife Testifies About "Cannibal" Recipes*, N.Y. POST (Feb. 26, 2013, 5:00 AM), <https://nypost.com/2013/02/26/teary-wife-testifies-about-cannibal-recipes> [<https://perma.cc/2RTR-6RVY>].

156. Lamont, *supra* note 152; see also *Ashley Madison: Life After the Hack*, CNN: MOSTLY HUM. WITH LAURIE SEGALL, <https://money.cnn.com/mostly-human/click-swipe-cheat> [<https://perma.cc/TJ5C-TU3H>].

157. Lopez, *supra* note 101, at 230–31 (summarizing a NetChoice study that showed that "[m]ore than 70 percent of Americans think that their private online communications and photos should remain private after they die — unless they gave prior consent for others to access[.]" though acknowledging some flaws in the study). Relatedly, some digital estate planning organizations recommend that an individual appoint a "cleaner" — usually a close friend — to log into their online accounts after they die and delete embarrassing data before family members can see it. See Gene Newman, *How to Eliminate All the Skeletons in Your Closet After You Die*, EVERPLANS, <https://www.everplans.com/articles/how-to-eliminate-all-the-skeletons-in-your-closet-after-you-die> [<https://perma.cc/FQ7Q-4ZGP>].

158. See Lopez, *supra* note 101, at 227 ("[D]isclosed information could be just as personally damaging for survivors.").

should be administered.¹⁵⁹ Numerous other families have been split apart by disagreements over legacy stewardship.¹⁶⁰ Particularly because intestacy laws assign heirship based on one's place in a family tree and not based upon any substantive relationship to the decedent,¹⁶¹ it can be incredibly challenging for intestate heirs to engage in effective, coordinated stewardship.¹⁶²

The family inheritance model has a lot of intuitive appeal. Surviving family members are usually the most closely intertwined with the decedent — financially, psychologically, and emotionally — so they should have the greatest say over how society continues to interact with an individual who will always be a part of them. This strong attachment can certainly lead to highly motivated stewardship by individuals who do often know more about the decedent and their desires than anyone else does. However, family stewardship can be risky business. We may want families to reap the financial benefits of the decedent's hard work, but they often are ill-equipped to take on the responsibilities that come with those benefits. Moreover, stewardship can take a serious toll on families — both by exposing them to the darker sides of the decedent and by pulling bereaved family members away from one another.

159. Order on the Appointment of Heirs' Representatives at 2, *In re Estate of Nelson*, No. 10-PR-16-46 (Minn. Dist. Ct. May 15, 2018) ("The Court has attempted to get the parties to work together collaboratively The Court looks at this occasion as the last opportunity to work towards a collaborative effort in the administration of this Estate."). Adding further complexity, at least two of Prince's half-siblings assigned their interests in his estate to a third-party entertainment company, which now claims to "stand[] in the shoes" of the two heirs. See Mike Hughlett & John Bream, *Death of Prince Heir Complicates Estate Settlement Even More*, STAR TRIB. (Feb. 22, 2020, 5:33 PM), <http://www.startribune.com/untimely-death-of-prince-heir-complicates-estate-settlement-even-more/568089142> [<https://perma.cc/SBZ8-AN9W>].

160. See, e.g., Shekhar Bhatia, *Marvin Gaye's Family in Ugly Feud After \$7.4m "Blurred Lines" Payout as His Widow Accuses His "Penniless" Sisters of "Picking on His Bones" and They Say He "Would Have Hated to See Us Like This,"* DAILY MAIL (Mar. 25, 2015, 11:50 AM), <https://www.dailymail.co.uk/news/article-3008499/Marvin-Gaye-s-family-ugly-feud-7-4m-Blurred-Lines-payout-widow-accuses-penniless-sisters-picking-bones-say-hated-like-this.html> [<https://perma.cc/T6SR-BCP2>] ("My sister and I were not included in the law suit [sic] even though I feel so close to the song because that is me making all the party sounds on it. You hear me before you hear anything else on 'Got to Give It Up.' I was there when Marvin recorded it."); Kurt Eichenwald, *The Family Feud Over Martin Luther King Jr.'s Legacy*, NEWSWEEK (Apr. 3, 2014, 7:01 AM), <https://www.newsweek.com/2014/04/11/family-feud-over-martin-luther-king-jrs-legacy-248083.html> [<https://perma.cc/W3LJ-DU5V>]; see also *In re Estate of Reynolds*, 327 P.3d 213, 217 (Ariz. Ct. App. 2014) (dismissing publicity rights lawsuit brought by one sister, as executor of her mother's estate, against another sister who wrote a blogpost about their mother's challenges with independent living).

161. See, e.g., Banta, *Minors and Digital Asset Succession*, *supra* note 13, at 1737–38 (discussing cases where parents inherited from their estranged children).

162. Cf. Scott & Chen, *supra* note 131, at 240 (recognizing "the potential for conflict among adult siblings about a parent's care" that may not be amenable to informal resolution).

3. Public Domain

Many of the drawbacks of the freedom of disposition and family inheritance models stem from relying on private property, instead of common ownership, to effectively steward a person's legacy. Giving a decedent too much control over their private communications might keep important, yet embarrassing, information out of the hands of journalists, biographers, and historians.¹⁶³ Giving surviving family members too much control over the decedent's creative works might deprive creative communities of important resources they have come to rely upon.¹⁶⁴ These concerns show that using private property as a proxy for stewardship tends to centralize the benefits of a person's legacy within the tightest of social circles.¹⁶⁵ A "public domain" model of stewardship, by contrast, shares the benefits and control of a person's legacy with the general public. Rather than enforce private property interests in a decedent's creative works, name, or online data, under a public domain model, everyone is entitled to access and use these resources. The result is a legacy that is created and maintained by society at large; anyone can say what they want about the decedent without having to go through a gatekeeping steward.

There is a vast literature, particularly within IP scholarship, that explores the benefits of common ownership and the public domain.¹⁶⁶ This Section outlines some potential advantages of relying on the public domain to make decisions about how an individual will continue to factor into the lives of the living.

First, there is a broad universe of individuals outside the family who have significant emotional and psychological investments in the decedent's legacy.¹⁶⁷ For example, when a celebrity dies, their fans often experience various forms of "disenfranchised" mourning,¹⁶⁸ and the

163. See Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMPLE L. REV. 67, 69–71 (2008).

164. See, e.g., *id.* at 89.

165. See Subotnik, *Living Dead*, *supra* note 83, at 116 ("[W]here valuable rights have been retained, the author's family . . . or other chosen successors will be able to benefit financially from continued exploitation of the work.").

166. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* xii (2008); LAWRENCE LESSIG, *FREE CULTURE* xiv (2004); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 147 (1981); Jessica D. Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990).

167. See, e.g., Edwards & Harbinja, *supra* note 17, at 100 ("Society in general, as well as specific heirs, family and friends, have an interest in the legacy of the dead . . ."); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 193 (1993) ("However strenuously the star may fight the intertextuality of his image . . . the media and the public always play a substantial part in the image-making process.").

168. See, e.g., Julie L. Andsager, *Altared Sites: Celebrity Webshrines as Shared Mourning*, in *AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME* 17, 17–19 (Steve Jones & Joli Jensen eds., 2005); Katie Z. Gach et al., "Control Your Emotions, Potter:" *An*

loss of an online friend can similarly give rise to a nontraditional, but nonetheless acutely experienced, grieving process.¹⁶⁹ Legacy stewardship, for example through creating online memorial pages, can form an important part of these mourning practices.¹⁷⁰ Such shared mourning practices are, again, not limited to celebrity decedents — various studies of online communities have shown that a wide range of online communities often experience a period of mourning following the loss of a member.¹⁷¹ A public domain model recognizes that the entirety of an individual's social network has an ongoing interest in both the life and death of each of its members.¹⁷²

Second, many of the justifications for privatized ownership — like incentivizing or rewarding productive labor — are very weak when applied after the death of the laborer.¹⁷³ A deceased laborer no longer responds to economic incentives (if they ever did), and any natural rights in a decedent's artifacts are generally understood as dying with them.¹⁷⁴ According to one court, “[i]t does not seem reasonable to expect that

Analysis of Grief Policing on Facebook in Response to Celebrity Death, 1 PROC. ACM ON HUM.-COMPUTER INTERACTION 47:1, 47:1 (2017) (“When a celebrity passes away, their fans experience the loss of what psychologists call a *parasocial* relationship: a one-sided, mediated relationship that people may experience with similar emotional strength to personal relationships.”); see also Neil Thompson & Kenneth J. Doka, *Disenfranchised Grief*, in HANDBOOK OF THE SOCIOLOGY OF DEATH, GRIEF, AND BEREAVEMENT 177, 177–81 (Neil Thompson & Gerry R. Cox eds., 2017).

169. See, e.g., Falconer et al., *supra* note 38, at 83–85.

170. See Jed R. Brubaker & Gillian R. Hayes, “*We Will Never Forget You [Online]*”: An Empirical Investigation of Post-Mortem MySpace Comments, in CSCW 2011: PROC. ACM 2011 CONF. ON COMPUTER SUPPORTED COOPERATIVE WORK 123, 123 (2011); Sue Jamison-Powell et al., “*P.S. I Love You*”: Understanding the Impact of Posthumous Digital Messages, in CHI 2016: PROC. 34TH ANN. CHI CONF. ON HUM. FACTORS IN COMPUTING SYSTEMS 2920, 2921 (2016); Alice Marwick & Nicole B. Ellison, “*There Isn’t Wifi in Heaven!*” Negotiating Visibility on Facebook Memorial Pages, 56 J. BROADCASTING & ELECTRONIC MEDIA 378, 378 (2012).

171. See, e.g., Robert Dobler, *Ghosts in the Machine: Mourning the MySpace Dead*, in FOLKLORE AND THE INTERNET: VERNACULAR EXPRESSION IN A DIGITAL WORLD 175, 186–93 (Trevor J. Blank ed., 2009); see also Cindy Lamothe, *How to Grieve for Online Friends You Had Never Met in Person*, N.Y. TIMES (Oct. 10, 2018), <https://nyti.ms/2C6PcuM> [<https://perma.cc/XC4B-EPK6>]; Thamiris, FANLORE, <https://fanlore.org/wiki/Thamiris> [<https://perma.cc/T2T4-BHBZ>] (memorial page for deceased fan fiction author).

