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Rights of the Dead

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Rights of the Dead

*Kirsten Rabe Smolensky**

I. Introduction

Many legal rules suggest that the dead do not have rights. The dead cannot marry, divorce, or vote. The executor of an estate cannot sue for the libel or slander of a deceased person. And the right to medical privacy substantially erodes at death, giving family members the ability to obtain sensitive information about a decedent's medical conditions. On the other hand, various legal institutions have spent considerable time trying to protect the rights of the dead. As a result most testamentary distributions, burial requests, and organ donation designations are held to be valid even if they contradict the preferences of the living. Certain destructions of property requested in wills are honored although they may have a negative impact on the living. Some states even statutorily recognize a posthumous right of publicity, and recent case law suggests there may be a posthumous right to reproductive autonomy.

This paper grapples with the question of why the law gives the dead certain legal rights but not others. While many legal rules favoring the dead might be explained in practical terms as simply an attempt to control behaviors, incentivize, punish and empower the actions of the living, such an explanation is incomplete because it ignores cultural norms and a desire among the living to honor the dead. There appears to be an innate desire among the living to honor the wishes of the dead even when those wishes may contradict their own. This desire does not appear to spring solely out of a self-interested desire in having one's own wishes honored at death, but out of a genuine respect for the dead. Furthermore, courts and legislatures often use rights language when creating legal rules that benefit the interests of the dead, something which seems unnecessary if the true goal of a proposed legal rule is to ultimately control the actions of the living. While it is not unreasonable to think that courts sometimes use the wrong language in opinions, judges consistently use rights talk in cases involving benefits and harms to decedents. Consistent use of rights language, therefore, suggests that a series of social and cultural norms guide judges and legislatures to honor and respect the dead, particularly where the concomitant harms to the living are minimal.

This article, therefore, proposes the Dignity Theory of posthumous rights, which recognizes that while legal rules affecting the dead often have a practical aspect, one of the primary, and yet unrecognized, forces driving the creation of these legal rules is the desire to honor the wishes of the dead. Under the Dignity Theory of posthumous rights, which adopts an Interest Theory approach to rights, a person only needs interests to be a potential legal rights-holder. The Interest Theory, therefore, recognizes persons currently incapable of making choices, such as the mentally incapacitated and infants, as potential rights-holders. Under this

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particular view of rights the dead, although unable to make real time choices, are capable of being legal rights holders. Furthermore, certain interests, such as the interest in seeing one's offspring survive or the interest in one's reputation, can survive death. When these interests are protected by legal rules, then the dead are granted legal rights that can be enforced against the living. While it is true that only a subset of interests may survive death, and even a smaller subset may receive legal recognition, death does not necessarily cut off all interests, and consequently, it does not necessarily end all legal rights. Recognition of posthumous rights, therefore, gives the dead significant moral standing within our legal system, as would be expected where certain legal rules are driven by a desire to treat the dead with dignity.

The desire to treat the dead with dignity also suggests that many posthumous rights, but perhaps not all, are based on the principle of autonomy. The law strives to honor a decedent's wishes and to protect his interests because society has chosen, within limits, to adhere to the principle of autonomy. There are legal limits to autonomy, even for the living, and the law is constantly struggling with the exact borders of these limits. With the dead, however, there appear to be more limits to autonomy, both because there is no individual whose feelings can be hurt and because the ability to make choices and change preferences dies with the decedent. The Dignity Theory of rights provides a first cut at defining the boundaries of posthumous autonomy by examining the limits of autonomy after death.

The following section gives a more careful definition of rights as used in this paper and then examines what it means to have an interest and be a legal rights-holder. It also discusses potential problems with enforcement and suggests, as is consistent with an autonomy view of posthumous rights, that where a decedent's wishes are not clear via a written document, the legal system relies on proxies or if a proxy is not available, a best interests test to enforce the legal rights of the dead. Next, the paper proposes the Dignity Theory of posthumous rights: namely, that while potential concerns about controlling, protecting and punishing the living may explain many legal rules, concerns about dignity and autonomy really drive the creation and legal recognition of posthumous rights. This section elucidates the factors that are important in the determination of whether a posthumous interest should be recognized as a posthumous legal right. In particular it discusses the following factors: impossibility, the right's importance, time limits, and conflicts of interest between the living and the dead. Finally, the paper concludes that the current legal trend is toward giving the dead more rights and suggests that this may be acceptable as long as the limits discussed in Section III are respected.

II. Rights Talk: Some Definitions

This section of the paper attempts to provide a framework for talking about posthumous rights by providing a series of definitions. It also limits significantly what can properly be called a posthumous right. First, it defines a legal right relying primarily on Wesley Hohfeld's classification of legal rights. Next, it argues that the dead can be legal rights holders if one adopts the Interest Theory of rights. Third, it examines how posthumous rights can be enforced through the use of proxies. Fourth, this section of the paper discusses the problem of timing and posthumous rights. Finally, it talks about situations where a decedent may appear to be a legal rights-holder, but is instead merely a third party beneficiary. In these instances, the decedent does not have a posthumous claim-right or power.

A. Defining a legal right

Establishing a succinct and agreed-upon definition of a “right” has eluded lawyers and philosophers for centuries. Early legal scholars considered rights and duties to be correlative, meaning that if A has a right to payment from B, B has a duty to make payment to A. But more recent legal scholars have challenged the correlative nature of rights and set about categorizing rights, in the loose sense of the term, in a systematic way. Other scholars, both legal and philosophical, have distinguished between moral rights and legal rights.¹ Some have even developed different theories, such as the Will Theory and the Interest Theory, for determining whether someone (and sometimes something) has a legal right. None of these attempts to define, categorize, or theorize has produced a widely accepted or clear-cut definition of legal rights. As a result, legal scholars and judges often use the word “right” to refer loosely to a series of legal relations between two people or entities. For example, legal scholars and judges talk about the right to demand payment for services under a contract, the right to speak freely about politics without governmental interference, the right to ignore a drowning person or the right to distribute one’s property at death. But all of these “rights” seems different in important ways.

In the early 1900s Wesley Hohfeld, lamenting the looseness of rights language in the law,² categorized “rights” into rights (now commonly called claim-rights or claims), privileges, powers and immunities.³ Under his theory, I have a claim-right if I have a claim against you and you have a corresponding duty to fulfill that claim either positively (for example, by paying me a sum owed under a contract) or negatively (by staying off my property). Claim-rights are rights in the strictest sense and always have correlative duties. A privilege (today often referred to as a liberty) is one’s freedom from the claim-right of another. Therefore, if I have the privilege of sitting in the park, you do not have a valid claim-right against me and I, therefore, am under no

¹ Legal rights are claims made against another by relying on laws, while moral rights are rights claimed on the basis of a moral principle. Moral rights may or may not be protected by the law. For example, I may arguably have a moral right to health care, but not a legal right. Similarly, a right granted by the law might not be based on a moral principle. On the other hand, moral and legal rights sometimes converge. There is both a law and a moral principle that prohibits unjustified murder. A brief discussion on the difference between moral and legal rights can be found in TOM L. BEAUCHAMP & LEROY WALTERS, CONTEMPORARY ISSUES IN BIOETHICS 30-31 (6th ed. 2003).

² Hohfeld wrote, “... the term ‘rights’ tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities.” Hohfeld created this classification by recognizing distinctions that he saw in legal cases. He teased out these distinctions to provide a descriptive account of legal rights. WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36 (Walter Wheeler Cook ed., Yale Univ. Press 1964) (1919).

³ Hohfeld also coined four correlative terms – duty, no-right, liability and disability. WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36 (Walter Wheeler Cook ed., Yale Univ. Press 1964) (1919). He used the following graph to depict the relationships between these terms:

Jural Opposites	{ Right	privilege	power	immunity
	{ No-right	duty	disability	liability
Jural Correlatives	{ Right	privilege	power	immunity
	{ Duty	no-right	liability	disability

obligation or duty to refrain from sitting in the park. Hohfeld also distinguishes between powers and immunities. If I have a power, I can alter someone's legal relation with my actions. For example, I can devise my car to you, thereby putting you under a liability (note that liabilities, in Hohfeldian terms, can be either positive or negative). But if you are not susceptible to my power, then you have immunity and I have a disability because I am not able to alter your legal relations.⁴

Because Hohfeld was a legal scholar and often considered a leader in legal rights talk,⁵ it seems appropriate to adopt some of his thinking when defining a "right" for the purposes of this paper. But using his analysis as a basic rights framework is not without difficulties. First, not every legal relation can fit neatly into a single box. Many legal relations involve a combination of claim-rights, duties, powers and immunities. For example, a landowner has the power to sell his property to B, but he also has various immunities against B (B is under a disability because he has no power to shift the legal interest in the property to him).⁶ These distinctions can be difficult to tease out. Additionally, Hohfeld always looks at legal relations as being between two persons, which persons are presumably living. He does not discuss the dead, future generations, trees, animals and all of the other things to which legal scholars might attempt to ascribe rights. In short, he does not discuss the requirements for being a legal rights-holder. This paper, therefore, will talk about all Hohfeldian claim-rights, privileges, powers and immunities as "rights" in a very loose way.⁷

B. The dead as legal rights-holders

Some scholars, relying primarily on philosophical principles, have discussed legal rights in ways that are quite distinct from Hohfeld's classification system. These discussions generally focus on who can be a legal rights-holder and not necessarily on what sort of rights that person is holding. The Will Theorists, for example, argue that legal rights only exist where one is sentient and capable of making choices.⁸ By contrast, Interest Theorists concentrate on the interests that one has and argue that those unable to make choices, such as persons in a persistent vegetative

⁴ Hohfeld summarized these categories as follows: "A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation." *Id.* at 60. For a more detailed explanation, see generally, WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (Walter Wheeler Cook ed., Yale Univ. Press 1964)(1919).

⁵ *CONCEPTS IN SOCIAL & POLITICAL PHILOSOPHY* 436 (Richard E. Flathman ed., 1973).

⁶ Example taken from WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 60 (Walter Wheeler Cook ed., Yale Univ. Press 1964)(1919).

⁷ Separate papers could be written on posthumous claim-rights, posthumous powers, posthumous privileges and posthumous immunities. This paper, however, is designed to look at posthumous rights broadly. One of the author's goals is to begin a discussion about potential posthumous rights which might be continued in later papers.

⁸ For a discussion on the use of the Will Theory of rights in the law see, e.g., Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 *Can. J. L. & Jurisprudence* 29 (2001).

state, can be legal rights-holders.⁹ The remainder of this section will address each of these two theories as they relate to posthumous rights, and ultimately endorse the Interest Theory of rights.

The Will Theory of rights says “the essence of a right consists in opportunities for the right-holder to make normatively significant choices relating to the behavior of someone else.”¹⁰ Because the dead are incapable of making significant choices and lack the ability to form interests, they cannot, under the Will Theory of rights, be rights-holders.¹¹ Under this theory, what remains of the once-living person is a corpse, an inanimate object similar to a rock or a park bench, and the law should not, and cannot, extend rights to inanimate objects.¹² A Will Theorist might explain posthumous rights in the following way: The dead cannot be legal rights-holders because they are incapable of making choices. Laws that appear to grant posthumous rights are really aimed only at living persons capable of making choices and forming interests. A law purporting to grant a posthumous right of publicity, therefore, is not concerned with honoring the decedent’s right to have a commercial interest in his identity, but rather with incentivizing the living to create marketable identities and with protecting the financial interests of the decedent’s heirs.¹³ As a result, legal rules that appear to give decedents rights are only created to protect, guide and punish the living.

⁹ Interest Theorists define a right as something that protects a right-holder’s interests. For examples of how Interest Theory intersects with the law see e.g., Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 *Can. J. L. & Jurisprudence* 29 (2001); Joel Feinberg, *The Rights of Animals and Unborn Generations*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 169, 162-63 (1980); Note, *Justice Unconceived: How Posterity Has Rights*, 14 *Yale J. L. & Human.* 393 (Summer 2002).

¹⁰ Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 *Can. J. L. & Jurisprudence* 29, 29 (2001). See also, Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 *ETHICS* 243, 249 (1981). In his paper, Ernest Partridge argues that (“[The dead] have no present desire because they are dead, and, more to the point, they have no interests now because, being dead, nothing that happens now can affect their final, immutable, and completed desires and prospects.”)

¹¹ See Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 *Can. J. L. & Jurisprudence* 29 at 30 (2001). See also, Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 *ETHICS* 243, 247 (1981). Partridge suggests that beings must be sentient to form interests. He writes, “But must we not also affirm that it is only in virtue of being persons (or, minimally, of being sentient), that beings can have interest and thus be harmed? And must we not also affirm that without the sentient interest bearer, there can be no interests at all?” I reject this argument. To be sentient a person must be aware of him or herself and his or her place in the world. Society gives non-sentient beings rights all the time, and I would argue that this is proper. For example, while in a persistent vegetative state Terry Schiavo was by almost all medical accounts non-sentient. (Autopsies later confirmed this). Regardless of one’s feelings about the value of her life, Terry Schiavo had legal rights. Similarly, newborns are not sentient, but they have legal rights.