172. See Jason Mazzone, *Facebook’s Afterlife*, 90 N.C. L. REV. 1643, 1657 (2011) (“[T]he group as a whole has an interest in the activities of individual members because they are the building blocks of the group.”).

173. See Gilden, *supra* note 20, at 647–49.

174. See Lionel Bently, *R. v The Author: From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 99 (2008) (“The creative link between an author and her work may justify protection during that author’s life, but thereafter an earlier author’s claim should readily give way to the needs of subsequent authors.”); Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 259 (rejecting incentives arguments as applied to heirs). Some civil law jurisdictions, however, have embraced a natural right to inheritance by close family members. These jurisdictions have a system of largely forced heirship that is quite different than in the United States and other common law jurisdictions. See Ryan McLearen, Comment, *International Forced Heirship: Concerns and Issues with European Forced Heirship Claims*, 3 EST. PLAN. & CMTY. PROP. L.J. 323, 323 (2011).

[exclusive control over an ancestor's name] would enlarge the stock or quality of the goods, services, artistic creativity, information, invention or entertainment available."¹⁷⁵ In the absence of any strong justification for private control over legacy, "[a]n equal distribution of the opportunity to use the name of the dead seems preferable."¹⁷⁶

Third, if one of the goals of legacy stewardship is to preserve the memory of the deceased, the public domain may be the best way to ensure that the necessary archival work takes place.¹⁷⁷ A public domain model can substantially lower the barriers to entry for scholarship, preservation, and follow-on creativity, particularly where private owners don't appreciate the value of these activities or zealously guard their families' privacy.¹⁷⁸

Fourth, in the absence of state-backed property rights, a public domain model would largely regulate legacy stewardship through community norms. Many studies on communities operating with little formal property protections show that the public domain doesn't operate as a chaotic free-for-all, but instead according to informally policed social norms.¹⁷⁹ As discussed in the previous Section, there is a danger of outsider stewards imposing their own preferences on communities they don't fully understand, and the public domain model leans much more heavily on the norms of the various communities in which the decedent participated.

A public domain approach to stewardship appears in a few significant places within the laws of legacy. As a preliminary matter, all copyright interests eventually expire, meaning that at some point the stewardship of a decedent's creative works will be shared by the general public.¹⁸⁰ Moreover, publicity rights in roughly half of the states do not extend postmortem.¹⁸¹ Accordingly, if the decedent was domiciled in New York or Wisconsin at the time of their death, anyone in

175. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959–60 (6th Cir. 1980).

176. *Id.* at 960.

177. See, e.g., Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 *BERKELEY TECH. L.J.* 1, 29 (2013) ("Consistent with several previous studies . . . we found that audiobooks were significantly more likely to be made from older bestselling public domain works than from bestselling copyrighted works from the same era.").

178. See Mazzone, *supra* note 172, at 1659–60.

179. See, e.g., Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 *CORNELL L. REV.* 1539, 1539 (2017); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *V.A. L. REV.* 1787, 1790 (2008); Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 *COLUM. J.L. & ARTS* 317, 317 (2011).

180. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

181. This data comes from a review of Jennifer Rothman's fifty-state survey. See Jennifer E. Rothman, *The Law, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY*, <https://www.rightofpublicityroadmap.com/law> [<https://perma.cc/LS95-WDZB>].

those states may freely use the decedent's name or likeness in merchandise, memorabilia, and documentaries without the consent of the estate.¹⁸² One frequent justification for this limitation has been that the right of publicity is an offshoot of the common law privacy tort of appropriation,¹⁸³ and privacy interests are typically seen as personal interests that evaporate at death.¹⁸⁴ For example, the EU General Data Protection Regulation does not require any protections for deceased persons' data beyond what, if any, each member nation might provide.¹⁸⁵ It is for similar reasons that in all but one US jurisdiction, a defamation cause of action extinguishes upon death.¹⁸⁶ Accordingly, in a large number of US jurisdictions, it is lawful to say anything you want about a deceased person, without any substantiation or research, and to prominently use or even profit from that person's name or likeness while doing so.¹⁸⁷ By contrast, most states that recognize a postmortem publicity right view such right as an alienable property interest, and such property interests generally can be transferred after death.¹⁸⁸ In those states, you can still lie about the deceased, but you may need to be careful about how you use their name or likeness while doing so.¹⁸⁹

182. See Jennifer E. Rothman, *New York*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/law/new-york> [https://perma.cc/6ATT-NWE6]; Jennifer E. Rothman, *Wisconsin*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/law/wisconsin> [https://perma.cc/DZ3H-FWSJ].

183. See ROTHMAN, *supra* note 21, at 71–73.

184. See RESTATEMENT (SECOND) OF TORTS § 652I cmt. a (AM. LAW INST. 1977) (“The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded.”); ROTHMAN, *supra* note 21, at 45, 82–83, 115, 126; see also Bo Zhao, *Legal Cases on Posthumous Reputation and Posthumous Privacy: History, Censorship, Law, Politics and Culture*, 42 SYRACUSE J. INT’L L. & COM. 39, 57 (2014) (“In common law jurisdictions, particularly in the U.S., reputation is a personal matter and the right cannot be inherited by the living.”).

185. See Regulation 2016/679 of Apr. 27, 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 27 (EU) (“This Regulation does not apply to the personal data of deceased persons.”); Gianclaudio Malgeri et al., *R.I.P.: Rest in Privacy or Rest in (Quasi-)Property? Personal Data Protection of Deceased Data Subjects Between Theoretical Scenarios and National Solutions*, in DATA PROTECTION AND PRIVACY: THE INTERNET OF BODIES 143, 156 (Rosamunde van Brackel et al. eds., 2018).

186. See DON HERZOG, *DEFAMING THE DEAD* ix, 258–60 (2017). That one state is Rhode Island. *Id.*

187. Assuming that no copyrighted works were infringed in the process.

188. See, e.g., *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1544 (11th Cir. 1983) (concluding that the right of publicity survives death and is enforceable by the estate); *In re Estate of Reynolds*, 327 P.3d 213, 217 (Ariz. Ct. App. 2014) (“As a property right, however, the right of publicity is ‘freely assignable’ Consistent with that principle, we hold the right of publicity is descendible, and therefore may be enforced by a decedent’s estate.”). For a critique of this view, see generally Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012).

189. See William H. Binder, Note, *Publicity Rights and Defamation of the Deceased: Resurrection or RIP?*, 12 DEPAUL-LCA J. ART & ENT. L. 297, 297 (2002).

Although a public domain model is attractive for its democratic ethos and its emphasis on shared, collaborative stewardship, there are some important reasons to not overly romanticize the public domain.¹⁹⁰ First, quite often the public domain is not as democratic as it might seem. Although ideally an individual's legacy might "be regarded as a common asset to be shared, an economic opportunity available in the free market system[.]"¹⁹¹ the free market has a track record of diverting the benefits of the public domain to the most powerful market actors. Public domain materials, such as folk music¹⁹² or scientific knowledge¹⁹³ or genetic material,¹⁹⁴ repeatedly have been appropriated by celebrity and/or corporate intermediaries without any recognition or compensation for the individuals, families, or communities that produced them.¹⁹⁵ In the legacy context, death can be a lucrative moment culturally, emotionally, and scientifically, and under a public domain model, those with the resources to quickly extract from and commercialize the dead have a freely accessible supply of information, images, and sometimes even bodies at their disposal.¹⁹⁶

Second, the public domain does not have a great mechanism for addressing privacy concerns. If all information and artefacts related to a decedent are available for the taking, then the public domain model creates no clear impediments to satisfying the public's hunger for juicy details about the decedent.¹⁹⁷ Sometimes a decedent or their family declares a privacy interest largely to cover up misbehavior,¹⁹⁸ but they

190. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1331–32 (2004).

191. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 960 (6th Cir. 1980).

192. See MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE 2–3 (2012) (describing the story of Solomon Linda, a South African singer whose song, Mbube, was turned into the hit song "Lion Sleeps Tonight" without compensation for him or his family).

193. See Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 CARDOZO J. INT'L & COMP. L. 247, 318–19 (2003).

194. See Radhika Rao, *Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?*, 35 J.L. MED. & ETHICS 371, 371 (2007).

195. See Chander & Sunder, *supra* note 190, at 1335 ("[F]or centuries the public domain has been a source for exploiting the labor and bodies of the disempowered — namely, people of color, the poor, women, and people from the global South."). See generally Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355 (2016) (describing race, gender, and class inequalities in the application of copyright's fair use doctrine).

196. See, e.g., *Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 912–13 (E.D. La. 2017); see also Julie E. Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*, 31 PHIL. & TECH. 213–14 (2018) ("Personal information processing has become the newest form of bioprospecting, as entities of all sizes compete to discover new patterns and extract their marketplace value.").

197. Informal norms around postmortem discourse and grieving may nonetheless shape how the deceased are actually discussed. See Gach et al., *supra* note 168, at 47:6–8.

198. See, e.g., Peggy J. Bowers & Stephanie Houston Grey, *Karen: The Hagiographic Impulse in the Public Memory of a Pop Star*, in AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME, *supra* note 168, at 97, 99 (discussing efforts by the Karen Carpenter estate to preserve her squeaky-clean, all-American image).

might also have an earnest desire to keep materials like naked images¹⁹⁹ or autopsy photos²⁰⁰ out of public view. A public domain model would provide little protection in those instances. Relatedly, the public domain model might provide “equal opportunity” to all potential stewards, but it falsely places all potential stewards on the same playing field. A decedent’s surviving spouse and a decedent’s Facebook friend might both be genuinely bereaved by the loss of someone they care about, but the public domain does a poor job of recognizing the difference in magnitude between losing someone who you lived with for decades and someone who really loved your YouTube videos.²⁰¹

A public domain approach to stewardship recognizes that there is usually a much wider universe of stakeholders in a person’s legacy, and it gives agency to those stakeholders to co-create a person’s social afterlife. But although it decentralizes legacy stewardship in ways that may be highly generative of follow-on creativity and scholarship, it also does little to constrain the free market where it doesn’t fully appreciate the acute grieving process experienced by the decedent’s closest circles of family and friends. A level playing field of stewardship may reflect the real-world experience of mourning quite poorly.

4. Consumer Contract

A “consumer contract” model may be the least intuitive way of approaching legacy stewardship. Rather than placing decision-making in the hands of the decedent, their family, or even the general public, this model places decision-making in the hands of third-party intermediaries who are in a contractual relationship with the decedent. Particularly since the advent of social media and cloud computing, a tremendous amount of a person’s financial and socioemotional wealth is in the hands of third-party market actors, and these third parties are accordingly important stakeholders in the legacies of their users. And although there are many legitimate reasons to be skeptical that companies like Facebook or Apple will make careful, empathetic decisions about what should happen to, for example, collections of family photos uploaded by a decedent, the consumer contract model nonetheless has become an increasingly important approach to legacy stewardship.

199. See *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1201–02 (11th Cir. 2009).

200. *Katz v. Nat’l Archives & Records Admin.*, 862 F. Supp. 476, 485 (D.D.C. 1994); *Earnhardt ex rel. Estate of Earnhardt v. Volusia Cty.*, No. 2001-30373-CICI, 2001 WL 992068, at *1–2 (Fla. Cir. Ct. July 10, 2001); *Reid v. Pierce Cty.*, 961 P.2d 333, 342 (Wash. 1998).

201. See *Gilden*, *supra* note 20, at 687–90.

Since 2016, over forty states have passed digital asset laws that embrace a consumer contract approach to legacy stewardship.²⁰² Although the Uniform Law Commission's initial Fiduciary Access to Digital Assets Act ("FADAA") gave a decedent's personal representative — usually a family member — substantial control over a decedent's digital accounts, the ULC's Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") substantially shifted the center of power towards online intermediaries. RUFADAA sets up the following multi-tiered approach towards postmortem decision-making: "online tools" trump a decedent's will or trust, which in turn trumps any applicable Terms of Service agreements.²⁰³

The highest priority under RUFADAA goes to any instructions the decedent expressly gave to the market intermediary in an "online tool" with respect to the preservation, deletion, or transfer of digital assets.²⁰⁴ Examples of such online tools include Facebook's Legacy Contact tool²⁰⁵ and Google's Inactive Account Manager,²⁰⁶ through which a user selects who can manage their account after death. Importantly, RUFADAA provides little guidance as to the substance of these online tools²⁰⁷ — for example, Facebook Legacy Contact does *not* give the option of transferring private messages to the appointed contact, and it does not allow the selection of a backup Legacy Contact. The decedent technically makes the decision within an online tool, but the intermediary decides what questions get asked and which options disappear entirely.²⁰⁸ And because online tools are at the top of the RUFADAA hierarchy, it does not matter if the decedent included instructions in a formally executed will — even if later-drafted — that fully contradict the online tool.²⁰⁹ For example, let's say Wilma went to her Bedrock.com account settings and selected her friend Betty to manage her email account postmortem, but then Wilma later drafted a will expressly giving her executor, her husband Fred, access to her emails. In this scenario, Betty wins under RUFADAA.

202. See *Fiduciary Access to Digital Assets Act, Revised*, *supra* note 22.

203. See RUFADAA § 4.

204. See *id.* § 4(a); see also *id.* § 2(16) (defining "online tool").

205. See *Choose a Legacy Contact*, FACEBOOK: HELP CENTER, <https://www.facebook.com/help/991335594313139> [<https://perma.cc/U8JL-GUZD>].

206. See *About Inactive Account Manager*, GOOGLE ACCOUNT HELP, <https://support.google.com/accounts/answer/3036546> [<https://perma.cc/6W23-FUKN>].

207. To qualify as an "online tool" and receive the highest priority within RUFADAA, all that is required is that the platform provide an "electronic service . . . that allows a user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person." RUFADAA § 2(16).

208. See, e.g., Banta, *Minors and Digital Asset Succession*, *supra* note 13, at 1725–26 (observing that individuals who rely on online tools are "dependent on the method, scope, and rules established by the company").

209. See Yael Mandel, Note, *Facilitating the Intent of Deceased Social Media Users*, 39 CARDOZO L. REV. 1909, 1936 (2018).

If the decedent did *not* utilize an online tool, however, then an express instruction in a will or trust regarding the disposition of a digital asset is controlling as against an intermediary, even if its Terms of Service agreement (“ToS”) is to the contrary.²¹⁰ For example, if Wilma’s will expressly gives Fred access to all her Bedrock.com emails, but Bedrock’s ToS says that a decedent’s account will be erased upon death, Fred wins under RUFADAA.

In the absence of an online tool or an express direction in a will or trust, however, the intermediary’s ToS governs the disposition of digital accounts.²¹¹ This is a very significant provision of RUFADAA because it means that even if a ToS does not trump an *express* direction in a will or trust, it does trump the default rules of intestacy.²¹² Accordingly, if Wilma died intestate, and her husband Fred is appointed as her personal representative, he cannot compel Bedrock to turn over Wilma’s email, so long as Bedrock’s ToS gives Bedrock the right to delete Wilma’s emails. As between the intermediary and the next of kin, the intermediary wins under RUFADAA.

The result of RUFADAA’s complex, tiered approach to digital assets — which I have simplified here²¹³ — is that social media companies and other online intermediaries have been granted substantial legal control over a decedent’s often-most-personal assets. In the vast majority of cases, the decedent will not have executed a formal estate plan,²¹⁴ let alone a formal estate plan that includes a provision addressing digital assets. And even if they make such a plan, this plan can be trumped by an online tool — just a few button clicks that may have occurred on a whim years ago. Ultimately, in most cases, the decedent will have neither used an online tool nor executed a formal estate plan, so the intermediary can decide for itself what rules it wants to include in its ToS and apply to the vast majority of its deceased users. RUFADAA gives intermediaries two separate avenues for substantially shaping succession and stewardship of their members’ data.

The consumer contract model has come under scholarly criticism along two general lines. First, RUFADAA has been criticized for departing so sharply from the default rules of intestacy: in particular, for

210. See RUFADAA § 4(b).

211. See *id.* § 5.

212. See Horton, *supra* note 57, at 595 (“[RUFADAA] predicates electronic inheritance on a user engaging in some form of estate planning.”).

213. For example, if there is no online tool, will/trust, or ToS provision dealing with post-mortem dispositions, then RUFADAA makes a distinction between the “contents” of the decedent’s communications, which are off limits to the fiduciary, and a “catalogue” of communications, which must be handed over (though potentially only with a court order). See RUFADAA §§ 7–8. These rules are meant to mirror a “content”/“envelope” distinction that has developed in Fourth Amendment and Stored Communications Act jurisprudence. See Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 WM. & MARY L. REV. 2105, 2105 (2009).

214. See Cahn & Zietlow, *supra* note 51, at 325.

sidelining families from the inheritance of digital assets.²¹⁵ As discussed above, families are often deeply emotionally and financially invested in the materials covered by RUFADAA, including family photos and videos as well as banking or web-based business accounts.²¹⁶ Accordingly, Natalie Banta has argued that “[i]f an individual has not made her desires known concerning her digital accounts, a family member’s desire to know more about the decedent’s life should override a third-party contract’s terms of deletion.”²¹⁷ Moreover, although a decedent’s digital accounts may contain private communications between the decedent and third parties, families have long inherited the decedent’s similarly private diaries and physical letters as the intestate heirs to personal property.²¹⁸ Other jurisdictions, such as Germany, have expressly analogized digital communications to physical letters: both descend to family members by default.²¹⁹ RUFADAA, in this line of critique, might arguably exhibit a form of digital exceptionalism that too hastily takes property away from families and places it in the hands of digital intermediaries.

In at least one case, a judge has balked at RUFADAA’s sidelining of surviving family members. In *In re Scandalios*, the decedent was a forty-five-year-old former champion gymnast who died in a “freak accident” at a trampoline park, and his surviving husband sought access to his iCloud account in order to retrieve some family photos.²²⁰ Although the decedent executed a will naming his husband as executor,

215. See Banta, *Digital Feudalism*, *supra* note 17, at 1131 (arguing that deletion of data by digital asset companies “flies in the face of decades of law and tradition in the American succession system”).

216. *Cf. id.* at 1143 (“A public figure’s next of kin should be able to capitalize on that value instead of allowing a third party platform like Google to sell the contents of a deceased person’s account.”).

217. Banta, *Death and Privacy*, *supra* note 17, at 977.

218. See *id.* at 948 (“A decedent’s documents, diaries, letters, and secrets are left behind for survivors to find and disseminate if they choose. Accordingly, our system of succession does not protect privacy from family members at death, because property dissemination usually reveals an individual’s secrets.”).

219. See Michels et al., *supra* note 55, at 13–14 (describing details of BGH July 12, 2018, III ZR 183/17, wherein the parents of a fifteen-year-old girl who died in a train accident sought access to the girl’s Facebook account, including all messages she had sent); Hanna Kozłowska, *A German Court Ruled You Can Inherit Facebook Content Like a Letter or a Diary*, QUARTZ (July 12, 2018), <https://qz.com/1327106/a-german-court-ruled-that-the-parents-of-a-teenager-who-died-tragically-could-inherit-her-facebook-content> [<https://perma.cc/R78L-NTXN>]; see also Harbinja, *supra* note 130, at 26 (describing the inherited postmortem data protection rights in, for example, Bulgaria and Estonia).

220. See Julia Marsh, *Broadway Exec Goes to Court Over Dead Spouse’s iCloud Password*, N.Y. POST (Jan. 18, 2019, 9:16 PM), <https://nypost.com/2019/01/18/broadway-exec-goes-to-court-over-dead-spouses-icloud-password> [<https://perma.cc/GK2J-UCNY>]; *Trampoline Parks Exploding in Popularity, but Expert Warns of “Catastrophic Injuries,”* CBS THIS MORNING (Mar. 29, 2019, 7:45 AM), <https://www.cbsnews.com/news/trampoline-parks-rising-in-popularity-expert-warns-of-catastrophic-injuries> [<https://perma.cc/ZD7Y-S99L>]; accord *In re Scandalios*, No. 2017-2976/A, 2019 WL 266570, at *1–2 (N.Y. Sur. Ct. Jan. 14, 2019).