¹²For some readers the idea that the dead cannot have legal rights may be tied to the notion of personhood. The definition of personhood has puzzled philosophers, theologians and bioethicists for a long time. In the end of life context some scholars have argued that personhood requires relational capacities (and, therefore, higher brain functioning). Under this view “people” in a persistent vegetative state, like Terry Schiavo, are not persons because they cannot process the world around them or respond in any meaningful way to stimuli. Other scholars have argued that personhood requires that one be sentient, or aware of one’s self. (Peter Singer article/ Partridge). Under this framework, pre-implantation embryos, fetuses, and newborn babies are not persons.

¹³ Note that these two potential goals of a posthumous right of publicity are really, at the most basic level, the same thing. While the law is concerned with protecting an heir’s inheritance, the motivation for this goal probably has more to do with incentivizing people to create marketable identities so they can support their family, save money,

While this rationale may be persuasive, some Interest Theorists have suggested that the dead can be proper holders of legal rights. In fact, the Interest Theory of rights has been used by some philosophers to argue that trees,¹⁴ animals¹⁵ and unborn generations¹⁶ can serve as legal rights-holders and consequently have legal rights. Similar lines of thinking suggest that the dead can also be appropriate legal rights-holders. Under the Interest Theory of rights, the interests of a once-living person survive death and these interests can be helped or harmed posthumously.¹⁷

One of the prominent philosophical proponents of this view is Joel Feinberg. Under his analysis, interests can be helped or harmed after death. A living person can have an interest in his reputation or in the welfare of his children. Recognizing that death is certain, the living create wills that establish charities, donate monies, and provide for the appropriate cemetery headstone or monument. The honoring of these wishes serves to maintain, improve and sustain reputations. A large segment of the population also leaves money or assets to their children upon their death. The purpose of these posthumous gifts is obviously to benefit the recipient so that they may flourish. In creating these testamentary distributions, the living are, in essence, acknowledging that their reputation, and in most cases their children, will survive their death. The testator is also acknowledging that he has an interest in what happens to his assets after his death. The testator's death, in and of itself, cannot extinguish that interest. It survives and can be helped or harmed.

Start with a basic principle: a decedent can only be harmed after death if he has interests that survive death. If there are no interests that survive death, then the once-living person cannot be harmed and we should not care what happens to a person or their interests after death. Assume that a person dies and his neighbor spreads defamatory remarks about him. These remarks hurt the decedent's reputation, regardless of whether he is alive and can become emotionally upset by the statements. The fact that he does not know about the harm, does not

and provide their children with financial incentives to care for them in their old age, than it does with a concern for the heir's financial welfare. This notion is supported by the fact that the estate tax is approximately 50% for estates over \$2.5 million dollars.

¹⁴ Some philosophers have argued that animals and trees should have legal standing to sue when they are harmed. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* (1996). By arguing that trees should have standing, these scholars are arguing for recognizable legal rights in inanimate objects.

¹⁵ Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 *Can. J. L. & Jurisprudence* 29 (2001).

¹⁶ Joel Feinberg, *The Rights of Animals and Unborn Generations*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 169, 162-63 (1980). *See also*, Note, *Justice Unconceived: How Posterity Has Rights*, 14 *Yale J. L. & Human.* 393 (Summer 2002).

¹⁷ *See e.g.*, Joel Feinberg, *Harm and Self-Interest*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 45, 59-68 (1980); Joel Feinberg, *The Rights of Animals and Unborn Generations*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 169, 173-76 (1980).

The recognition of harms to the dead has been noted throughout history. "[B]oth good and evil are thought to happen to a dead person . . . Take, for example, honours and dishonours, and the good and bad fortunes of his children or descendants generally." ARISTOTLE, *NICOMACHEAN ETHICS*, I: 10, pp. 16-17 (Roger Crisp ed., Cambridge 2005)(While Aristotle did not adopt an Interest Theory of rights, he did note that people often think that good and bad things can happen to someone after they die).

mean that a harm to the decedent's interest, namely his reputation, has not occurred.¹⁸ One might respond that while the decedent's reputation might be harmed in this example, the decedent is not harmed because he cannot know about the defamatory comments after his death. But knowledge of a harm is not required for a harm to occur. Take, for example, a living landowner whose land is trespassed upon by a harmless trespasser without his knowledge.¹⁹ In this hypothetical, an interest of the living landowner is harmed even though he never finds out about the harm.²⁰ To extend this principle to decedents, we should look at the dead as morally similar to sentient, living adults who serve as the model for a rights-holder.²¹ This is best proven by "subsum[ing] the aftermath of each dead person's life within the overall course of his or her existence. By highlighting . . . the continuing influence of the dead person on other people and on the development of various events, the memories of him that reside in the minds of people who knew him or knew of him, and the array of possessions which he accumulated and then bequeathed or failed to bequeath—we can highlight the ways in which the dead person still exists."²²

But the idea that some interests survive death does not necessarily lead to the conclusion that all interests must survive death. For example, interests that can no longer be helped or harmed by posthumous events, such as a secret desire for personal achievement, die upon the death of that interest holder.²³ The distinction between interests that survive death and those that die with the decedent therefore appears to turn on whether there is a record of that particular desire. The record could exist either in the mind of a surviving friend or family member or it could be recorded in writing. The important point is that an interest incapable of becoming known after death cannot be protected.

Furthermore, the simple fact that an interest survives death does not require that the law recognize this interest as a posthumous legal right.²⁴ Theoretically someone could die with a certain set of interests written in a document, perhaps a will. These interests might include the desire to transfer assets to one's children after death or the desire to have one's flower garden

¹⁸ See e.g., Joel Feinberg, *Harm and Self-Interest*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 45, 65 (1980). Mr. Feinberg argues, "Dead men are permanently unconscious; hence they cannot be aware of events as they occur; hence (it will be said) they can have no stake one way or the other, in such events. That this argument employs a false premiss can be shown by a consideration of various interests of *living* persons that can be violated without them ever becoming aware of it." *Id.* (emphasis in original).

¹⁹This is one of Mr. Feinberg's fine examples. See *Id.*

²⁰ *Id.* at 65-66. Let me take Mr. Feinberg's hypothetical one step further. Assume that the day after unknown trespass, the landowner becomes mentally incapacitated such that he can never appreciate the nature of the trespass or be emotionally harmed by it. Upon his incapacitation, a guardian is appointed for him. After the appointment, the guardian learns about the trespass and sues the trespasser. Would the law allow the landowner to recover?

²¹ *Id.* at 47.

²² *Id.* at 47.

²³ *Id.* Coincidentally, this idea is similar to the old common law rule that a personal action dies with the person. The true root of this common law rule is unknown. See T. A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 *VAND. L. REV.* 605 (1960).

²⁴ Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 *Can. J. L. & Jurisprudence* 29, 29 (2001).

tended in perpetuity. Given the wide range of posthumous interests that survive death in a philosophical sense, the law's purpose is to choose which of these interests are worthy of legal recognition. Interest Theorists make no suggestions about which surviving interests should be considered posthumous legal rights. This requires the adoption of a theory about which sorts of posthumous rights should be recognized. This is done in section II of the paper.

C. Principal-Agent Problems in the Enforcement of Posthumous Rights

Assume for a moment that the law decides to recognize certain interests of the dead as posthumous legal rights. In this state of the world, there is still the problem of enforcement. The rights of the living are most often enforced because the individual whose right has been violated speaks up. For example, if I have a claim-right against you for payment under a contract and you refuse to honor your duty to pay me, my claim-right will not be enforced in most instances unless I hire a lawyer and take you to court. But the dead are physically incapable of enforcing their posthumous rights and keeping their postmortem affairs in order. Therefore, if the law grants posthumous rights, it must also establish a system for enforcing these rights. This may be one of the reasons we have executors. This section will examine two ways to conceive of estates and executors: as surrogate decision-makers for the decedent or as the decedent's agent.

In most circumstances the person enforcing a decedent's legal rights is the executor of the decedent's estate or, in some circumstances, the decedent's beneficiaries or next of kin. This makes sense because these people are either chosen by the decedent to carry out his or her wishes (in the case of an executor appointed by will) or close family members or friends (in the case of an executor appointed by the court, beneficiaries or next of kin). Theoretically, these people are the best proxies for the decedent. Decedents likely chose particular executors because they valued their decision-making skills and judgment.²⁵ Beneficiaries, most of whom are either next of kin or close friends, can also serve as excellent surrogate decision-makers for the deceased because they are likely to know the decedent's wishes.²⁶ Furthermore, absent the naming of an independent executor in the will, the wishes of the decedent likely are aligned with the interests of his or her heirs. Because heirs may benefit financially if the decedent's estate pursues a posthumous right, it makes sense that they are the most likely to defend a decedent's rights.

²⁵ In some ways choosing an executor is much like choosing a person to serve as a durable power of attorney in the case of incapacitation. One would assume that the person chosen to serve in this capacity has the trust of the person signing the durable power of attorney. The same is probably true of persons chosen to serve as executors. (This might make an interesting empirical study if it has not already been done).

²⁶ Many states have health care surrogate acts that provide for family members to serve as surrogate health care decision-makers if a person becomes incapacitated and does not have a durable health care power of attorney. Usually statutes list potential surrogate decision makers in the following order of preference: spouses, adult children, parents, adult brothers and sisters, other relatives and close family friends. The idea is that persons related to the incapacitated patient are more likely to know that person's wishes and act in accordance with them. For the pros and cons of the family as decision-maker see ALLEN E BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* 136-139 (1989).

But executors and heirs are not perfect surrogate decision-makers. Studies have shown that surrogate health care decision-makers are not necessarily good proxies for patients.²⁷ According to one study, surrogate decision-makers, whether spouses, children or other family members, correctly predict the patient's wishes only 66% of the time.²⁸ And the patients in this particular study had been diagnosed with a terminal illness and were presumably aware that they might become incapacitated. The apparent reason for this discrepancy is the failure of families to discuss end of life decision-making in the health care setting. Similarly, families do not like to discuss estate planning. The ability to make correct decisions does not always improve when written instructions are left behind.²⁹ In the health care setting, surrogates are under an enormous amount of emotional distress and when asked to make important medical decisions such as whether to withdraw a ventilator, surrogates often focus on what they want (their loved one alive) and not what the sick loved one would have wanted (for example, not to be hooked up to a ventilator). The same is likely true when it comes to certain posthumous decisions such as a decedent's desire to be cremated. There is a conflict of interest.

The same problem is apparent if posthumous rights are analyzed through the lens of the principal-agent relationship. The problem here, beside potential conflicts of interest, is that the law has created a principal-agent relationship where the principal is missing. While the principal's instructions might be clearly recorded, for example in a will or other written documents, there is a lack of oversight by the principal and an inability on the agent's part to get clarification on an instruction or further direction if necessary. This leaves some portion, if not a large portion, of the principal's instructions open to the interpretation, misuse, and whim of the agent. Furthermore, in situations where a decedent dies intestate or there is a need for a court-appointed executor, the principal-agent relationship is fraught with problems.

Apparently recognizing some of the limitations of the principal-agent relationship and substitute decision-making, courts have limited the contracts that an estate can enter into on the testator's behalf. While executors can enter into contracts to cremate or bury the decedent as called for in the will, courts do not allow executors to enter into other post-mortem contracts.³⁰ For example, if an offer is on the table and the offeree dies, the offeree's estate generally cannot

²⁷ See, e.g., Daniel P. Sulmasy, et. al, *The Accuracy of Substituted Judgments in Patients with Terminal Diagnoses*, 128 ANN. INTERN. MED. 621 (1998); J. Suhl, et al., *Myth of Substituted Judgment: Surrogate Decision Making Regarding Life Support is Unreliable*, 154 ARCH. INTERN. MED. 90 (1994).

²⁸ Daniel P. Sulmasy, et. al, *The Accuracy of Substituted Judgments in Patients with Terminal Diagnoses*, 128 ANN. INTERN. MED. 621 (1998). The study did find that surrogates were generally better at predicting the patients' wishes for more invasive procedures.

²⁹ Find Cite. NOTE: Do advanced directives (living wills) make surrogate decision-making more accurate? If this study doesn't exist, it would be great to do one.