“[n]o provision in decedent’s will expressly authorize[d] the executor to access decedent’s digital assets”²²¹ The husband nonetheless argued that he had “implicit consent” to access the decedent’s digital assets because there was “never any effort to shield [their] computer screens or [their] access to [their] digital assets from one another.”²²² Even though Apple’s ToS stated that the decedent’s account terminated at death,²²³ and notwithstanding RUFADAA’s blessing of the ToS in these precise circumstances, the court nonetheless reached the highly-questionable conclusion that photos stored in a third-party server were not “electronic communications” subject to RUFADAA’s privacy protections.²²⁴ Apple was ordered to allow the decedent’s spouse to reset the decedent’s Apple ID and fully access the contents of his iCloud account.²²⁵

Although the *Scandalios* case presented an extremely sympathetic plea by a surviving family member to access cherished memories stored in the cloud, the court’s analysis, if taken up by other courts, would create a giant exception to RUFADAA that would give family members presumptive access to *all* photos and documents held in cloud storage. Although cloud storage accounts will likely include materials that are undeniably important to surviving family members, they may also contain a huge range of intimate materials that the decedent had no intention of sharing with their spouse or children or parents. A decedent may have never made any overt effort to shield a particular computer screen from his husband, but an iCloud account may contain subject matter uploaded from any number of devices outside the spouse’s purview.

221. *In re Scandalios*, 2019 WL 266570, at *2.

222. *Id.*

223. Andrew Keshner, *Apple Must Give Grieving Husband Access to Cloud-Stored Family Photos, Judge Rules*, MKT. WATCH (Jan. 26, 2019, 10:45 AM), <https://www.marketwatch.com/story/apple-must-give-grieving-husband-access-to-cloud-stored-family-photos-judge-rules-2019-01-25> [<https://perma.cc/BW87-QHEY>].

224. *In re Scandalios*, 2019 WL 266570, at *2. The court excluded photos in cloud storage based upon a sentence in the official comments to RUFADAA, which states that “electronic communication” includes “email, text messages, instant messages, and any other electronic communication *between private parties*.” *Id.* at *2 n.3 (citing RUFADAA § 2 cmt.). However, the very next sentence of that comment indicates that RUFADAA is borrowing its definition from the Electronic Communications Privacy Act, which much more broadly includes “any transfer of signs, signals, writing, *images*, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system.” RUFADAA § 2 cmt. (emphasis added). Photos in an iCloud account certainly are “images” transmitted by electromagnetic system. Moreover, another official comment to RUFADAA addresses the scenario where the decedent “has stored photos in a cloud-based Internet account” and treats that scenario identically to the scenario where a fiduciary seeks access to an electronic banking statement — in both cases, the fiduciary must follow the specific, privacy-protective procedures set forth in Sections 7 and 8 of RUFADAA. *Id.* § 15 cmt. ex 1.

225. *In re Scandalios*, 2019 WL 266570, at *3.

The *Scandalios* case, nonetheless, represents an understandable discomfort with a consumer contract model of legacy stewardship and its potential to sideline grieving families.

The second, related critique of RUFADAA is that it places too much faith in digital intermediaries to protect the interests of their users.²²⁶ Even if social media companies and other intermediaries were truly concerned about their users' privacy interests, as they claim,²²⁷ such concern is likely eclipsed by their financial and legal interests.²²⁸ In light of well-documented misuse of user data, scholars have been reluctant to place too much faith in the stewardship capacities of digital intermediaries.²²⁹ Indeed, the typical business model of social media platforms involves selling information about its users to third parties,²³⁰ creating, at the very least, a potential conflict of interest between respecting the wishes of deceased users and maximizing the value of their digital trail. Furthermore, despite the privacy-focused rhetoric surrounding recent digital assets law, these laws provide an avenue for intermediaries to insulate themselves from much of the legal risks of legacy stewardship — if they provide an online tool, they can entirely rely on the user's selections without having to worry about the costs and uncertainty of determining whether a contrary direction was provided in a will or trust.²³¹ Moreover, as discussed above, the ToS is largely ratified by RUFADAA in most circumstances as a legitimate guidepost for legacy stewardship, notwithstanding that boilerplate ToS

226. See Banta, *Inherit the Cloud*, *supra* note 29, at 827 (“By prohibiting transfer of digital assets, service providers act more like overlords over our personal digital assets than as corporations providing us with a service . . .”); Banta, *Minors and Digital Asset Succession*, *supra* note 13, at 1725 (arguing that a contractual approach to minors' digital asset succession “puts a minor at the mercy of a digital asset provider”); Shelly Kreiczer-Levy & Ronit Donyets-Kedar, *Better Left Forgotten: An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power*, 84 BROOK. L. REV. 703, 705 (2019) (emphasizing “the need to protect users from platform power, motivated and fueled by economic interest”).

227. See Banta, *Inherit the Cloud*, *supra* note 29, at 837 (“Companies' retreat behind the banner of privacy in refusing to transfer digital assets is somewhat suspicious.”); Lopez, *supra* note 101, at 218 (“If user privacy is discounted during that user's life, then service provider assertions that they seek to protect a deceased account holder's privacy are, to say the least, dubious.”).

228. See Banta, *Death and Privacy*, *supra* note 17, at 965 (arguing that postmortem ToS clauses “dictate terms of an agreement that favor a company's business goals and directives, not necessarily the best interest of society as a whole”).

229. See, e.g., Tamara Piety, *Radical Skepticism about Information Fiduciaries*, LAW & POL. ECON. (May 31, 2019), <https://lpeblog.org/2019/05/31/radical-skepticism-about-information-fiduciaries> [<https://perma.cc/A5N6-N2C9>].

230. See Khan & Pozen, *supra* note 28, at 511–12.

231. See Horton, *supra* note 57, at 597 (acknowledging the potential litigation costs around interpreting decedents' wishes as set forth in a will, trust, or “sketchy writing”); cf. Mandel, *supra* note 209, at 1944 (proposing a more “thorough” online tool partially because “giving users a simpler way to make these decisions may lessen the likelihood of being taken to court or subpoenaed for records from a deceased user's account.”).

provisions have a long track record of legitimizing privacy limitations.²³²

Despite the well-founded concern about the motivations and values of large technology companies, it is important not to overly discount the potential for digital intermediaries to facilitate and/or provide effective stewardship of their users' legacies. Given the structural role of digital intermediaries within so many important lifetime social interactions, these intermediaries may be particularly well-suited both to reveal the stewardship preferences of the deceased and to improve the quality of stewardship decisions.

Digital intermediaries can drastically reduce the transaction costs of legacy stewardship. Part of the problem with a pure freedom of testation model, as described above, is that most people avoid making decisions about death due to the expected economic and psychic costs.²³³ Digital intermediaries, however, are in the faces of their users for many hours a week, and they can, better than anyone else, nudge people to execute legally binding succession plans with just a few clicks of an online tool.²³⁴ Lawyers, witnesses, and notaries largely fall out of the picture. And although lawyers and financial planners can sometimes be crucial advisors, digital intermediaries can limit the improvisational decision-making that sometimes wreaks havoc in the context of unfettered testation.²³⁵ Through providing a circumscribed set of stewardship options, platforms significantly limit the opportunities for the decedent to engage in some of the eccentric, and arguably cruel, estate planning practices that appear in the trusts and estates canon. Facebook presumably will not, for example, allow someone to serve as your Legacy Contact only if they marry a Jewish girl.²³⁶

Along these lines, the consumer contract model of digital asset stewardship has some important analogs in the "nonprobate revolution" that has occurred in estate planning more broadly.²³⁷ Rather than primarily relying on formally executed wills, which traditionally require

232. See, e.g., *In re Google, Inc. Privacy Policy Litigation*, No. C-12-01382-PSG, 2013 WL 6248499, at *2 (N.D. Cal. Dec. 3, 2013) (integrating privacy policies across platforms); *Rodriguez v. Instagram, LLC*, No. CGC-13-532875, 2014 Cal. Super. LEXIS 10592, at *1–2 (Cal. Super. Ct. Feb. 28, 2014); cf. Banta, *Digital Feudalism*, *supra* note 17, at 1133 (suggesting digital asset inheritability contracts are characteristically unconscionable).

233. See Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 688 (2011) (collecting sources).

234. Cf. Banta, *Death and Privacy*, *supra* note 17, at 959 (acknowledging that "digital asset companies are well positioned to effectuate individual intent").

235. See Kasket, *supra* note 39, at 32 (interviewing Facebook employee who explained, "We don't ask the bereaved to go and embalm their loved ones. A lot of that complexity [can be] taken away. Call it an example of good design, so that people make choices that meet them where they're at." (alteration in original) (citation omitted)).

236. See *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 826 (Ohio Ct. Com. Pl. 1974).

237. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

strict compliance to a laundry list of formal requirements and eventually become public records, estate planners now also rely much more heavily on estate planning methods that fall entirely outside public probate proceedings.²³⁸ Many of these methods — for example, life insurance and payment-on-death contracts — are designed by institutional intermediaries in ways that both substantially reduce the costs of selecting a beneficiary and improve the quality of postmortem planning.²³⁹ For example, a financial institution might suggest that an individual allocate their investments in a particular way based upon their age and retirement status,²⁴⁰ or a life insurance company may suggest the policy holder consider naming several contingent beneficiaries.²⁴¹ A consumer contract model can create a choice architecture for legacy stewardship that avoids many of the costs of traditional estate planning, while placing some guardrails on a father who thinks he knows best but doesn't.

When a user nonetheless *does not* make a decision as to postmortem stewardship, intermediaries are well-positioned to set default policies that balance the interests of the relevant stakeholders.²⁴² When setting postmortem policies, digital intermediaries need to signal to their current users that they will treat them and their families kindly in the event of an unexpected death; this might mean locking down intimate materials, or it might mean sharing cherished content with survivors. At the same time, intermediaries need to signal that when such a tragedy happens to a particular user, the interests of all other users will also be respected — whether in the privacy of their communications or in a desire to publicly mourn the loss of a friend. A failure to properly

238. See Tritt, *Liberating Estates*, *supra* note 17, at 116 (“In the United States, will-substitutes are becoming the predominate estate planning tool. In fact, far more property passes by Will-substitutes than by Will in the United States.”).

239. See, e.g., Adam C. Smith & Todd J. Zywicki, *Nudging in an Evolving Marketplace: How Markets Improve Their Own Choice Architecture*, in *NUDGE THEORY IN ACTION* 225, 236–7 (Sherzod Abdukadirov ed., 2016) (suggesting credit life insurance can be beneficial to buyers); cf. Linda Miesler et al., *Informational Nudges as an Effective Approach in Raising Awareness Among Young Adults About the Risk of Future Disability*, 16 J. CONSUMER BEHAV. 15, 21 (2017) (claiming exposure to informational nudges increased the frequency with which study participants rated disability insurance as the most preferred insurance product).

240. See Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 12 (2013) (“One of the insights of choice architecture is that employer decisions about plan default settings can significantly affect whether employees contribute to a 401(k) plan, and, if so, the rate at which they contribute.”); Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 54 n.81 (2015).

241. Cf. Cahn & Zietlow, *supra* note 51, at 370–74 (discussing ways nonprobate assets, such as life insurance and joint bank accounts, could be structured to improve account holder decision-making).

242. But cf. Banta, *Death and Privacy*, *supra* note 17, at 966 (“It is troubling in a democratic society that private companies currently make the default rule rather than state legislatures.”).

consider all of these stakeholders — the decedent, the decedent’s family, and the broader community — creates the risk of a breakdown of trust in the platform and the willingness of users to share information across it.²⁴³ Because digital intermediaries need some level of trust from all relevant stakeholders, they have an incentive to respect the social norms of the communities they serve, while at the same time showing empathy and respect to the emotional needs of individuals and their families.²⁴⁴ Although the community trust incentive may be eclipsed by the requirements of an ad-based business model and diminished in the face of limited competition, the consumer contract model at the very least has the potential to thread the needle between the freedom of disposition, family inheritance, and public domain models.

There is some real-world evidence that the consumer contract model can respond to the varying needs of different stakeholders in different contexts. First, different intermediaries have indeed adopted different policies with respect to their deceased users’ data. For example, the ToS for Yahoo’s email service, for Apple’s iCloud, and for Tinder’s dating app expressly exclude inheritance rights and provide for deletion of account content.²⁴⁵ By contrast, Facebook expressly acknowledges that an account will either be “memorialized” — remain visible with the words “Remembering” next to the profile — or managed by a selected Legacy Contact.²⁴⁶ Other intermediaries are silent about succession questions in their ToS,²⁴⁷ leaving them considerable case-by-case flexibility in deciding how to respond to particular access requests.²⁴⁸

243. See Ari Ezra Waldman, *Privacy, Sharing, and Trust: The Facebook Study*, 67 CASE W. RES. L. REV. 193, 195–96 (2016); see also Lopez, *supra* note 101, at 202 (“[O]nline service providers are ceaselessly concerned with the privacy of their consumers in an age of hacking and phishing.”).

244. See Jeehyeon (Jenny) Lee, Note, *Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets*, 2015 COLUM. BUS. L. REV. 654, 677 (“Moreover, ISPs have an interest in ensuring that accounts are not used in an inappropriate manner after the user’s death; ‘trolling’ of inactive accounts can cause emotional distress to families of decedents.”); Michels et al., *supra* note 55, at 15 (“The digital files a user stores in the cloud may affect the privacy or data protection interests of third parties, including other users. Cloud providers also need to consider other users’ rights and interests.”); see also Brubaker et al., *supra* note 41, at 4164 (enumerating a hierarchy of responsibility that digital stewards have toward survivors and the deceased); Mandel, *supra* note 209, at 1944 (“[C]ompanies have a general interest in keeping their customers or users satisfied.”).

245. See Michels et al., *supra* note 55, at 6–7.

246. *Id.* at 7; see also *Memorialized Accounts*, FACEBOOK: HELP CENTER, <https://www.facebook.com/help/1506822589577997> [<https://perma.cc/GXP7-NL4P>].

247. See Michels et al., *supra* note 55, at 6.

248. See *In re Coleman*, 96 N.Y.S.3d 515, 517 (N.Y. Sur. Ct. 2019) (explaining that “the custodian of digital assets has complete discretion” with respect to how, if at all, it will provide access to digital assets). Moreover, Section 16(f) of RUFADAA provides that “[a] custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this [act].” RUFADAA § 16(f).

These variations make sense from the perspective of the consumer contract model²⁴⁹ — each intermediary is adopting a postmortem policy that likely maps onto the interests and values of its respective customers: a person's dating app content is unlikely to be intended for their spouse and children; a person's email or cloud storage accounts may contain highly sensitive or intimate material; and a Facebook profile is designed for ongoing interactions within a social network. Unlike a family inheritance model, which often fails to account for contextual differences, the consumer contract model is more likely to result in policies that subject different social contexts to different stewardship rules.

Second, although it may seem odd to entrust deeply personal questions surrounding death to large corporate bureaucracy, online intermediaries nonetheless are in a position to both understand and internalize the values of the communities they host. In the regular course of business, intermediaries collect a large amount of data, which can be used both to understand user preferences and also potentially to tailor settings to individual preferences.²⁵⁰ In recent years, there have been numerous proposals to harness such large data sets to “personalize” law by tailoring legal rules to the behavioral predictions gleaned from such data.²⁵¹ Although there are a range of practical, distributive, and moral objections to such personalization, and we might not want to give algorithmic predictions the force of law,²⁵² the large data sets held by social media platforms might provide useful guidance in designing the digital estate planning tools that these platforms offer their users.

Moreover, some organizations have taken additional steps to better integrate their users' viewpoints into their stewardship products. For example, in order to design its Legacy Contact feature, Facebook relied heavily on the work of Jed Brubaker, an information science expert focusing on identity and community-building in social media.²⁵³ Brubaker and his colleagues researched Facebook users' experiences with death and bereavement and used this research to make a series of design decisions to better meet the needs of community members.²⁵⁴ Some decisions were meant to uphold privacy expectations of the deceased — for example, Legacy Contacts cannot access the decedent's private

249. *Contra* Banta, *Inherit the Cloud*, *supra* note 29, at 803 (“Contracts that prohibit descendibility of personal assets should be void as a matter of public policy.”).

250. *See, e.g.*, FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 20 (2015).

251. *See, e.g.*, Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627, 630–31 (2016); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1417 (2014).

252. *See, e.g.*, Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349, 360–61 (arguing against the adoption of personalized intestacy rules).

253. *See* Brubaker & Callison-Burch, *supra* note 37, at 2910.

254. *Id.* at 2915–16.

messages. Some decisions were meant to facilitate the mourning practices of the living — for example, Legacy Contacts can manage photos and add new posts related to the decedent. Other decisions were designed to reduce the costs of stewardship — for example, users were intentionally provided a limited menu of options to simplify the selection process, and selected Legacy Contacts receive a carefully-worded message to minimize the potential for alarm. This message reminds “people about the value that others may find in their memorialized profile so as to encourage them to consider both the community’s preferences as well as their own.”²⁵⁵ In other words, Facebook nudges appointed stewards to consider the interests of all stakeholders. Social media platforms may not be well-suited to make fine-tuned, nuanced decisions as to each one of their millions of deceased users,²⁵⁶ but the Legacy Contact backstory reveals a promising sociological angle these companies can bring to contemporary legacy stewardship.

Third, it is important to remember that not all online intermediaries are huge, for-profit corporations; there is an endless number of online communities dedicated to all manner of niche interests and identities. Particularly where a community represents a misunderstood and/or marginalized subculture, the consumer contract model places the default rules of stewardship squarely in the hands of organizations that are familiar with that subculture. For example, the website Archive of Our Own is a noncommercial and nonprofit central hosting place for all manner of fan fiction projects.²⁵⁷ In 2015, the website launched a “Fan-nish Next of Kin” program in order to respond to potential anxiety among users about what would happen to their works — some of which might be sexual or violent or in some way embarrassing²⁵⁸ — if they were to die:

Thinking about your own death is difficult under normal circumstances. But what happens when you consider the effect it would have on your identity as a fan? If you’re like a lot of us, it probably comes with a moment of panic:

255. *Id.* at 2913.

256. See Julie E. Cohen, *Scaling Trust and Other Fictions*, LAW & POL. ECON. (May 29, 2019), <https://lpeblog.org/2019/05/29/scaling-trust-and-other-fictions> [<https://perma.cc/3LT4-M9VT>] (“The fiduciary construct implies a mutual encounter predicated on the knowability of human beings as human beings, with mutually intelligible desires and needs. The information fiduciaries proposal abstracts speed, immanence, automaticity, and scale away from that encounter and then assumes they never mattered in the first place.”).

257. ARCHIVE OF OUR OWN, <https://archiveofourown.org> [<https://perma.cc/7WLC-Y2C2>].

258. See *Terms of Service FAQ*, ARCHIVE OF OUR OWN, https://archiveofourown.org/tos_faq#content_faq [<https://perma.cc/9CRP-7K4S>] (“We will not remove content from the Archive because it contains explicit material, as long as it doesn’t violate any other part of the content policy (e.g., the harassment policy).”).

“What happens to all my fanworks?!”

Or possibly: “What happens if my mom — or my partner, or *my kid* — finds my fanworks?”²⁵⁹

Under the Fannish Next of Kin program, a site member can select another member to take the reins of their account once the website has been notified of their death.²⁶⁰ The Fannish Next of Kin may preserve, delete, “orphan,”²⁶¹ authorize remixes of, or continue working on the contributions of the decedent.²⁶² When a user dies, the default setting is that nothing about their contributions will change, reflecting the collaborative, open source commitment of the organization.²⁶³ However, unlike a pure public domain model of stewardship, the Fannish Next of Kin program allows agency for decedents and their closest associates to shape their own fandom legacies.²⁶⁴ But unlike a family inheritance model, the Fannish Next of Kin program keeps decision-making about fan communities squarely within those communities. Whether a community is bound together by James Bond or bondage, the Fannish Next of Kin program shows the potential for a consumer contract model to develop context-specific rules that emerge from inside those communities.

Despite understandable skepticism towards relying on third-party platforms to diligently and loyally steward their users’ legacies, the consumer contract model nonetheless holds great potential for designing a system of stewardship that reflects and balances the interests of all stakeholders. Under a consumer contract model, third party intermediaries are expected to adopt stewardship practices that fairly reflect the norms and expectations of the individuals who rely on them. If the intermediary is a traditional banking service, its customers would likely expect that surviving family members would have relatively easy access to financial assets held in a bank account. If the intermediary is a social media, dating, or email service, however, its customers might have very different expectations about what should happen to their accounts upon death. The consumer contract model leaves it up to each intermediary to understand the expectations of the communities it serves and to set stewardship rules accordingly.

259. *Fannish Next of Kin*, ARCHIVE OF OUR OWN (Feb. 4, 2015, 1:34 PM), https://archiveofourown.org/admin_posts/2366 [<https://perma.cc/8CGY-AZFB>].