³⁰ Post-mortem contracting situations arise whenever the estate enters into a contract on the decedent's behalf. If the decedent, for example, had a pending lawsuit when he died, the estate can be substituted as the plaintiff (assuming the cause of action survived death) and can enter into a contract settling the suit on the decedent's behalf. See the sub-section on torts for more information regarding these type of post-mortem contracting situations.

accept the offer.³¹ If the offer allows for the contract to be accepted by the offeree and his heirs, however, then the offeree's estate can accept the offer after the offeree's death.³² Death terminates the decedent's power to accept an offer because offers, with few exceptions, are generally made only to one person.

A hypothetical helps explain this rule. If A privately offers his car to B for \$2,000 and B tells his neighbor, N, about the offer, that does not mean that N can bang on A's door and say, "I accept your offer of \$2,000 for your car" and thereby create a binding contract.³³ N is a stranger to A and A cannot be bound by N's apparent acceptance of an offer A never made to N. Therefore, N's statement "I accept your offer of \$2,000 for your car" operates only as an offer and not as an acceptance. Similarly, if A offers B (not B and his heirs) his car for \$2,000 and B dies, B's estate cannot call A and say, "The estate accepts your offer made to B. Here is the \$2,000 for your car." A made the offer to B, not B's estate. An inherent part of the offer is who makes up the parties to the potential contract. Changing one of the parties to the agreement changes the offer and functions as a rejection of the initial offer. Of course, there are practical reasons for these rules. Perhaps B's estate is being administered by E, someone unknown to A. Under these circumstances, the law probably does not want to force A to deal with a stranger. Perhaps A and B had a special relationship and A made the offer, expecting a certain manner of dealing or later goodwill on B's part. Perhaps B's reputation led A to make the offer. Perhaps the legal status of the estate or certain requirements placed upon the executor or beneficiaries makes the deal more complicated. All sorts of plausible explanations for terminating the offer at B's death can be made.

In some ways, however, this outcome seems a bit bizarre. If the estate is simply stepping into the shoes of the decedent, it seems that the estate should be able to accept A's offer. Theoretically, the decedent has left some instruction as to how his or her affairs should be handled and the executor is theoretically bound to follow these instructions. Even if this is not the case, however, the executor might be familiar with B's dealings, his reputation, and his business strategies and he might hope to proceed with B's affairs in much the same manner as B would have had he remained alive. If B's estate is simply a proxy for B, then any concerns about dealing with strangers, particularly if the contract is for a good and not a service, should be alleviated. We allow agents to enter into contracts on behalf of their principals. Additionally, if we think that B's estate is a perfect substitute for B, then B's death and the acceptance of A's offer by his estate is not a change in the contracting parties, and the acceptance should not function as a rejection of the initial offer.

³¹ 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:68 (2004)("An offeree's death terminates a revocable offer and renders ineffective a subsequent attempt by an administrator to personal representative to accept that offer.")

³² 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:71 (2004)("An offeree's power of acceptance is terminated when the offeree or offeror dies . . ." An exception is made, however, if the terms of the offer allow the personal representative of the offeree to also accept the offer. The death of the offeror, however, always forecloses acceptance of an offer not already accepted.)

³³ An exception may be offers made to the public through advertising and price tags in department stores.

But allowing B's estate to accept an offer absent a specific provision regarding B's heirs seems suspect even though the law allows executors to contract for a decedent's funeral arrangements. The reason for this distinction must be that B's estate is not a perfect substitute for B, at least when it comes to accepting an offer or entering into certain kinds of contracts. The courts have recognized the principal-agent and substitute decision-making problems associated with posthumous rights.

D. Posthumous rights and the timing problem

One further problem in defining a posthumous right has to do with timing. It appears that the dead may be accorded rights that can come into existence while they are living, at death or after death. The time that the right accrues may affect the way that the right is defined. For instance, it seems that there should be some difference between a cause of action that is recognized during one's life and is allowed to survive death, and a cause of action that accrues after someone has already passed away. This timing problem may have much to do with whether one considers a right to be a posthumous right.

While members of many disciplines, namely physicians and theologians, may consider death to be a process, the law has gone to great pains to define death as a singular moment in time.³⁴ At the moment of death, the decedent's legal status changes. Death ends marriage, initiates the transfer of property to its next owner, ends some contractual and parental obligations, and transforms the decedent's body from a living vessel over which its occupant has almost complete autonomy to a corpse in which the family is granted quasi-property rights. Since defining the moment of death is so important to the law, it seems sensible to think that it matters whether a decedent's right accrues prior to, at, or after death.

Rights that come into being after someone has already passed away are clearly posthumous rights. This is the easy case. What is more difficult, however, is determining whether rights that came into existence prior to or at death can be considered posthumous rights. For the purposes of this paper, all rights recognized after a decedent's death, regardless of the time that they accrue, are considered posthumous rights. The timing of the emergence of the right does not affect the fact that the right is honored in death, but it may merely change the character of the right. Assume, for example, that a person's constitutional right is violated while they are alive. The person sues and dies during the court proceedings. Does this mean that the decedent has a constitutional right to, say, free speech? Perhaps, but what it more likely means is

³⁴ In an effort to define death in a way that keeps pace with modern technology, all states have adopted some form of the Uniform Definition of Death Act (1980). Under the Uniform Definition of Death Act ("UDDA") "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards." Uniform Definition of Death Act (1980). Some states, such as Florida, have adopted a modified UDDA rule in which total brain death is only an acceptable means of determining death if it would be too difficult to determine death via the cardiopulmonary definition because mechanical respirators are being used. FLA. STAT. ANN. § 382.009 (West 2005). Other states allow religious accommodations for certain beliefs, such as Orthodox Judaism, that reject brain death criteria. See N.J. STAT. ANN. § 26:6A-5 (West 2004) and RULES AND REGULATIONS OF NEW YORK § 400.16 (2004).

that the decedent has a posthumous right to have pending constitutional claims survive his or her death.

E. The dead as mere beneficiaries

A final problem with posthumous rights is distinguishing between situations where the decedent has a posthumous right and situations where the decedent is merely receiving some benefit but is not the legal rights-holder. Sometimes a living person may be the holder of a right, the enforcement of which somehow benefits a decedent. In these situations, it is easy to think that the law is granting the dead some right because they are receiving a benefit. But in reality the decedent is really only a third-party beneficiary.

Possible rights-holders in cases involving decedents might include the decedent, the estate, beneficiaries of the estate, the public, and the next of kin. Untangling the rights-holder from third-party beneficiaries and other interested parties can sometimes be complicated. For example, wrongful death claims may appear to give the dead rights, but in most cases the decedent's next of kin is the true rights-holder.³⁵ Therefore, while the decedent's interests may be benefited by this rule, the decedent cannot be properly defined as the rights-holder because the right to sue for wrongful death resides with the next of kin. Clues as to who the rights-holder is can be found in who is granted standing to sue, who the remedy flows to,³⁶ and who the court says the true rights-holder is.³⁷

III. The Dignity Theory of Posthumous Rights

The granting of some posthumous rights and not others suggests that the law is full of conflicts when it comes to the rights of the dead. This paper not only draws attention to this conflict, but it attempts to take a first cut at developing a cohesive theory of posthumous rights. A Will Theorist might easily solve the posthumous rights puzzle by arguing that all attempts to grant the dead rights are really just a way to control the actions of the living. The dead simply do not have rights. On the other hand, an Interest Theorist would argue that one only needs interests to be a rights-holder. Furthermore, certain interests are capable of surviving death and a subset of these interests can be legally recognized as posthumous rights.³⁸ Under an Interest Theory

³⁵This example assumes the decedent is in a jurisdiction with a statutorily created wrongful death cause of action designed to be brought by a decedent's next of kin. These wrongful death claims generally compensate the next of kin for the harms they suffer as a result of the decedent's wrongful death.

³⁶ Except, perhaps, if the remedy is specific performance and not money damages.

³⁷ While courts do not always get it right, the language that a court uses to talk about a case can be helpful in determining whether the decedent is a rights-holder or a mere third-party beneficiary. For example, most wrongful death statutes and cases will clearly say that the right to proceed belongs to the next of kin and not to the decedent. While the decedent may get some sort of retribution for the harm done to him or her by their death, the paper would not consider the decedent to be a holder of a posthumous right. Most survival statutes will allow the estate to sue on behalf of the decedent. As a general rule, where courts allow the decedent's estate to proceed as the plaintiff and recognize the damages being sought as damages that the decedent (and not some living person) suffered, the court is discussing posthumous rights.

³⁸ Some general interests, such as an interest in the commercial use of one's name, might consistently be assumed to survive death. Additionally, an interest to provide for one's offspring is assumed to survive death even if specific

approach, therefore, the dead can have rights. While both of these theories are useful for thinking about who can be a rights-holder, neither theory provides a normative account of which rights should be legally recognized.

This paper, therefore, proposes the Dignity Theory of posthumous rights. The Dignity Theory of posthumous rights adopts an Interest Theory approach to thinking about rights, but it goes several steps further. First, it recognizes an innate human desire to treat the dead with respect and dignity.³⁹ This desire does not appear to spring solely out of a self-interested need to have one's own wishes honored at death, but out of a genuine respect for the dead. As a result of this innate desire, courts sometimes honor decedents' interests and autonomy after death by granting them posthumous rights. The Dignity Theory, therefore, is able to explain why courts and legislatures continually rely on rights language in their opinions and statutes. Second, the Dignity Theory of posthumous rights provides an account of which surviving interests of the dead are, and oftentimes should be, recognized a posthumous legal rights. In doing so, the Dignity Theory centers on the principle of autonomy and its limits.

This section of the paper explores some of the boundaries of a decedent's autonomy. Often, when rights are granted the principle of autonomy plays an important part in the decision. When courts want to recognize a decedent's autonomy they recognize a posthumous interest as a posthumous right. But there are limits to what sort of posthumous rights the law is willing to grant. The following section addresses the limits of posthumous rights by examining a series of factors that courts often consider in posthumous rights cases. While courts sometimes use these factors inappropriately, the factors, in conjunction with the principle of autonomy, provide a rough guideline for what posthumous rights should be recognized. This section will examine each of these factors in turn: impossibility, the right's importance, time limits on rights, and conflicts of interest between the living and the dead.⁴⁰

instructions are not left. This is why we have default rules about the descendability of personal property. But not all interests survive death. For example, if I have an interest in having my home turned into a museum to house my Chinese Export Silver collection, it is unlikely that this interest will survive my death unless I specifically provide for such arrangements in my will. This happens because my interest is uncommon. Uncommon interests that are not in writing often die with the decedent.

³⁹ It is interesting to note that one of the largest networks of funeral homes, crematoriums and cemeteries in the United States is called Dignity Memorial. See <http://www.dignitymemorial.com/>. The choice of this name suggests that dignity after death is indeed an important concept in American culture.

⁴⁰ Additional papers could be written about each of these factors. For example, one could view impossibility as a two-step limiting process. First, impossibility (in a non-legal sense) prevents certain interests from surviving death because those interests are unknown. Second, impossibility prevents certain interests that do survive death from becoming legal rights because while the interests might be known, it is impossible for the decedent to exercise a particular right. Of course a more complex proxy system might alleviate the limiting process of the second step. For example, a man might die while engaged but his fiancée might still be able to marry him posthumously and thereby legitimize her children and make a claim on his estate. In fact, this happened in France during WWI and WWII. Fiancées of war heroes were allowed to marry their deceased lovers. This paper, however, will discuss each of these five factors briefly, saving more detailed analyses for later papers.

A. Impossibility

When deciding whether to grant the dead a legal right, impossibility seems to be the first threshold factor. Even if a court wishes to recognize the autonomy of a decedent, the decedent's inability to perform some actions after death may prevent recognition of certain posthumous rights. Impossibility, a term often used in contracts, refers to the inability to perform a contract, for example because the wedding hall is destroyed by the elements or because the artist contracted to paint a portrait dies. In these situations, the law excuses the promisor because the thing promised simply cannot be done. It is impossible. Death, because of its permanency, often results in impossibility, particularly in pre-mortem personal services contracts, and thereby often relieves the promisor from certain contractual obligations at death. The effects of impossibility, however, are not limited to contracts. For example, certain constitutional rights, such as the right to marry, vote or run for office, die with the decedent because it is impossible for a decedent to exercise these rights. When death makes it impossible for a particular right to be exercised, it currently dies with the decedent. This section will examine impossibility both in the contracts context and the constitutional rights context and suggest that the problem of impossibility may be solved in certain circumstances through the use of more sophisticated proxies.

Pre-Mortem Contracting

In contracts, impossibility generally occurs where there is pre-mortem contracting with post-mortem effect (hereafter "pre-mortem contracting"). Pre-mortem contracting is a living person's ability to enter into a contract that will bind his heirs, either to the benefit or detriment of the estate, after his death. While many pre-mortem contracts are satisfied during the lifetime of the persons entering the contract, some contracts extend beyond the life of its signors. Sometimes this result is intended. For example, some contracts provide for post-mortem payments or performance. These are generally held to be valid contracts.⁴¹ Similarly, contracts to make a will are enforced after the promisor's death.⁴² In both of these examples the law is honoring the decedent's ability to contract for a specific result after death. The recognition of

⁴¹ C.T. Foster, Annotation, *Provision for Post-Mortem Payment or Performance as Affecting Instruments Character and Validity as a Contract*, 1 A.L.R.2d 1178 (1948)(analyzing only post-mortem payment or performance to be made at or after the death of the promisor).

⁴² For a complete discussion of the treatment of contracts to make a will see 57 Am. Jur. 148, Wills, §§ 166 et. seq. See also *United States v. Stevens*, 302 U.S. 623 (1938)(enforcing a contract made between the National Home for Disabled Volunteer Soldiers and an ex-soldier whereby the soldier, in exchange for admission to the Home, agreed to give all of his personal property to the Home at his death); *In re Estate of Horrigan*, 757 So.2d 165 (Miss. 1999)(enforcing a grandfather's promise to give his grandchildren realty in his will if they invested in various property improvements); *Exchange Nat. Bank of Tampa v. Bryan*, 165 So. 685 (Fla. 1936)(holding that decedent's agreement to pay a woman \$100 per month for his care while living and \$50,000 at his death was an enforceable contract); *Fishman v. Hopson*, 32 So.2d 913, 914 (Fla. 1947)(enforcing a promissory note of \$20,000.00 to be paid one day after the decedent's death in exchange for the plaintiff's agreement to "come into his home and care for him and treat him as a father"); *Hudson v. Hudson*, 701 So.2d 13 (Ala. Civ. App. 1997)(enforcing a decedent's agreement with his ex-wife to leave his estate to her and their four children).

these contractual rights honors the decedent's autonomy to contract just as it would honor a living person's contracting autonomy.⁴³

At other times, however, the decedent's autonomy is further restrained. Sometimes contracts do not have post-mortem provisions but merely remain unsatisfied at the death of the promisor or promisee. The general rule is that most of these contracts survive death.⁴⁴ Contracts that are personal in nature, however, end without further obligation at the death of the promisor because it is impossible to complete the contract.⁴⁵ The classic example of a personal contract involves art work. Assume that a patron hires an artist to create a landscape painting. If the artist dies before the painting can be completed, the patron cannot sue to enforce the terms of the contract.⁴⁶ This makes sense because no one except that artist can be expected to complete the job adequately because artists are generally hired for their unique talents and style. Interestingly, the death of the patron does not excuse his estate from paying the artist for the painting.⁴⁷ This is because the patron's estate can readily uphold his end of the bargain after his death. In fact, a simple promise to pay money almost always survives the death of the promisor and requires the estate's executor to pay the contracted for sum.⁴⁸ Under principles of autonomy this makes

⁴³ The autonomy of living persons is limited because they are unable to contract for things because the contracts will be void as a matter of public policy. The same limits apply to the dead. Additional constraints, such as impossibility, are placed on the dead.

⁴⁴ "It is a presumption of law, in the absence of express words, that the parties to a contract intend to bind, not only themselves, but their personal representative,' and this presumption extends not only to the obligation of contractual performance but the corresponding right to receive the consideration therefor [sic], where not personal in nature." *Estate of Traub*, 92 N.W.2d 480, 482 (Mich. 1958)(quoting Cardozo in *Buccini v. Paterno Const. Co.*, 170 N.E. 910, 912 (N.Y. 1930)(holding that a decedent's daughter and heir could collect damages from the estate of her aunt where the aunt had contracted with her father to will stock to him at her death but failed to do so and where the decedent had predeceased the aunt)(internal citations omitted). See also *Brearton v. DeWitt*, 170 N.E. 119 (N.Y. 1930)(holding that an agreement by the decedent to pay the plaintiff \$1,000 a month for the rest of her natural life if she submitted to his care may constitute a contract that could bind his estate providing that the consideration for the contract was legal). See generally, *Thomas Yates & Co. v. American Legion*, 370 So.2d 700 (Miss. 1979); and *Matter of Gaylord's Estate*, 552 P.2d 392 (Okla. 1976).

⁴⁵ 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:72 (2004)("Death cancels a personal services contract. Indeed, death does more than make a personal services contract impracticable, it makes performance itself impossible."), 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:70 (2004)("If, as both parties understand, the existence of a particular person is necessary for the performance of a duty ... the death of that person ... discharges the obligor's duty to render performance. [Furthermore, where] the obligor personally pledges to perform the duty, the obligor's death or incapacity results in objective impracticability as it is no longer practicable for anyone to perform the duty.")

Whether a contract is a personal services contract that terminates with the death of the promisor turns upon the fact specific determination of whether the contracted work can be completed by someone else. 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:72 (2004)(providing a list of contracts held to be personal services contracts that terminated upon the death of the promisor).

⁴⁶ 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:72 (2004)(If the artist was paid in advance to complete the portrait, the patron may be able to successfully sue for any unearned compensation).

⁴⁷ 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:76 (2004).

⁴⁸ See generally, *Hasemann v. Hasemann*, 203 N.W.2d 100 (Neb. 1972). A promisor can also be required to continue paying under a divorce settlement agreement with third party beneficiaries even if the wife dies. See *Shutt v. Butner*, 303 S.E.2d 399 (N.C. App. 1983)(finding that the defendant husband must comply with various

sense because the estate is capable of functioning as an accurate proxy, the law wants to honor the decedent's wishes, and the law wants to protect the interests of the living.

An examination of pre-mortem contracting highlights some interesting themes that seem to resonate throughout the law. For example, contract law distinguishes between personal services contracts and contracts for money. It also makes it clear that the dead not only have legal rights, but legal duties in a Hohfeldian sense.⁴⁹

Constitutional Examples of Impossibility

Another example of impossibility comes from several constitutional cases. While constitutional rights are generally some of the most important rights a person can have and perhaps should survive death for this reason, not all constitutional rights are recognized after death. The reason for this seems to be that the law considers the exercise of these rights impossible after death. Examples of this phenomenon include the right to vote and the right to marry.

Shortly after death, a person's name is removed from the list of registered voters, thereby ending that person's right to vote.⁵⁰ In many ways removing a decedent's name from the list of registered voters is common sense because it seems impossible for a decedent to form a preference for a particular candidate after he or she dies. The right to vote requires that the voter be competent, meaning that he or she must be able to exhibit some minimal level of cognitive functioning. Without this minimal level of cognitive functioning, a person is not able to form any preferences for candidates or the intent to fill out a ballot. The dead lack brain function and

provisions of a separation agreement entered into prior to his wife's death, including continued child support payments and an agreement to sell the family home and divide the proceeds). Palimony claims have also been successfully brought against a decedent's estate. *See In the Estate of Roccamonte*, 303 A.2d 838, 847 (N.J. 2002)(holding that a verbal contract to care for one's live-in unmarried partner is not a contract for personal services but a "contractual undertaking binding the estate like any other contractual commitment the decedent may have made in his lifetime").

⁴⁹ This paper does not explore the potential duties of a decedent. In addition to contractual obligations, the law requires the payment of estate tax for estates exceeding \$1.5 million dollars. 26 U.S.C.A. § 2001(a). The taxes are due nine months after the decedent dies. INTERNAL REVENUE SERVICE, FORM 706: GENERAL INSTRUCTIONS § D, available at <http://www.irs.gov/instructions/i706/ch01.html#d0e557> (last visited August 8, 2005). Many state statutes also require a decedent's estate to provide support for a surviving spouse by allowing for an elective share. *See e.g.*, ALA.CODE 1975 § 43-8-70 (2004)(providing that the surviving spouse has the right to take the lesser of "all of the estate of the deceased reduced by the value of the surviving spouse's separate estate" or "one-third of the estate") and 755 Ill. Comp. Stat. 5/2-8 (2005)(allowing a spouse to renounce a will and claim one-third of the estate if the testator leaves a descendant or one-half of the estate if the testator leaves no descendants). In these situations the decedent, with the estate acting as his proxy, has a duty to make certain payments because other parties, perhaps the government or a surviving spouse, have a claim-right against the decedent.

⁵⁰ Rules concerning the qualifications for voter registration are governed by state law. While state laws vary, most states have a mechanism for promptly removing a decedent's name from the list of registered voters. *See e.g.*, OHIO REV. CODE ANN. § 3503.18 (2004)(providing that "The chief health officer of each political subdivision and the director of health shall file with the board of elections, at least once each month, the names, dates of birth, dates of death, and residences of all persons, over eighteen years of age, who have died within each subdivision or within this state or another state, respectively, within such month. ... Upon receiving [this] report ... the board of elections shall promptly cancel registration of the elector.")

the ability to perceive the world around them, and therefore lack the ability to form preferences and the intent to cast a ballot. Put simply, the problem with posthumous voting rights is impossibility. A second form of impossibility is physical in nature. Even if the dead were able to form voting preferences while living that they wished to extend beyond the grave, it would be impossible for a decedent to show up at a voting center and cast a ballot or to fill out an absentee ballot and submit it. Given physical impossibility and lack of competency, however, it is still possible to imagine a series of hypotheticals in which extending voting rights to a decedent might seem possible if not practical.

A person could, theoretically, leave a will stating that he would like to vote Republican after his death. His will could instruct the administrator of his estate to cast his ballot every year for all Republicans running for office. As long as the provision did not violate the rule against perpetuities it would seem that the only reason for declaring this provision invalid would be some unspoken rule that the dead do not have voting rights. But why does this necessarily need to be true? If it honors other pre-mortem preferences after death, then perhaps the law should honor a decedent's voting preferences as well. The answer could be, as Jefferson once suggested, that we do not want the dead controlling or significantly influencing the lives of the living.⁵¹ But this already happens in many instances. Another answer might be that circumstances change over time and these changes are not experienced by the dead. Perhaps these political, social or economic changes might have affected the decedent's voting preferences if they were still living. But since the dead are unable to voice any potential preference change after death, the decedent's true intent may go unheeded. Recognizing stronger proxies, however, could counter this concern. If the decedent were allowed to choose a proxy to vote in his stead, perhaps a like-minded Republican, and if the decedent were further allowed to leave detailed instructions about his general political preferences (much like an advanced directive for politics), then one might think that the surrogate political decision-maker might properly honor the decedent's wishes regardless of changing circumstances. Yet another problem with posthumous voting rights might be that the dead do not have to live with the consequences of their decisions and so their preferences before death might be distorted in ways that have severe negative consequences for the living. This argument, in the end, seems to be what the law cares about the most. The law is willing to give the dead autonomy with limits and those limits tend to become more severe when the wishes of the dead conflict with the wishes of the living.

A more practical example might arise if someone dies the day before the election, but has already mailed in an absentee ballot several weeks prior to their death. Should this vote count? It seems that no examples of this scenario have been reported.⁵² But given the administrative hassle of catching these ballots before they are counted, it is reasonable to assume that the dead do occasionally vote. This means that some decedents are, by an accident of sorts, granted the right to vote. If the law cares most about the interests of the dead conflicting with the interests of

⁵¹“Can one generation bind another and all others in succession forever? I think not. The Creator has made the earth for the living, not for the dead. Rights and powers can only belong to persons, not to things, not to mere matter unendowed with will.” Thomas Jefferson to John Cartwright, 1824.

⁵² Most accounts of people voting after death center on stories of voting fraud. For a satirical commentary on the voting rights of the dead in St. Louis see Justice William W. Bedsworth, *Meet Me In St. Louis*, 43 Orange County Lawyer 44 (April 2001).

the living, though, this problem seems less troubling than one might imagine at first glance. First, the effect on the living is limited because there are probably very few votes that fall into this category. Furthermore, one does not have to worry about distorted preferences because the person was living when he or she voted and presumably thought they would live, even if for a short time, under the rule of the newly elected official.

The right to marry is another example of a right that seems to disappear at death. There is arguably a constitutional right to marry whom you choose in America.⁵³ The right to marry, however, does not extend to someone who is dead. The completion of vows necessary to enter into a legal marriage is physically impossible if someone is dead. Furthermore, marriages are voidable if one person is determined to have been mentally incompetent at the time of the marriage.⁵⁴ While the power to marry and the marriage itself end at death, some of the privileges of marriage continue beyond death. This is distinctly unlike the right to vote.