260. *Id.*

261. “Orphaning” means to strip all indicia of authorship from a particular work. *Orphaning*, ARCHIVE OF OUR OWN, <https://archiveofourown.org/faq/orphaning> [<https://perma.cc/S5CV-MZ7K>].

262. See *Fannish Next of Kin*, *supra* note 259.

263. *Terms of Service FAQ*, *supra* note 258.

264. See *id.*

III. SYNTHESIZING STEWARDSHIP: THE DECENTERED DECEDENT

The laws that govern a person's legacy reveal that there is no such thing as a perfect steward. As between the decedent, the family, the public, and the intermediary, each brings to the table a host of strengths, but also a range of weaknesses. As a result, a model of stewardship that places full faith in any particular entity is likely to sideline the interests of important stakeholders in a person's legacy. This Part, instead, synthesizes a model of stewardship that harnesses the strengths of each potential steward, while attempting to minimize the potential fallout from empowering one stakeholder over another. This synthesized stewardship approach results in the "Decentered Decedent" model. It is a model that strives, wherever possible, to place postmortem decision-making about a particular aspect of the decedent's legacy within the particular socioeconomic context in which it emerged.

Several guiding principles emerge from the above examination of the existing models of legacy stewardship:

- **The Dispersion Principle:** There are a broad range of stakeholders in a person's legacy: surviving family members, the broad range of communities in which the person participated, and (in some cases) the public at large.
- **The Diversity Principle:** The different social contexts in which the decedent lived are subject to different social norms.
- **The Familiarity Principle:** Stewards should be familiar with the cultural contexts in which they are operating, and no one entity, aside from the decedent, is familiar with all the contexts — and associated norms — in which the decedent lived.
- **The Competency Principle:** The decedent cannot be relied upon to set forth comprehensive legacy guidelines that will effectively resolve all stewardship questions that arise in the future.
- **The Dependency Principle:** There can be an economic or emotional stake in a person's legacy.
- **The Loyalty Principle:** A stakeholder's self-interest — economic, emotional, or legal — can sometimes interfere with effective stewardship and due regard for the interests of other stakeholders.

By synthesizing these six principles, the Decentered Decedent model allows decisions to be made by those who understand the stakes at

issue in a particular context and who can be trusted best to respect the needs of the relevant stakeholders.

The first three stewardship principles — dispersion, diversity, and familiarity — point strongly towards a framework of contextual testation. Wherever possible, a decedent should make the primary decision about what should happen to a particular asset based upon their understanding of how that asset is valued by those that will survive them. Where the asset at issue is the product of creative collaboration, the decedent may wish to cede stewardship over their creative legacy to those who they know share a certain set of creative values. Where the asset is highly intimate or sexual in nature, the decedent may wish to delete that asset in order to insulate partners and children from the distress that can come from the postmortem revelation of such assets. Where the asset is economically valuable — for example, a cryptocurrency account — the decedent may want to ensure that their financially-dependent children are able to easily access it. No one entity, aside from the decedent, is able to separate out each of these contexts and make succession plans that reflect both the decedent's values and the expectations of the relevant stakeholders in each context. Father may not always know best, but he probably knows better than most.

This idea of contextual testation aligns well with contemporary understandings of privacy and the experience of identity-building online. By facilitating decision-making that is tailored to a particular social context, the Decentered Decedent model both promotes individual self-determination²⁶⁵ and helps avoid what privacy scholars have termed “context collapse.”²⁶⁶ Individuals live heterogeneous lives, and they often struggle to keep different contexts, with very different social norms, separate from each other.²⁶⁷ Sexual minorities, for example, will pre-

265. See Harbinja, *supra* note 36, at 31 (“[A]n individual should be able to exercise his autonomy online and decide what happens to their assets and privacy on death.”).

266. See Jenny L. Davis & Nathan Jurgenson, *Context Collapse: Theorizing Context Collisions and Collisions*, 17 INFO. COMM. & SOC'Y 476, 477 (2014). See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010) (arguing that information should be protected according to the norms of distinct social contexts).

267. See Eric P. S. Baumer & Jed R. Brubaker, *Post-Userism*, in CHI 2017: PROC. 2017 ACM SIGCHI CONF. ON HUM. FACTORS IN COMPUTING SYSTEMS 6291, 6297 (2017) (“[A] single individual may maintain multiple user accounts for, say, a given social media site. Motivations for doing so can vary from separating professional and personal contacts, to distinguishing between actions as an individual vs. actions on behalf of an organization, to negotiating gender identity transitions.” (endnote omitted)); Buitelaar, *supra* note 59, at 132 (“On social network sites such as Facebook, one attempts to take care of one's privacy by a constant dialectic between openness and concealing, depending on the context.”); DeVito et al., *supra* note 150, at 44:2 (explaining that “[t]he rise of social media has complicated [the] process” of presenting context-appropriate images to different audiences); Stefanie Duguay, “He Has a Way Gayer Facebook Than I Do”: Investigating Sexual Identity Disclosure and Context Collapse on a Social Networking Site, 18 NEW MEDIA & SOC'Y 891, 899 (2016).

sent different aspects of their identities on different social media platforms and/or adjust their privacy settings to ensure that information about a particular sexual desire stays within a particular sexually-focused community.²⁶⁸

As discussed with respect to the family inheritance model, however, death is often a moment of context collapse; the boundaries that the decedent maintained between their family, work, and sex lives disappear in ways that can radically and negatively impact the legacy of the decedent in the eyes of their very surprised survivors. During life, an individual may have used Facebook to interact with their family, Snapchat to interact with other LGBTQ+ people, and FetLife.com to interact with niche fetish communities;²⁶⁹ it is highly unlikely that this individual would want the walls between these contexts to collapse when they die. Proposals that would subject digital assets to traditional intestacy rules risk such a collapse. Accordingly, an effective stewardship model needs to respect the decedent's efforts to maintain contextual integrity,²⁷⁰ both for their own lifetime identity-building as well as for the postmortem wellbeing of their loved ones.²⁷¹

Although the first three stewardship principles suggest a fairly heavy reliance on a freedom of disposition model and its deference to the desires of the decedent, the fourth principle — the competency principle — recognizes the limits of this approach. We cannot always rely on the decedent to make context-sensitive decisions about what should happen to their various property interests after death.²⁷² Quite often, despite prodding and nudging, they won't make any decision at all, and even if they do make a decision, there is no way to fully account for changes in culture, technology, or the economic circumstances facing survivors. Moreover, drawing from the loyalty principle, a decedent's preferences may not fully take into account broader societal interests in studying and engaging with the decedent's legacy.

(“One set of tactics for context collapse prevention involved tailoring identity expressions so they would be received differently among audiences.”); Gach et al., *supra* note 168, at 47:3 (observing that different social identities online are governed by different social norms); Grimmelmann, *supra* note 27, at 1152 (“Social network sites offer a gloriously direct tool for what Goffman calls ‘impression management’ . . .”).

268. See DeVito et al., *supra* note 150, at 44:3–4.

269. *Id.* at 44:7, 44:9–13.

270. See Brubaker & Callison-Burch, *supra* note 37, at 2909 (“Given the role of profiles pre-mortem, others have stressed the importance of maintaining the integrity of the user's digital identity.”).

271. See Buitelaar, *supra* note 59, at 140 (arguing that social media companies should design applications that allow informational self-determination to continue postmortem).

272. See Banta, *Digital Feudalism*, *supra* note 17, at 1154 (“Market pressures to encourage devisability are inherently flawed because individuals do not easily confront their mortality.”); Brubaker & Callison-Burch, *supra* note 37, at 2909 (“Configuration [of postmortem settings by the decedent] excels at giving account holders specific control but cannot accommodate changes in circumstances or unexpected needs — both social and technological.”).

When we can't rely on the decedent, who, then, should make legacy decisions in their place? Until the rise of social media, decision-making defaulted to the decedent's surviving family members, largely through the rules of intestacy. But intestacy, spousal shares, and inalienable copyright termination rights have largely been justified based on families' close economic entanglement with decedents. Their stewardship, accordingly, has been justified based on the fifth stewardship principle — the dependency principle. Family stewards may be substantially dependent on the decedent for their well-being, but they often seriously lack the familiarity with a decedent's various social contexts to engage in the types of context-sensitive decision-making increasingly required for effective legacy stewardship. Family stewardship may lead to dedicated labor on behalf of the decedent, and it may centralize the decedent's wealth in those that the decedent supported during life, but the experience of families in the IP and digital assets arenas reveals a substantial risk of various forms of context collapse. Moreover, families may have a difficult time recognizing that there is a broader universe of individuals and communities who maintain a stake in the decedent's legacy.

Because family stewards often fare poorly under the dispersion, diversity, and familiarity principles, relying on intermediary platforms can make a lot of sense. Although an intermediary may not be particularly familiar with the preferences of any one decedent, it is highly likely to be aware of the general norms and expectations of the community members it hosts.²⁷³ By letting each intermediary set its own default rules for postmortem decision-making, death becomes much less likely to result in context collapse.²⁷⁴ If a decedent had accounts with Facebook, Tinder, and Bank of America, but left no estate plan

273. See Grimmelmann, *supra* note 27, at 1157–59; cf. Boni-Saenz, *supra* note 143, at 43 (arguing that assisted living facilities can play an important role in the sexual decision-making of their cognitively-impaired residents based on their “familiarity with this population and its needs”).

274. Kreiczer-Levy and Donyets-Kedar caution that giving social media platforms substantial control over stewardship rules might result in a flattening of social contexts, for example by not differentiating among different social networks that might coexist *within* that platform. See Kreiczer-Levy & Donyets-Kedar, *supra* note 226, at 728–29. This is certainly a possibility, for example, if an individual cannot easily hand over stewardship of one Facebook community to one contact and stewardship over another community to a different contact. Nonetheless, many users separate social contexts across different platforms that are subject to different expectations among users, and users may have multiple accounts on a single platform to avoid the types of postmortem context flattening these authors are concerned with. See Alice E. Marwick & danah boyd, *I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience*, 13 NEW MEDIA & SOC'Y 114, 122 (2010) (“To navigate these tensions, social network site users adopt a variety of tactics, such as using multiple accounts, pseudonyms, and nicknames, and creating ‘fakesters’ to obscure their real identities.”).

whatsoever, a reasonable outcome would be the preservation of the Facebook page,²⁷⁵ the deletion of the Tinder account, and the transfer of the Bank of America account to a surviving spouse.²⁷⁶ By allowing each intermediary to set its own default rules, the expectations of each context remain intact.