An examination of the posthumous privileges of marriage and the right to marry, in contrast to the right to vote, informs an understanding of why the law may recognize certain posthumous rights in some limited form while it completely abolishes others. The death of one spouse ends a marriage and the majority of the legal rights and responsibilities that accompany it. But not all of the legal perks and responsibilities of marriage end upon death. For example, some spouses can continue to file taxes jointly for three years after their spouse's death, thereby reaping the tax benefits of being married.⁵⁵ If a wage-earning spouse dies, the surviving spouse will continue to receive social security benefits even if they never worked a day in their life.⁵⁶ Furthermore, estates passing entirely to a spouse do not owe estate taxes at the time of the decedent's death.⁵⁷ While many of these measures benefit a surviving spouse, they also coincide with the decedent's presumed wishes, particularly the rule that allows the decedent's estate to avoid its tax obligations by leaving the entire estate to his or her spouse.

The right to marry and the right to vote are examples of two rights that do not survive death because they are impossibilities. But while both of these rights end at death, some marital

⁵³ This article does not attempt to enter into the debate of whether gay marriage is a constitutional right. The paper does recognize, however, that persons over eighteen are generally free to marry whom they choose. The government generally does not restrict marriages based on race, religion or age when the marriage is between two competent persons at least eighteen years old. *See Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁴ See *Moss v. Davis*, 794 A.2d 1288 (Del. Fam. Ct. 2001)(annulling a marriage because an elderly woman lacked the mental capacity to consent to the marriage where she was diagnosed with moderate Alzheimer's disease three months before the ceremony and it appeared that she had forgotten several times prior to the marriage that she was going to be married); *In re Estate of Acker*, 20 Fiduc.Rep.2d 358 (Pa. Ct. Com. Pl. 2000)(declaring a marriage void because of the mental condition of an elderly man and appointing his daughter to be his guardian).

⁵⁵ *See IRS Publication 559*.

⁵⁶ If a decedent is eligible for social security benefits at the time of death, his or her spouse will generally receive 75-100% of the decedent's retirement benefits even if the surviving spouse has never paid into the social security system. *Understanding The Benefits*, Social Security Administration Publication No. 05-10024, ICN 454930 (Jan. 2005).

⁵⁷ IRS, *Estate and Gift Taxes* at <http://www.irs.gov/businesses/small/article/0,,id=98968,00.html> (last visited October 16, 2005).

benefits survive death while none of the decedent's voting interests are legally recognized after death. The law treats these rights the same in that they end at death because the ability to cast a vote or say marriage vows is an impossibility. But the law treats some of the privileges of marriage differently after death. The reason for this distinction is the result of the differences between the right to marry and the right to vote.

Marriage and voting are different in very important ways. The institution of marriage supports some of the goals of a state. It allows for the creation of families and a support structure whereby the traditionally reliant members of the family unit, namely the mother and the children, are provided for financially by the male breadwinner. This type of family structure is beneficial to the state, perhaps relieving it of obligations to care for children without parents or unmarried women with children. When the institution of marriage ends due to death, traditionally of the male breadwinner and today of either spouse, the result could be disastrous for the state because it may be required to financially care for the survivors. To relieve itself of some of this potential responsibility, the state enacted laws aimed at doing primarily one of two things: carrying forward some of the benefits of marriage after the death of one spouse or creating obligations on the part of the decedent's estate so that the remaining spouse would not be left financially devastated. In this way the law is consciously choosing to extend some of the interests of marriage beyond death, but it does not choose to do the same for voting interests because the state burdens would actually lean in the other direction. There would be a negative effect on the living.

B. The right's importance

The second factor that courts consider is the importance of the right itself. Some rights are more important than others. For example, society generally views the right of bodily freedom as more important than the right to prevent trespassers from trampling the grass in one's yard. The relative importance of rights admittedly varies from person to person and from situation to situation, but there is some basic ordering of rights that most of us can agree on. Society has aggregated individual preferences through the mechanism of democracy in such a way that the law, in theory, should naturally reflect the ever-changing values of society. Rights that are valued as important are more closely guarded than rights that are seen as less important. This principle is true whether one is living or dead. For example, the law appears to protect some fundamental rights after death just as it would if the person were living. It is not surprising that these rights often happen to be constitutional rights. Free speech and reproductive autonomy are two examples of this principle at work. This section will address each of these in turn and then talk about the valuation of interests as it relates to whether a posthumous right should be recognized.

Free Speech

Free speech is a well-known, long-standing and clearly established constitutional right. Most relevant free speech cases involve a violation of a living person's free speech and a

subsequent filing of suit prior to that person's death.⁵⁸ Instead of dismissing the case as moot after the plaintiff's death because the claim is too personal or declaring that the estate lacks standing to pursue the claim, the courts carefully review these cases. It is interesting to ponder what compels the courts to review these cases when theoretically they could be dismissed as moot or for lack of standing, especially since the decedent can presumably no longer enjoy his free speech.

A Will Theorist would claim that courts are compelled to review free speech cases after the plaintiff's death because the cases raise issues that are important to the living. Free speech cases involve not just a violation of one person's right, but a violation of a constitutional principle which society holds dearly. Just because the champion of this particular case dies, that does not mean that society should be powerless to protect this sacred right. This, however, seems insincere. If the plaintiff's death means that the remaining free speech case is only about a violation of society's sacred ideals, we might expect the law to develop such that the public, perhaps in the form of a non-profit organization, would be granted standing to pursue constitutional claims on behalf of the public. Instead, courts allow these claims to be pursued by the decedent's estate.

While some courts have indeed suggested that free speech cases should be pursued after the death of the plaintiff because of the importance of the case, these courts have recognized that the claim being pursued is that of the individual plaintiff and not society.⁵⁹ Often these cases are pursued even in light of a small dollar amount, suggesting that the executor was acting on this claim solely for the benefit of the decedent and not for the benefit of any heirs.⁶⁰

The next interesting question, however, is whether an executor is legally obligated to pursue these sorts of claims. Often the courts simply substitute the name of the personal representative or executor of the estate for the decedent without much explanation.⁶¹ It is not

⁵⁸In *McIntyre v. Ohio Elections Commission*, for example, the United State Supreme Court held that a state statute prohibiting the anonymous distribution of campaign literature violated Mrs. McIntyre's freedom of speech guaranteed by the First Amendment. *McIntyre v. Ohio Elections Commission*, 514 U.S. 335 (1995).

⁵⁹In *McIntyre*, Justice Stevens, writing the majority opinion of the court, notes that "Mrs. McIntyre passed away during the pendency of this litigation. Even though the amount in controversy is only \$100 (this was the amount Mrs. McIntyre had been fined for violating the statute), petitioner, as the executor of her estate, has pursued *her* claim in this Court. Our grant of certiorari ... reflects our agreement with his appraisal of the importance of the question presented." *Id.* at 340 (emphasis added)(internal citations omitted). This language suggests that Mrs. McIntyre's First Amendment right to free speech, or at least her right to sue to protect her right to free speech, survived her death. Her First Amendment right to free speech was not transferable to the estate as the dollar amount was. It was a personal right, but it continued after death. Her executor, knowing that she would have wanted this claim pursued, continued the claim even though the dollar amount in controversy did not make pursuing the case a financially wise decision.

⁶⁰ See footnote 28. In this particular case the executor of the estate was the decedent's husband, who was also most likely the primary beneficiary of the estate. In cases where the executor is not the beneficiary, it would seem that it might violate the executor's fiduciary duties to the heirs if he or she were to continue to pursue such a small dollar amount claim at the expense of enormous legal fees. I have not yet found a case exploring this potential aspect.

⁶¹ For example, in *Royer v. City of Oak Grove*, 374 F.3d 685 (8th Cir. 2004), the wife of the decedent, as personal representative of his estate, was allowed to continue an action by the decedent against the City of Oak Grove, Missouri in which the decedent alleged that the city interfered with "his First Amendment freedom of association

clear if the representative wanted to continue the suit or the representative was forced to continue the suit. It is reasonable to assume in most cases that the representative continues a suit either because he or she has a personal interest in the suit (for example, they are the spouse of the decedent) or because there is some financial benefit to the estate that the executor must pursue in order to fulfill his fiduciary responsibilities.

Reproductive Autonomy

Another example is the constitutional right to reproductive autonomy. Reproductive autonomy is a fundamental constitutional right guaranteed to American citizens under the United States Constitution. It generally includes the right to procreate, the right to purchase and use contraceptives and the right to abortion.⁶² In recent years technological advances in reproductive technology have made posthumous reproduction possible. As a result, all sorts of previously unimaginable situations have arisen. Two of the most relevant and prevalent types of posthumous reproduction cases involve the use of frozen sperm after the donor's death and the birth of babies to brain dead women. Each of these issues is discussed in turn.

Generally cases involving posthumous reproduction with the use of frozen sperm fall into one of two categories, those where the potential use of the frozen sperm is in dispute and those where the benefits for the children created as a result of posthumous conception are at issue. In both sorts of cases, courts have held that a decedent has a reproductive autonomy interest in how his or her gametes are used after death.⁶³ But posthumous conception is only allowed where there is a clear intent on the part of the decedent to reproduce posthumously.⁶⁴ Additionally, the children that result from posthumous conception are only recognized as heirs entitled to benefits where the deceased parent's intent to reproduce posthumously is clear.⁶⁵ If a decedent fails to call for a specific disposition of his or her genetic material, the decedent's gametes or embryos are generally destroyed. Alternatively, if the decedent has specifically provided that his sperm

rights, his Fourteenth Amendment due process rights and his free access to the courts." *Id.* at 686. These allegations stemmed from a city order that banned Royer, President of several not-for-profit organizations, from entering a city building that housed one of his organizations while a city employee that he had allegedly sexually harassed was working there. *Id.* at 687. The Eighth Circuit Court of Appeals says nothing about the rights of someone who is dead, but simply notes that Mr. Royer died after he filed this suit and that his wife, as the representative of his estate, was substituted as the plaintiff after his death. *Id.* at 686 (fn1).

⁶² ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997).

⁶³ See *Woodward v. Comm. Of Soc. Security*, 760 N.E.2d 257 (Mass. 2002)(holding that posthumously conceived children could obtain Social Security benefits if the mother could establish a genetic link between the father and children and finding that the deceased father's reproductive rights should be respected when determining whether children born two years after his death using frozen sperm should be declared his heirs) and *Hecht v. Superior Court*, 20 Cal.Rptr.2d 275 (Cal. Ct. App. 1993).

⁶⁴ *Hecht v. Superior Court*, 20 Cal.Rptr.2d 275 (Cal. Ct. App. 1993).

⁶⁵ In *Woodward*, the court held that "a decedent's silence, or his equivocal indications of a desire to parent posthumously, 'ought not to be construed as consent.' The prospective donor parent must clearly and unequivocally consent not only to posthumous reproduction but also to the support of any resulting child." *Woodward v. Comm. Of Soc. Security*, 760 N.E.2d at 552.

be used to conceive children after his death, his wishes are honored even if his next of kin object.⁶⁶

The emphasis on intent in the frozen sperm cases raises some interesting problems. In *Hecht v. Superior Court*, the case was easy because the decedent's intent to reproduce posthumously was clear. The court wrote:

From decedent's clear expressions of intent, it is apparent he created these vials of sperm for one purpose, to produce a child with this woman. Not to produce a child with any other specific woman or with an anonymous female. Not to produce a descendant with any other genetic makeup than would result from a combination of his sperm and this woman's ovum. Even Hecht lacks the legal entitlement to give, sell, or otherwise dispose of decedent's sperm. She and she alone can use it. Even she cannot allow its use by other, if the law is to honor the decedent's clearly expressed intent. . . . [T]he decedent's right to procreate with woman he chooses cannot be defeated by some contract third persons—including his chosen donee—construct and sign. His 'fundamental right' must be 'jealously guarded.' It is true the chosen donee may voluntarily elect not to become impregnated with the decedent's sperm. But she may not sell or contract away the decedent's 'fundamental right' to other persons.⁶⁷

But the intent to reproduce may not always be written and clear. Assume for example a situation where a man afflicted with cancer and his wife go to the sperm bank to deposit his sperm prior to his receiving radiation treatment. During his treatment he dies. A year later his wife wishes to conceive and goes to the sperm bank to retrieve his sperm. The sperm bank has lost the document evidencing the decedent's intent that his sperm be used after his death and there are no other written records of his intent. The decedent's wife enters into a dispute with the decedent's children from a first marriage about the disposition of the sperm. The court could decide that the man's action of going to the sperm bank with his wife evidenced a clear intent to procreate with her, but given the language in *Hecht* and *Woodward*, chances are good that the court will rule the other way. In doing so, the court is focusing on the decedent's intent, much like it might do in cases involving end of life decision making and will interpretation. But, while focusing on intent, the court is also creating a very strict default rule that does not appear in similar situations. In the end of life decision making situation, the court will switch to a best interests test absent any evidence of the decedent's intent.⁶⁸ If the will does not express a clear intent, the court will attempt to determine the decedent's intent, and if necessary place the particular asset in

⁶⁶ *Hecht v. Superior Court*, 20 Cal.Rptr.2d 275 (Cal. Ct. App. 1993)(quoting a French court that had addressed this issue: "The court . . . characteriz[ed] sperm instead as 'the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive.' This fundamental right must be jealously protected, and is not to be subjected to the rules of contracts. Rather the fate of the sperm must be decided by the person from whom it is drawn. Therefore, the sole issue becomes that of intent.")

⁶⁷ *Hecht v. Superior Court*, 59 Cal.Rptr.2d 222, 226 (Cal. Ct. App. 1996)(partial opinion)(the California Supreme Court denied review of this decision and simultaneously ordered that it not be officially published).

⁶⁸ Generally this means that the court will keep the patient alive as long as the doctors feel that care is appropriate.

question in the bulk of the estate to be distributed among the heirs. But courts more “jealously guard” a decedent’s right to reproductive autonomy.⁶⁹

Questions about reproductive autonomy also arise in cases involving maternal brain death. In situations where there is maternal brain death, brain dead pregnant women are often “kept alive” by life support until the fetus is old enough to be delivered.⁷⁰ Persons in this state are dead but retain cardiopulmonary function and appear to be breathing, although with the help of machinery. Sometimes these cases do not appear to present any serious ethical or legal concerns because the woman has voiced her desire to have her child born no matter what the physical, emotional or financial cost to her. Imagine, however, a woman with an advanced directive that specifically rejects life support. In these situations a decision must be made between honoring a competent adult’s advance directive and trying to save the fetus. Various state statutes, often based on the Uniform Rights of the Terminally Ill Act or the Uniform Health-Care Decisions Act, invalidate a woman’s advanced directive if she is determined to be pregnant.⁷¹ These statutes override a woman’s advanced directive if she is pregnant because the law assumes that the woman would have wanted to be kept alive had she anticipated her pregnancy status. As a result, her intent, as expressed in her advanced directive, not to be kept on life support is ignored. But in *Hecht* and *Woodward*, the court suggests that intent is vital in the posthumous conception context. Why is the law so willing to presume intent in the maternal brain death context, but not in the paternal posthumous conception context?

One way to analyze this problem is by using the principle of autonomy.⁷² Under this analysis, the law is using a substituted judgment standard in the maternal brain death case. The rationale for the substituted judgment standard is that a woman’s circumstances have changed so drastically in ways that she could not have anticipated that the law, using the principle of autonomy, decides the case in favor of what she *would have wanted* had she foreseen these particular circumstances. In the posthumous conception cases, the court refuses to use a substituted judgment standard. Instead it focuses solely on the man’s explicitly expressed intent. While the outcomes are different in these cases, both situations apply principles of autonomy, albeit in different ways. One could speculate why they are treated differently and develop a series of rationales for these differences, but there is something more interesting going on that is consistent across both cases.

In both cases, the law assumes that the dead are autonomous, that they have the ability to make decisions about what happens to them and their bodies after their death. But when the courts are suspect of the result a decedent’s decisions might create, as in the case of the brain

⁶⁹ Arguably, this may have more to do with judges’ general value judgment that children should not be born into the world without a father than it has to do with the decedent’s reproductive liberty.

⁷⁰ See Associated Press, “Woman on Life Support Gives Birth” at <http://www.cnn.com/2005/HEALTH/08/02/brain.dead.pregnancy.ap/> (reporting that a brain dead woman named Susan Torres was kept on life support for almost three months until her fetus could be delivered)(last visited August 8, 2005).

⁷¹ See e.g., Natural Death Act, KAN. STAT. ANN. § 65-28,103 (2004); Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, OKLA. STAT. ANN. Tit. 63, § 3101.4 (West 2005); and TEX. HEALTH & SAFETY CODE ANN. § 166.033 (West 2005).

⁷² Sexism is another way to explain this disjunction.

dead pregnant woman with an advanced directive, courts create a way to circumscribe a decedent's true intent. The law places limitations on the woman's autonomy because it dislikes the end result. While the law may also dislike the result of a living woman's autonomy, it is much more difficult to justify a law that limits the autonomy of the living than it is to justify a law that limits the autonomy of the dead. Why is this the case?

Feinberg's work suggests that the severity of harm done to an individual interest can vary depending on whether the individual is living or dead. He acknowledges that if someone's reputation is slandered after his death, the decedent does not suffer the same embarrassment and distress that he might while living, but the harm to reputation, the harm to family and the economic harm may be substantially the same regardless of whether a person is living or dead.⁷³ A corollary to this thinking suggests then, that while an interest in reputation survives death, it may be a less strong interest than that individual had in his reputation while he was alive. The exact same interest, for example a businessman's interest in his reputation, has a higher value to that businessman the instant before his unexpected death than the instant after his death. Before his death, a harm to his reputation, perhaps an untrue rumor that he cheated on a business deal three months earlier, might cost the man embarrassment and anger, harm to his family, harm to his reputation itself, and economic harm. All of these harms add up to create a certain cost to his reputation. After his death, however, the man cannot suffer embarrassment and anger. This reduces the harm to him. Correspondingly, it makes the man's interest in his reputation less important after death and perhaps less deserving of recognition as a legal right. Generally speaking, the expected decrease in the importance of an interest the moment after death is most likely tied to the emotional cost of losing that interest while alive. Sometimes this decrease in the value of an interest after death (even if the interest survives death) is enough to prevent the law from recognizing that particular posthumous right.

Valuing an Interest After Death: Is the Interest Valuable Enough to Deserve Legal Protection?

It appears that an interest's decrease in value after death may be greater if the right is more personal in nature. For example, if the emotional distress or harm to a person is seen as significant to the granting of a particular legal right, then we might expect that right to die with the decedent. In fact, the cases surveyed in this paper suggest that the more personal a right is, the more likely it is to die with the person. This is the basis for the Latin maxim "Actio Personalis moritur cum persona."⁷⁴ The rationale for this principle seems to be that once the victim (or under English common law the tortfeasor as well) dies, there is no one to compensate for the harm done (or conversely there is no one to punish for the harm done). To compensate an estate or to punish an estate did not seem important because a substantial portion of the interest's value resided with the decedent.

In recent years, however, this principle seems to be losing strength. Some of this change may have to do with society's morphing views on mortality and some of it may have to do with

⁷³ See e.g., Joel Feinberg, *Harm and Self-Interest*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 45, 65-68 (1980).

⁷⁴ "Actio Personalis moritur cum persona" means "personal actions die with the person."

technological advancements.⁷⁵ As health has improved throughout the world, and particularly in the West, society's views on death have changed. During the migration West, early Americans viewed death as a common and expected event. Death was more accepted than it is now. Given this, it makes sense that causes of action would die with decedents. Today, however, society fears its own mortality and the creation of posthumous rights may simply be one way to avoid this certainty. Changes in the rights of the dead also seem to be related to technological advancements. With the growing use of railroads, wrongful death statutes came into being.⁷⁶ The inventions of radio and television gave birth to the right of publicity in 1953 or 1954⁷⁷ and eventually led to the creation of a posthumous right of publicity as early as the mid-1970s.⁷⁸ The growth of assisted reproductive technologies in the 1970s, 80s and 90s probably factored into judicial decisions to recognize a posthumous right to reproductive autonomy in the 1990s.⁷⁹ These are all examples of rights once considered so personal in nature that they died with the decedent.

Similar to other tort claims, the common law did not allow rights of privacy and reputation to survive death.⁸⁰ Therefore claims for defamation and the right of publicity died with the person who held them. Recently some states have begun to recognize the descendability of these rights and to allow the estate to recover for claims that would previously have been lost. Unlike wrongful death and survival statutes, however, the ability of the dead to enforce these rights is less recognized, leading to an interesting dichotomy of privacy rights. Perhaps this dichotomy has something to do with the personal nature of the right.

The right of publicity "is the inherent right of every human being to control the commercial use of his or her identity."⁸¹ Like other privacy rights, the right of publicity traditionally died with the decedent and estates were not allowed to bring suit to recover for the unauthorized use of the decedent's likeness. Some states, however, have created a statutory right of posthumous publicity.⁸²

⁷⁵ Additional papers could be written on each of these theories. Since this paper is meant to provide a broad overview of the topic, each is briefly addressed here.

⁷⁶ T. A. Smedley, *Wrongful Death- Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

⁷⁷ 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §1:4 (2d. ed. 2005).

⁷⁸ 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §9:5 (2d. ed. 2005).

⁷⁹ While artificial insemination has been around for over one hundred years, technological advancements in gamete storage, in vitro fertilization and other advanced reproductive technologies have led to the realization that it may become relatively common for children to be born after the death of at least one of their genetic parents.

⁸⁰ Restatement Second of Torts, Sec. 652I.

⁸¹ 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §1:3 (2d. ed. 2005).

⁸² See *Montgomery v. Montgomery*, 60 S.W.3d 524, 527 -528 (Ky 2001)(applying Kentucky's posthumous right of publicity statute). See also William A. Drennan, *Will, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 Ark. L. Rev. 43, Exh. II (2005)(listing California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Tennessee, Texas, Utah and Virginia as states that recognize a descendible right to publicity).

In these states the duration of that right varies from ten years to one hundred years (although at least one state statute could be interpreted to allow a posthumous right of publicity to endure forever).⁸³ The majority of states recognizing explicit durations of publicity rights provide for a duration of forty to one hundred years.⁸⁴ This suggests that certain rights of the dead have an expiration date. The wide variety of the time limits, however, suggests that determining the appropriate time limit for a descendible right of publicity is not easy.

In contrast, however, no action lies for defamation⁸⁵ of the dead.⁸⁶ “There is no common law right of action for defamation of a deceased person. Thus, the defamation of a deceased person generally does not give rise to a right of action at common law in favor of the surviving spouse, family, or relatives who are not defamed. However, in some jurisdictions, a libel action by a parent or close relative of a deceased person may be actionable if it is shown that the libel was published about or concerning them or that the defendant had the intention of injuring the relative and was aware of the relative’s relationship to the person defamed.”⁸⁷ Given these rules it appears that the law sometimes allows estates to sue on behalf of the decedent when their likeness is misappropriated, but not when someone spreads horrible rumors about them.

At first glance, the reason for this distinction seems puzzling. The protection of someone’s likeness and reputation would seem to be equally important. Some scholars have hypothesized that courts are treating the right of publicity as a property right.⁸⁸ If this is true then perhaps the courts have reconsidered the right of publicity rules because of the potential commercial value involved. It would make sense to reason that a rock star’s likeness should be able to garner royalties to the same extent as his songs. But the flaw in this logic is that the rock star’s reputation is equally, if not more, valuable than the use of his likeness.⁸⁹ Perhaps, therefore, the distinction arises because one’s reputation is more personal in nature than the use of one’s likeness. While rights of publicity and perhaps wrongful death can have true economic consequences for the decedent’s survivors, defamation will not. Therefore, defamation remains

⁸³ See William A. Drennan, *Will, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 Ark. L. Rev. 43, Exh. II (2005)(listing the duration of the posthumous rights of publicity as follows: California (70 years), Florida (40 years), Illinois (50 years), Indiana (100 years), Kentucky (50 years), Massachusetts (no indication), Nebraska (no indication), Nevada (50 years), New York (no indication), Ohio (60 years), Oklahoma (100 years), Tennessee (10 years, but potentially forever), Texas (50 years), Utah (no indication) and Virginia (20 years)).

⁸⁴ *Id.*

⁸⁵ Defamation by writing or contemporary communications such as movies is libel and defamation communicated orally is slander. DAN B. DOBBS, *THE LAW OF TORTS* 1120 (West 2000).

⁸⁶ DAN B. DOBBS, *THE LAW OF TORTS* 1139-40 (West 2000)(writing that “neither the estate of the deceased person nor her relatives can recover”). Some states do, however, allow the survival of claims that accrued while the plaintiff was living. *Id.* at 1140. This depends on each states’ survival statute.

⁸⁷ Am.Jur.2d Libel and Slander §356.

⁸⁸ ___ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §___ (2d. ed. 2005).

⁸⁹ If the rock star’s image is defamed after his death, it follows that the commercial value of his likeness and his songs might plummet. The estate would theoretically not be able to recover for the financial loss attributable to the defamatory statement.

solely a personal action that can only hurt feelings and not have true negative economic implications.⁹⁰

C. Time

The passage of time is the third, and probably one of the most important factors that courts consider in examining the rights of the dead. In most instances, the rights of the dead are time-limited. The longer a decedent has been dead, the less likely a court is to extend a certain right to him or her. This is because a decedent's interests decrease over time, while the interests of a living person can increase or decrease over time.⁹¹

It makes sense that the interests of the dead, and therefore their corresponding rights, would decrease over time. First of all, the interests of the dead can never increase over time. For one's interest in a particular thing to increase over time, that person has to be consciously aware so that his or her preferences can be reordered. Absent the cognitive ability to reorder preferences, an interest can only remain stagnant or decrease because the decedent can never again be consciously aware of all of the interests he or she has.⁹² Furthermore, the ties of the dead to the living decrease with time. Consider the things that might keep a decedent's interests alive: his written instructions found in letters, his will, books, contracts, and the memories that living people have of his desires. The overall value of a decedent's interests decreases with time as friends and family members die, as memories fade, and as once-strong connections to the decedent become more tenuous.⁹³ But this is not just a matter of philosophical reasoning. The law bears out this principle. Take, for example, the time limits on the posthumous right of publicity. Most states recognizing a posthumous right of publicity limit the time of the right, suggesting that the law thinks that the rights of the dead should be time-limited.