Although RUFADAA has been criticized for cutting families out of the equation and giving too much power to large tech companies, there is nonetheless much wisdom built into its framework. It avoids the context collapse that can occur when families are charged with overseeing communities they know nothing about, and it protects the privacy expectations of users that are often dismissed by a public domain model. Where the decedent is silent, each individual platform is likely best-positioned to balance the needs of all relevant stakeholders, yielding a diversity of stewardship defaults that are decently tailored to the dispersed contexts of a decedent's life.²⁷⁷ Although it might be argued that default rules should be created democratically through state legislatures, and not private companies,²⁷⁸ it is highly unlikely that legislators will both have sufficient familiarity with the subcultural norms of various online communities and be able to tailor legislation to such norms.

The main danger of relying on intermediary platforms for effective stewardship, however, lies with the sixth stewardship principle — the loyalty principle. Intermediaries may be well-positioned theoretically to address the challenges of context-sensitive stewardship, but their separate financial or legal interests may get in the way of realizing this

275. See Mazzone, *supra* note 172, at 1680 (“[A] default option [on Facebook] geared toward collective interests would result in the preservation of a substantial amount of digital content.”).

276. See Joint Letter from Ctr. for Democracy & Tech. et al., Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act (Jan. 12, 2015), <https://cdt.org/wp-content/uploads/2015/01/Joint-Letter-re-ULC-Bill-general-statement-2-FINAL.pdf> [<https://perma.cc/PCB5-3Z4G>] (“Some users may expect an online billing account to be turned over to a fiduciary executing their estate, but may think very differently about access to their dating profile.”).

277. See Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die? Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 248 (2012) (“The check-a-box provision [discussed in early digital assets proposals] would respect such nuance by allowing social-media services to specifically tailor their options to their services — even their default options.”); see also Tal Morse & Michael Birnhack, *Digital Remains: The Users’ Perspectives*, in DIGITAL AFTERLIFE: DEATH MATTERS IN A DIGITAL AGE, *supra* note 39, at 107, 122 (“The findings indicate that default rules regarding access to digital remains would be problematic. . . . [A]ny uniform policy that is applied to all online accounts would inevitably fail to meet the wishes of large segments of users, and moreover, it would frustrate others’ wishes and expectations.”).

278. See Banta, *Inherit the Cloud*, *supra* note 29, at 837 (“State legislatures make default rules in succession through intestacy statutes, and thus are the proper body to establish default rules because such matters are ‘fraught with questions of morality’ and give the power to ‘establish[] social norms.’” (quoting JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS & ESTATES 65 (9th ed. 2013))).

potential. Accordingly, any system of stewardship that relies heavily on a steward with a high potential for conflict needs some guardrails to protect the interests of vulnerable third parties. In both the copyright and trusts and estates contexts, strong dependency interests are recognized through significant carve-outs from the freedom of disposition. These carve-outs include inalienable termination rights, spousal shares, family set-asides, and the imposition of fiduciary duties on trustees and personal representatives. A stewardship model that gives substantial power to communities and their members will need some equivalent safeguards for outsiders to those communities who are nonetheless impacted — economically or emotionally — by the decisions of that community. Part IV provides some potential reforms in this direction.

It might be asked: how is the Decentered Decedent approach different from the existing state of affairs? For instance, the dominant freedom of disposition model already gives great deference to the desires of the deceased, and the patchwork of legal rules across trusts and estates, copyright, publicity rights, and Internet law means that stewardship is already dispersed across a variety of different actors.

The Decentered Decedent model differs from the current state of affairs in two important respects. First, it entails letting go of one of the central tenets of traditional estate planning, namely creating a core set of planning documents that centralize stewardship in a core set of individuals empowered to make stewardship decisions across contexts. For example, many estate planners recommend maintaining a central repository of online accounts and passwords and giving a single personal representative maximal authority to access and control those accounts.²⁷⁹ This approach will often substantially violate the diversity and familiarity principles, and it is highly prone to context collapse. Rather than try and consolidate stewardship in a single entity, the Decentered Decedent model moves away from one-size-fits-all, out-of-context decision-making. A decentralized approach does encourage individuals to plan for and make decisions about what happens after they die, but it encourages them to do so within the specific contexts of each of their various social circles, instead of in the aggregate.

To the extent that traditional estate planning “centralizes” the decedent in an entity known as “the estate,” it denies the heterogeneous reality of many peoples’ lived experiences, particularly in the online context.²⁸⁰ A decentralized model, by contrast, introduces into legacy stewardship what Julie Cohen has referred to as “semantic discontinuity”: a deliberate layer of complexity that protects privacy through

279. Lamm et al., *supra* note 129, at 416–17; Lopez, *supra* note 101, at 187.

280. See, e.g., Baumer & Brubaker, *supra* note 267, at 6296–97 (describing the use of “throw-away” accounts on sites like Reddit, through which “an individual can sustain multiple, repeated interactions with a system, even though the system does not maintain a persistent representation of the individual”).

keeping different contexts separate from each other.²⁸¹ Digital estate planners often speak in terms of a single representative stepping into the shoes of the decedent in order to access their digital accounts,²⁸² but the footwear metaphor drastically oversimplifies a person's diverse, dispersed digital footprint. A decedent's shoes are often scattered around the house, vary greatly in their sensibility and sexiness, and may be missing their pairs. Good stewardship will sometimes require accepting the messy shoe closet.

Second, although the legal landscape explored in Part II reveals that there currently are many entities involved in the co-creation of a person's legacy, the *de facto* decentralization of the status quo does not reflect any single organizing theory of stewardship. Instead, the existing laws of legacy represent a hodgepodge of stewardship models, developed independently within separate fields of practice, which happen to frequently collide at death. Rarely are the various areas of law that shape a person's legacy brought into direct conversation with each other; accordingly, there is no conceptual through line that explains why, for example, children can be fully disinherited as to all their parent's real and personal property, but not necessarily as to their parent's copyright and publicity rights. The framework set forth here provides a conceptual through line to help harmonize these areas. It recognizes that there are some significant virtues in recognizing a dispersed set of stewards and stakeholders, but it by no means endorses the current state of affairs as optimal for legacy stewardship.

In sum, under the Decentered Decedent model, the goals of legacy stewardship are (1) to facilitate legacy decision-making by the decedent within the various contexts they inhabit, (2) to protect against postmortem context collapse through default rules that allow communities to maintain their own behavioral norms, and (3) to account for the interests of all stakeholders wherever possible. The heterogeneous social and economic bonds that existed during a person's life should, ideally, continue in a manner that is as minimally disruptive to the lives of surviving stakeholders as is reasonably possible under the circumstances. Processing a person's death is an inevitably challenging — and often quite messy — experience, but the Decentered Decedent model better maps onto contemporary life and the challenges of legacy stewardship than do any of the existing approaches.

281. See Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1931–32 (2013).

282. See, e.g., Lamm et al., *supra* note 129, at 415.

IV. IMPLEMENTING THE DECENTERED DECEDENT

The Decentered Decedent is useful not only as a conceptual framework for the relationship between a decedent and the various social networks they leave behind. This framework can also lead to a number of concrete reforms throughout the various laws of legacy. This Article, by bringing together trusts and estates, IP, and Internet law, highlights stewardship insights in certain areas of law that, through an integrated stewardship framework, could be brought to bear on problems that arise in others. This Part, although certainly not exhaustive, sets forth a number of ways the laws of legacy could better incorporate the principles underlying the Decentered Decedent approach. These potential reforms generally fall into three categories.

A. Facilitating Contextual Testation

The primary goal of the Decentered Decedent approach is to facilitate lifetime decision-making about aspects of a person's legacy within the particular social context most directly impacted by that decision. Rather than encouraging individuals to sit down in an attorney's office and make one-size-fits-all decisions about what should happen to their fan fiction, Grindr, Facebook, and LinkedIn accounts, the Decentered Decedent approach tries to get individuals to reveal their postmortem preferences while they are inhabiting a particular community and contemporaneously steeped in the norms of that community. This sort of contextual testation is facilitated by the use of "online tools" ratified by RUFADAA. Such tools elicit decision-making about what happens on a particular platform from entirely within that platform. Moreover, these decisions are extremely low-cost — both financially and emotionally — compared with traditional estate planning. However, despite the high priority RUFADAA gives these online tools, the vast majority of platforms have not yet developed them, and the ones that exist, like Facebook's Legacy Contact, are buried deep within a user's privacy settings. In order to unlock the great potential of such tools, they need to be made far more salient.²⁸³

The online tool approach may provide some useful lessons for legacy stewardship outside the digital assets context. As discussed above,

283. See Banta, *Death and Privacy*, *supra* note 17, at 967 (recommending legislation providing choice and transparency regarding postmortem digital asset disposition); Banta, *Minors and Digital Asset Succession*, *supra* note 13, at 1725–26 (recognizing potential for online tools to give minors greater control over their digital assets but criticizing problems with their design and implementation); *see also* Morse & Birnhack, *supra* note 277, at 118 (finding that less than 20% of surveyed Israeli Internet users were aware of Google and Facebook's online tools, and only 6% had actually used them).

many of the stewardship problems that emerge under the family inheritance model come from relying on the default rules of intestacy to direct both ownership and control over culturally valuable assets. Accordingly, stewardship likely would be greatly improved if individuals somehow and somewhere revealed their postmortem preferences during life. For example, Cahn and Zietlow, in their study of middle-class wealth transmission, suggest a number of different ways of making estate planning more salient, for example by eliciting postmortem preferences from tax filings, drivers' license renewals, or voter registration.²⁸⁴ This insight could be extremely valuable in the IP context, where prominent figures such as Prince, Marvin Gaye, and Martin Luther King, Jr. dutifully registered their copyright interests but left no will indicating who would have control over their postmortem rights. When a copyright is registered, the Copyright Office could simply ask who the decedent appoints as their postmortem steward, and, like RUFADAA, this instruction could supersede intestate succession and, potentially, a will or trust. If Prince, Gaye, or King had selected such a postmortem steward, this selection might have substantially mitigated the many coordination and enforcement concerns that followed the division of their copyright among numerous surviving family members.