⁹⁰ I doubt this third possibility because it seems to me that defamation, particularly if the decedent had a business that survives his death, can have some economic consequences.

⁹¹ Interests of the living can increase or decrease over time. Consider for example two interests, the desire to see one's offspring flourish and the desire to be athletically superior. When a man is a small child his interest in seeing his offspring flourish might be quite small because he does not have children. His interest in being athletically superior to his classmates, however, might be very great. After his children are born, however, his interest in seeing his children flourish will likely grow stronger, while his desire to be athletically superior to his friends may have waned.

⁹² A clever person might argue that a deceased person's interests might increase in value if a once-forgotten public figure is jettisoned to the spotlight by a fabulously written historical text, thereby revealing his interest in the flourishing of his offspring. Or perhaps the value of the deceased's interests might increase by virtue of societal change. For example, an environmentalist who died in the 1960s and had an interest in preserving the environment might see an increase in the value of the interest today because environmentalism has increased in popularity. Both of these suggestions, however, must fail. The first fails because that person's interest in the flourishing of his offspring is now simply a historical fact. The deceased's offspring have either flourished or failed, and they have probably produced or failed to produce offspring of their own. Simply because the historical fact of the decedent's interest has been revealed, that does not mean that it becomes more valuable and therefore something that the law should step in to protect. Similarly, the value in the environmentalist's interest in protecting society has not increased. While *society's* interest in this topic may have increased in value (because society has reconsidered the ranking of its interests and made environmentalism more important), that does not mean the individual decedent's interest has increased in value.

⁹³ This concept is similar to the notion of social personhood.

D. Conflicts of interest between the living and the dead

The final and perhaps most confounding factor in determining whether the dead should have a particular right arises when there is a conflict between the interests of the living and the interests of the dead. There appears to be an unspoken balancing test that helps courts determine when the dead should not have rights. Consider for example the case of a woman who wants her house destroyed after her death, much to the chagrin of her neighbors.⁹⁴ This case, when taken to court, would result in the decedent's right to dispose of her property being overridden by the rights of the living neighbors not to have an open lot in their neighborhood.⁹⁵ Many might think that this is the proper outcome even though it overrides the decedent's autonomy.⁹⁶ But in other situations, succumbing to the wishes of the living seems ridiculous. Consider the family who prevents an organ donation desired by their deceased loved one because they cannot stand the thought of the loved one being cut up.⁹⁷ While a focus on the principle of autonomy would solve the last problem in favor of the decedent's wishes, it also raises another series of questions. If the courts are relying on the principle of autonomy in deciding whether the dead have posthumous rights, when do society's interests become strong enough to override the decedent's autonomy even if they would not be strong enough to override a living person's autonomy? This section will analyze situations where the rights of the living seem to conflict with the rights of the dead. In particular, it will look at limits on testamentary powers, posthumous medical privacy and pre-mortem contracting.

Limits on Testamentary Powers

The conflict between the living and the dead is most pronounced in trusts and estates where the law sometimes imposes limits on testamentary powers. The following paragraphs provide some examples of where the wishes of the dead conflict with the wishes of the living. Primarily these conflicts occur because the wishes of the dead impose some restraint or burden on the living benefactor. In almost all cases some family member views the distribution as unreasonable and in conflict with the desires of the living.

Generally, the law does not care if the testator's distribution of his or her assets seems unfair. For years, courts have held that "the right of an individual to dispose of his property as he sees fit is a sacred right, and even though he may make what others might think was an unequal or unjust disposition of his property, or give nothing to some or all of those who are regarded as naturally entitled to his bounty, the courts must not interfere when it appears that he knew what he was doing."⁹⁸ There is no such thing as a legal right in any relative, other than the

⁹⁴ *Eyerman v. Mercantile Trust Co., N.A.*, 524 S.W.2d 210 (Mo. Ct. App. 1975).

⁹⁵ *Id.*

⁹⁶ But others do not. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L. J. 781 (2005).

⁹⁷ While following the wishes of family members is common practice, no doctor, hospital or organ procurement operation has ever been successfully sued for taking the organs of a deceased person where that person signed an organ donor card even where the family vehemently opposed the organ donation. N.D. Law Review article.

⁹⁸ 6 Am. Jur., Pof 2d 95

surviving spouse, to the testator's bounty.⁹⁹ A testator may generally exclude his child or children from sharing in his estate by devising all of his property to others by a will executed in compliance with the law.¹⁰⁰ Furthermore; a testator may arbitrarily give a greater share of his estate to one child than to another.

Forcing a beneficiary to fulfill a certain condition as a prerequisite of collecting an inheritance shows the ultimate exercise of property rights from beyond the grave, rivaled only, perhaps, by the right to destroy. Examples of conditional bequests abound. Sometimes decedents condition the transfer of property on the marriage of a child to someone of a particular religion or ethnicity. In most cases courts have upheld these partial restraints on marriage, finding that “a man’s prejudices are part of his liberty.”¹⁰¹ In *Estate of Keffalas*, the court held that a bequest to the decedents’ three eldest unmarried sons was valid even though it was conditioned each of them marrying someone of “true Greek blood and descent and of Orthodox religion.”¹⁰² This bequest necessarily sets up a conflict between the decedent’s right to freely bequeath his property and the right of his sons to marry partners of their choosing. In *Estate of Keffalas*, the court chose the decedent’s rights over the living children’s rights so long as the bequest did not promote divorce (which then involved questions of state interest). Even though

⁹⁹ *In re Estate of Heller*, 233 Iowa 1356, 11 NW2d 586. *See also*, Rees, American Wills Statutes, 46 VA L REV 856; Bordwell, The Statute Law of Wills, 14 IOWA L REV 172.

¹⁰⁰ “Where the testator does not expressly disinherit a child yet fails to provide for that child in his will, a question arises as to whether such failure was intentional. If the failure to mention the child is found to be intentional, he may be disinherited as effectively as if the testator had included a provision in the will specifically disinheriting the child. If the omission is found to be unintentional, as where the child was forgotten or overlooked, the child may inherit his intestate share of the estate . . . under the applicable pretermisssion statute. . . . The object of the pretermisssion statutes is to provide protection for an omitted heir and to guard against inadvertent, mistaken or unintentional disinheritance. They are not designed to regulate, control or diminish the testator's power to make a disposition of his property, or to compel him to make provision for any of his children. Pretermisssion statutes have generally been enacted on the theory that a testator who neither provided for his children, nor expressly indicated his intention to disinherit them, must have failed to provide for them through inadvertence, and his probable intention could best be carried out by giving the omitted child the share he would have received had the testator died intestate. The statutes tend to reverse the general rule that a testator is presumed to know the contents of his will and to intend the effect thereof. Where the child is expressly named in a disinheriting provision in the will, specifically identified by the language of the will, or described in the will as a child or an heir, the pretermisssion statute does not apply and the child will not share in the testator's estate.” Am. Jur., Pof. 2d 95 (internal citations omitted).

¹⁰¹ “There is no doubt that ‘a man’s prejudices are part of his liberty,’ *King’s Estate*, supra, and we have so held in not striking down the marriage conditions as violative of freedom of religion. Yet the liberty of prejudice cannot transgress the interests of the Commonwealth. When a disposition tends to lead to divorce, as this one does, despite the relatively small amounts involved, then it is void.” *Estate of Keffalas*, 233 A.2d 248, 250 (Pa. 1967)(holding that a bequest conditioned on a child remarrying a person of certain nationality and religion were invalid because it encouraged divorce, but that a bequest conditioned on unmarried children marrying a person of a certain nationality and religion were valid conditions). *See also Taylor v. Rapp*. 124 S.E.2d 271 (Ga. 1962)(Upholding as valid a will provision that disinherited decedent’s daughter if she married a specifically named person). *But see* Restatement, Second, of Property § 6.2, illus. 1 (condition invalid where the beneficiary was already engaged to the specified individual) and § 6.2, illus. 3 (condition invalid where the beneficiary was unlikely to marry someone of the designated religion).

¹⁰² *Estate of Keffalas*, 233 A.2d 248 (Pa. 1967).

the right to marry is a constitutional right, courts have not treated conditional bequests as restraints on the living's constitutional rights.¹⁰³

Testamentary distributions conditioned on religious requirements are also generally valid,¹⁰⁴ as are conditions that the beneficiary retain the family name¹⁰⁵ or spell the family name in a particular way and refrain from using tobacco and liquor.¹⁰⁶ The validity of these restrictions show that while a conflict between the living and the dead will sometimes result in the withholding of posthumous rights, courts generally honor a decedent's wishes. In most cases of testamentary power, autonomy seems to rule.

Courts have only withdrawn from this principle in instances where it appears that the living are suffering a great hardship or the granting of a posthumous right appears to be extraordinarily wasteful. In these instances, the law appears prepared to limit a decedent's autonomy. For example, the law limits a testator's ability to destroy valuable pieces of art, manuscripts, and property upon his or her death.¹⁰⁷ Sometimes, a provision in a testator's will destroying property is held to be invalid as against public policy.¹⁰⁸ In these cases certain state

¹⁰³ “[T]he right to marry is constitutionally protected from restrictive state legislative action. . . . Plaintiff contends that a judgment of this court upholding the condition restricting marriage would, under *Shelley v. Kraemer*, constitute state action prohibited by the Fourteenth Amendment as much as a state statute. [But in this case], this court is not being asked to enforce any restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance. If the facts and circumstances of this case were such that the aid of this court were sought to enjoin Daniel's marrying a non-Jewish girl, then the doctrine of *Shelley v. Kraemer* would be applicable, but not, it is believed, upon the facts as they are.” *Shapira v. Union Nat. Bank*, 315 N.E.2d 825, 827-28 (Ohio Com.Pl. 1974).

¹⁰⁴ *In Re Laning's Estate*, 339 A.2d 520 (Pa. 1975)(holding that a provision requiring the beneficiary to become a member of the Presbyterian church before inheriting is not invalid because a person may peacefully persuade others to convert); *In Re Kempf's Will*, 252 A.D. 28 (N.Y. App. Div. 1937)(holding that it is not against public policy for a testator to condition the disposition of his property on the requirement that the beneficiary comply with religious observances). *But See* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* § 3.10 (3d ed. 2004)(stating that certain conditions will not be upheld where it is difficult to determine if the condition has been met).

¹⁰⁵ *National Bank of Commerce v. Greenberg*, 258 S.W.2d 765 (Tenn. 1953).

¹⁰⁶ *Holmes v. Conn. Trust & Safe Deposit Co.*, 103 A. 640 (Conn. 1918).

¹⁰⁷ *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L. J.* 781 (2005) for an excellent discussion on the right to destroy property.

¹⁰⁸ *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975)(holding that a will provision calling for the razing of the testator's home after her death was invalid because it was unexplained, capricious, and harmful to the decedent's neighbors.) There are a few principles at play in this case. The first is that “the taking of property by inheritance or will is not an absolute or natural right by one created by the laws of the sovereign power.” *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 214 (Mo. Ct. App. 1975). This is an interesting quote for two reasons. First, it confirms that the right to own property is one that does not exist in the natural order of things, it is a state-created right. What rights the state has given its members, it can take away or restrict. Second, the quote says that a decedent's property rights can be limited in ways that the property rights of the living cannot. A decedent's property rights can be limited by other living people if the decedent's interests conflict severely enough with the interests of the living. “A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society. It is clear that property owners in the neighborhood of # 4 Kingsbury, the St. Louis community as a whole and the beneficiaries of testatrix's estate will be severely injured should the provision of the will be followed. No benefits are present to balance against this injury and we hold that

interests trump a decedent's right to act in a certain way even though a similarly situated living person may be allowed to destroy property or set up ridiculous restrictions on gifts of money. One reason for these limits is the courts' belief that there are few, if any, restraints on the decedent's destructive desires.¹⁰⁹ A lack of consequences seems to be another reason for restricting a decedent's autonomy.