B. Promoting Fairness and Loyalty

The main danger of low-cost, contextual testation is that it cedes too much power to intermediaries who design the decision-making tools in question. In particular, the soundest critique of RUFADAA is that it gives large tech companies too much power over their users' legacies while doing little to address the inherent conflicts between their business models and nuanced, empathetic stewardship. There are at least two potential ways of better guarding against this risk of disloyalty. First, rather than entirely ceding the design of online tools to digital intermediaries, as RUFADAA does, lawmakers might consider adding some particular substantive requirements to the intermediaries' offerings. These could include the option for the decedent to transfer all account content to a particular individual, allow for contingent or concurrent stewards,²⁸⁵ or require notice that the user's selections legally trump a duly executed will. Facebook's Legacy Contact service, for example, offers none of these options.

Second, and more controversially, lawmakers might impose some form of fiduciary duties on intermediaries who retain control over a decedent's digital assets. A recent bill introduced by Senator Brian

284. See Cahn & Zietlow, *supra* note 51, at 365.

285. See Mandel, *supra* note 209, at 1941–42.

Schatz, echoing a much-debated proposal by Jack Balkin,²⁸⁶ would place duties of care and loyalty on Internet platforms in possession of sensitive user data.²⁸⁷ Although numerous scholars are skeptical about the feasibility of imposing such duties,²⁸⁸ fiduciary duties are sufficiently adaptive to different professional, cultural, and economic circumstances that they are at least worth considering in the context of postmortem stewardship. On one hand, a strong-form duty of loyalty, such as is typically imposed in the trustee context, may both be infeasible and strip intermediaries of some of the flexibility to adopt postmortem policies that reflect the heterogeneous values of different online communities. On the other hand, an information fiduciary model could take a weaker form — perhaps more akin to a contractual duty of good faith — that accounts for some of the structural conflicts inherent in the dominant social media business model.²⁸⁹ Requiring some sort of due regard for the interests of decedents with respect to their data might incentivize more intermediaries to actually adopt postmortem stewardship policies and, as a result, produce a clearer sense of best practices in this area.

C. Disaggregating Compensation from Control

Many of the challenges surrounding legacy stewardship involve recognizing that certain stakeholders were economically dependent on the decedent in the past while at the same time not conflating such dependency with a right to control the conduct of other stakeholders in the future. For example, an author's family might have heavily relied on royalties from the author's books, but this does not mean that the

286. See Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1160–63, 1170–71 (2018); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1229 (2016). But see generally Khan & Pozen, *supra* note 28 (criticizing Balkin's proposal); Symposium, *Skepticism About Information Fiduciaries*, LAW & POL. ECON. (2019), <https://lpeblog.org/category/symposia/information-fiduciaries> [https://perma.cc/GLN3-699D] (assessing and critiquing Balkin's proposal).

287. Inside Privacy, *Democratic Senators Introduce Privacy Bill Seeking to Impose "Fiduciary" Duties on Online Providers*, COVINGTON & BURLING LLP: INSIDE PRIVACY (Dec. 21, 2018), <https://www.insideprivacy.com/data-privacy/democratic-senators-introduce-privacy-bill-seeking-to-impose-fiduciary-duties-on-online-providers> [https://perma.cc/VU9N-R3EY].

288. See, e.g., Symposium, *Skepticism About Information Fiduciaries*, *supra* note 286.

289. Cf. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1487–88 (2002) ("Fiduciary duty and the duty of good faith and fair dealing . . . are judicially imposed loyalty obligations designed to attack the potential for opportunism in relationships. . . . In either role, the doctrine requires each contracting party to consider the interests of the other contracting party when contemplating self-interested actions.").

author's children are particularly familiar with the author's creative collaborators or the expectations of the author's field.²⁹⁰ In the digital assets context, surviving family members may have a substantial economic need to access a particular online account, such as a cryptocurrency wallet, but they may not have an equivalent need to access accounts on other services, like Tinder or Grindr. The Decentered Decedent framework would push the laws of legacy towards recognizing these differences.

Ideally, vulnerable stakeholders would be accounted for without necessarily giving them formal stewardship. For example, in the trusts and estates context, the needs of dependent family members are accounted for through an elective share and/or family set-asides, but these economic protections don't give those family members control over any particular asset; a disinherited spouse gets a percentage of the value of the estate, not necessarily ownership of, for example, the decedent's publicity rights.²⁹¹ And when the decedent tries to get around the spousal share protections by placing assets in, for example, a trust or joint bank account with a third party, many states now will "augment" the probate estate and ensure the disinherited spouse receives some portion of the value of those nonprobate assets as well.²⁹² If the decedent were to place an asset in trust for purposes of secrecy or to ensure stewardship by a third party — for example, intimate photos or unfinished manuscripts — "augmenting" the estate merely acknowledges the economic value of the asset; it does not give the surviving spouse any additional control or access to the asset itself.

Decoupling dependency from control would have some substantial payoffs in the copyright context. As discussed above, the inalienable termination of transfer provisions gives surviving family members substantial control over the permitted uses of a decedent's creative works. The laudatory goal of this provision is to give authors and their families a "second bite at the apple" if a work ends up being particularly valuable, but families consequently end up stewarding cultural activities to which they are often outsiders. The result is often a serious stranglehold over journalism, scholarship, and follow-on creativity. Moreover, termination rights can upset the conscious, careful decision by the decedent to place postmortem stewardship decisions in the hands of a third party, and not in their children. To avoid these stewardship problems, copyright law might consider ways of ensuring that surviving families

290. Cf. Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 *LAW & CONTEMP. PROBS.* 185, 191–96 (2007) (recognizing a distinction between an interest in compensation and an interest in control stemming from intellectual property rights).

291. See UNIF. PROBATE CODE § 2-202(a) (UNIF. LAW COMM'N 2019) ("The surviving spouse of a decedent who dies domiciled in this state has a right of election . . . to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.").

292. See UNIF. PROBATE CODE art. II, pt. 2 general cmt. (UNIF. LAW COMM'N 2019).

retain some right to compensation without enabling them to fully wrest away control from more culturally knowledgeable third parties. This might take the form of a substantial compulsory license to family members, rather than a full termination right, that would kick in at some number of years following a challenged, potentially unfair transfer. Furthermore, as suggested by other scholars, the Copyright Act should insulate both probate and nonprobate estate planning tools from the inalienable termination rights held by deceased authors' families.²⁹³

Stakeholder vulnerability might also be accounted for through opportunities to challenge stewardship decisions *ex post*. Even if stewardship decisions might be made by a carefully selected professional colleague or might be governed by a particular website's ToS, the difficulty of stewardship and the potential vulnerabilities of third-party stakeholders mean that there needs to be some judicial safety valve built into the stewardship ecosystem. For example, although, as discussed above, the court in *In re Scandalios* reached a highly problematic conclusion that the decedent's iCloud account fell outside RUFADAA's protections for electronic communications,²⁹⁴ the surviving spouse nonetheless presented a fairly compelling need to retrieve a series of family photos that the decedent had stored in that account. A better approach, which arguably appears to be developing in New York probate court,²⁹⁵ would be to allow survivors to petition a court, within some reasonable period of time, for an order to access specific financially- and/or emotionally-important assets. This case-by-case equitable relief

293. See Evans, *supra* note 121, at 343; Tritt, *Liberating Estates*, *supra* note 17, at 182, 190. The termination of transfers provision does not apply to an author's transfers by will, but it does apply to nonprobate transfers, for example inter vivos trusts, that are commonly used in estate planning. See 17 U.S.C. § 203(a) (2018) (providing that "the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, *otherwise than by will*, is subject to termination" (emphasis added)).

294. See *In re Scandalios*, No. 2017-2976/A, 2019 WL 266570, at *2 (N.Y. Sur. Ct. Jan. 14, 2019).

295. New York courts have arguably begun to develop a taxonomy for the types of content that may be released to a personal representative of an estate, where the digital intermediary has requested a court order regarding disclosure. Compare *id.* at *2–3 (authorizing surviving spouse's access to iCloud account to obtain family photos), with *Estate of Paragon*, No. 2016-1024/E, 2019 N.Y. Misc. LEXIS 7049, at *3 (N.Y. Sup. Ct. Dec. 5, 2019) (denying access to deceased lawyer's emails out of concern with the disclosure of privileged material), and *In re Coleman*, 96 N.Y.S.3d 515, 519 (N.Y. Sur. Ct. 2019) (denying parents access to son's iCloud account, where they "have not amply demonstrated, at this juncture, the need to access the content of Ryan's digital assets for the administration of his estate"). See generally Yi W. Stewart, *The Path to Disclosure of a Decedent's Digital Assets: Settled or Evolving?*, JD SUPRA (Feb. 26, 2020), <https://www.jdsupra.com/legalnews/the-path-to-disclosure-of-a-decedent-s-66713> [<https://perma.cc/KD46-WU3M>] (surveying recent developments in New York digital assets litigation).

preserves the benefits of a decentralized stewardship system while not entirely sidelining the needs of families.²⁹⁶

V. CONCLUSION

Death isn't what it used to be. New technologies have extended our social lives substantially past the shelf lives of our physical bodies and far beyond a local circle of family and friends. Such social and technological changes require a rethinking of how our legal system approaches the burdens and benefits that accompany our still-inevitable physical deaths. No longer can the law see death solely through the lenses of premortem financial planning and postmortem inheritance. Instead, the law must confront disputes among a variety of different entities that retain an economic, emotional, and cultural stake in an individual's legacy. Indeed, these various stakeholders often want to inherit the decedent's financially valuable real, personal, and intellectual property — i.e., to receive the decedent's economic legacy; but they also often want to shape how the decedent continues to figure into the social lives of the living — i.e., to steward the decedent's cultural legacy. Rather than try to centralize stewardship decisions in any one stakeholder — the family, the public, the market, or even the decedent themselves — the laws of legacy should instead try to recognize and respect the diverse, disperse experiences that we leave behind.

296. See Lee, *supra* note 244, at 700 (“[I]f a Facebook user dies and the fiduciary wants to access the account in order to collect photographs that are of sentimental value, the fiduciary does not need to view status updates, posts, and photographs from other users that will appear in the decedent’s newsfeed.”); Lopez, *supra* note 101, at 240–41 (“Rather than complete immunity from access and disclosure based upon testator’s will, model statutes like RUFADAA . . . should account for the possibility that a testator’s intent for posthumous privacy may need to be breached to promote the orderly administration of estates.”).