*Postmortem Medical Confidentiality*¹¹⁰

Postmortem medical confidentiality is another area where the rights of the dead often come into conflict with the rights of the living. While postmortem medical confidentiality exists, it is much narrower than the privacy protections guaranteed to the living.¹¹¹

Access to patient medical records, whether living or dead, is restricted under both state and federal law. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") provides a set of federal guidelines for use and distribution of individual medical information.¹¹² HIPAA controls the use of medical information except when state law is more protective of an individual's privacy than HIPAA. In these instances, the more restrictive state law trumps HIPAA. Under HIPAA only covered entities, business associates and persons seeking medical information for lawful purposes are allowed to have access to a living, competent patient's medical records. Even a spouse is not entitled to see his or her spouse's medical record. Furthermore, physicians have a legal duty to keep medical information confidential. Physicians violating this duty can be found liable in tort under both common law doctrine and varying state statutes. Some courts have also found that people have a constitutional right to keeping medical information private.¹¹³ Most states, however, relieve physicians from liability for informing certain at-risk people that someone has HIV.¹¹⁴

to allow the condition in the will would be in violation of the public policy of this state." *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975).

¹⁰⁹ "While living a person may manage, use or dispose of his money or property with fewer restraints than a decedent by will. One is generally restrained from wasteful expenditure or destructive inclinations by the natural desire to enjoy his property or to accumulate it during his lifetime. Such considerations however have not tempered the extravagance or eccentricity of the testamentary disposition here on which there is no check except the courts." *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 215 (Mo. Ct. App. 1975).

¹¹⁰ This sub-section is particularly concerned with medical privacy of decedents and not with other forms of postmortem confidentiality.

¹¹¹ Even if postmortem protections do exist they are sometimes violated accidentally. For example, the accidental release of Dr. Atkins' death certificate fueled suspicions that the famous creator of the Atkins diet, who died after he sustained head injuries from a fall on icy Manhattan street, may have fallen after suffering a heart attack. See <http://www.thesmokinggun.com/archive/atkinsmed1.html> (last visited June 14, 2005).

¹¹² The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 et. seq. (1997) and 45 C.F.R. §§ 160, 162 & 164. For additional information regarding the interpretation of the regulations, go to the website for the Office for Civil Rights, <http://www.hhs.gov/ocr/hipaa/> (last visited Aug. 8, 2005).

¹¹³ See e.g., *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994)(holding that persons infected with HIV have a constitutional right to privacy regarding their condition).

¹¹⁴ See 410 ILL. COMP. STAT. 305/9 (Allowing a physician in Illinois to notify a spouse if "the test result is positive and has been confirmed . . . provided that the physician has first sought unsuccessfully to persuade the patient to

After death, however, the confidentiality rules are relaxed. Generally, the next of kin or the personal representative of the estate is entitled to the deceased person's full medical record. If there are any restrictions on obtaining records after a person's death, they vary widely by state. This is because HIPAA provides virtually no guidance when it comes to postmortem confidentiality.¹¹⁵ Therefore, the majority of postmortem protections arise under state law.

State laws relating to the release of vital records, such as birth,¹¹⁶ marriage,¹¹⁷ and death¹¹⁸ certificates, often restrict who can obtain a copy of these records.¹¹⁹ States give several reasons for promulgating these laws, the most common of which include concerns about identity theft and the privacy of the citizens whose records might be requested. While the concerns about identity theft seem to support the living theory of posthumous rights, these concerns can be alleviated by measures that combat identity theft without necessarily protecting the privacy of

notify the spouse or that, a reasonable time after the patient has agreed to make the notification, the physician has reason to believe that the patient has not provided the notification. This paragraph shall not create a duty or obligation under which a physician must notify the spouse . . ."). See also CAL. HEALTH & SAFETY CODE § 121015 (West 2004)(Allowing disclosure under similar circumstances to "a person reasonably believed to be the spouse, or to a person reasonably believed to be a sexual partner or a person with whom the patient has shared the use of hypodermic needles").

¹¹⁵ See Jessica Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 34 CONN. L. REV. 81, 86 (Fall 2001)(reporting that the proposed HIPAA regulations concluded that all medical privacy protections should expire two years after the patient's death. This time restriction, however, was not included in the final rule.)

¹¹⁶ In Connecticut, birth records become publicly available after they are 100 years old. Before that time, access to and examination of the record is restricted by statute. CONN. GEN. STAT. § 7-51 (1997).

¹¹⁷ A search in the LexisNexis Public Records database revealed that eight states, Colorado, Connecticut, Florida, Georgia, Kentucky, North Carolina, Nevada and Texas, makes marriage records public via the database. See LexisNexis Public Records Database (last visited June 13, 2005).

¹¹⁸ A search in LexisNexis's Public Records database revealed that only six states, California, Connecticut, Florida, Georgia, Kentucky, and North Carolina, made death certificates publicly available on the database. Of these states, only some of the Kentucky death certificates (mostly 2002 and 2003 certificates) gave any medical information. The most recent Kentucky certificates listed the cause of death and often some history about contributing factors. While Kentucky did make this information publicly available on LexisNexis, the death certificates available for Kentucky were approximately eighteen months old, meaning that the database was only complete as of December 2003. Perhaps this lag time was intentional and meant to protect the medical privacy of the dead for a certain period of time. Earlier Kentucky death certificates and death certificates from other states did not list a cause of death. Instead they often listed name, address, date of birth, date of death, place of death and occupation of the decedent. See LexisNexis Public Records Database (last visited June 13, 2005).

In Arizona, vital records certificates can be issued, "except the portion of the certificate that contains medical information, to any person determined to be eligible to receive the certified copy pursuant to criteria prescribed by rules." ARIZ. REV. STAT. § 36-324(A) (2004). To "protect the confidentiality rights of [its] citizens" only certain people, including the decedent's "immediate family" or a "family member or relative engaged in research for genealogical purposes who provides proof of relationship to the deceased" can gain access to the records. Arizona Department of Health Services, Office of Vital Records, *Death Certificates*, http://www.azdhs.gov/vitalrcd/death_index.htm. See also ARIZ. ADMIN. CODE R9-19-405 (2003).

¹¹⁹ The Centers for Disease Control maintains a list of where to write to obtain birth, marriage, divorce, and death records in each state. CDC, *Where to Write For Vital Records*, <http://www.cdc.gov/nchs/howto/w2w/w2welcom.htm>. The list provides not only the address of the appropriate state agency, but often a link to that state agency's website. Most state agencies provide the instructions and requirements for obtaining various certificates on their websites.

the dead. For example, some states have passed statutes that allow for the matching of birth and death certificates.¹²⁰ Under these statutes birth certificates with a matching death certificate are marked “deceased” so that they cannot be used to perpetrate a fraud. If a state were only concerned about identity theft, it could match birth and death certificates and make all medical information on the certificates public. Few states, however, do this. Instead, they still keep the medical information private. Reasons other than identity theft (protecting the living) seem to be driving states to protect the privacy of the dead.

States seem particularly concerned about privacy, including the medical privacy of the deceased. This is why they restrict access to certain vital records. The concern for protecting the medical privacy of the dead is most often voiced in statutes related to death certificates. Most death certificates list a cause of death and contributing factors. This is medical information that could not be disclosed under state and federal law if the person were living. And similarly, most states restrict access to this information after death, at least for a specified period of time.

In an attempt to balance the states’ dual interests of postmortem medical privacy and identity theft reduction against the public’s interest in public health, population and genealogical information, some states have created exceptions that allow certain information contained in death records to become publicly available. For example, almost all states allow the federal government to collect data from these records.¹²¹ Most states, in contravention of our traditional notions about the medical privacy of the living, allow persons who are direct descendants of the decedent and can prove the blood relation to obtain a copy of the death certificate.¹²² Other states, wishing to make the records more widely available, for example to genealogical researchers, will make death certificates public after the person has been dead for a specified period of time.¹²³ And another set of states creates two types of death certificates, making the

¹²⁰ In 2004, Connecticut passed such an Act. CONN. GEN. STAT. § 19a-44 (2004)(authorizing the local registrars of vital records to “match birth and death certificates and to post the facts of death to the appropriate birth certificate. Copies issued from birth certificates marked deceased shall be similarly marked”).

¹²¹ See e.g., ALA. CODE 1975 § 22-9A-22(a)(4) (2004); D.C. CODE ANN.. § 7-220 (2005); and MD. CODE ANN. § 4-220 (2005).

¹²² Who counts as a direct descendant or an “authorized person” can vary from state to state. West Virginia limits access to death certificates to the “next of kin or to persons with a legal right to the certificate.” “West Virginia Birth and Death Certificates” at <http://www.wvdhhr.org/bph/oehp/hsc/vr/birtcert.htm> (last visited June 7, 2005). Pennsylvania limits access to legal representatives of the decedent’s estate, immediate family members and “extended family members who indicate a direct relationship to the decedent.” “Death Records,” at <http://www.dsf.health.state.pa.us/health/cwp/view.asp?a=168&Q=202275&pp=12&n=1> (last visited Aug. 8, 2005). In New York City, access to death certificates is limited to spouses, parents or children of the decedent, those with a documented lawful right or claim, a documented medical need or a New York state court order. “Death Certificates,” at http://www.health.state.ny.us/vital_records/death.htm (last visited June 7, 2005).

¹²³ See e.g., FLA. STAT. ANN. § 382.025(2)(b) (2005)(making the death certificate available after fifty years); Conn. Gen. Stat. Ann. § 7-51a (2005)(making a certified death certificate available to anyone one hundred years after the person’s death).

certificate with the medical cause of death available only to authorized persons while making a “cleaned up” version of the death certificate available for public inspection immediately.¹²⁴

These varied approaches to postmortem medical privacy exemplify attempts to mediate the conflicts between the interests of the living and the interests of the dead. The variety of approaches also highlights how there can be a wide variety of opinions about the importance of posthumous rights, and how even when there is a consensus that posthumous rights should be recognized to some extent, there is a wide range of limits imposed on these rights.

Pre-mortem Contracting Part II

The paper has already discussed how some pre-mortem contracting interests are not honored after death because the contract calls for something that is impossible. But where impossibility does not prevent the recognition of a decedent’s contracting rights, courts may be forced to consider the potential conflict between the living and the dead.

Pre-mortem contracts generally bind the next of kin and can limit an heir’s ability to sue for the injury or death of a decedent. This includes agreements relating to the arbitration of claims¹²⁵ and agreements related to the settlement of claims.¹²⁶ Pre-mortem assumption of risk agreements can also bind the next of kin.¹²⁷

¹²⁴ See e.g., (CITE). There is a similar law in Arizona, although it is not clear who counts as an eligible person. See ARIZ. REV. STAT. § 36-324 (2005)(providing that a “registrar shall issue a certified copy of a registered [birth or death] certificate, except the portion of the certificate that contains medical information, to any person determined to be eligible to receive the certified copy pursuant to criteria prescribed by rules”).

¹³ See *Herbert v. Kaiser Found. Hosps.*, 169 Cal.App.3d 718 (Cal. App. 1985)(holding that the decedent’s signing of the group health care plan could bind not only the decedent’s wife and children who were members of the plan, but the decedent’s adult non-plan members, to the arbitration clause contained in the contractual provisions of the plan agreement, thereby forcing them to arbitrate their wrongful death action). *But cf. Pacheco v. Allen*, 55 P.3d 141, 144 (Colo.App. 2001)(comparing the case to *Herbert* and holding that the heirs were not bound by the arbitration agreement because a wrongful death action under Colorado’s Wrongful Death Act arises independently and is not derivative of a cause of action in the deceased).

¹²⁶ Often binding settlement agreements relate to wrongful death claims. The most common example arises where the decedent initially survives an accident and enters into a settlement agreement purporting to compensate the injured party and relieve the negligent party of further liability. The injured party later dies and his heirs then bring a wrongful death action to recover for their injuries. The defense generally files for dismissal of the case arguing that the settlement agreement relieves them of all liability. See e.g., *Estate of Hull v. Union Pac. R.R. Co.*, 141 S.W.3d 356, 360 (Ark. 2004)(holding that “since the wrongful-death statute is derivative in nature from the original tort, and since the original right of the decedent was settled and thus, no longer preserved, the defense of a prior settlement with the decedent” is proper in this wrongful death action).

¹²⁷ See *Turner v. Walker County*, 408 S.E.2d 818 (Ga. App. 1991)(holding that the heirs could not maintain an action relating to the decedent’s death because decedent had signed a waiver relieving the defendant of all liability should he become injured while performing community service); *Coates v. Newhall Land & Farming, Inc.*, 191 Cal.App.3d 1 (Cal. App. 1987)(holding that decedent’s voluntary signing of a release before riding a dirt bike prevented his next of kin from bringing a wrongful death action after he was killed while riding the bike). *But cf. Gershon v. Regency Diving Center, Inc.*, 845 A.2d 720, 727 (N.J. Super. Ct. App. Div. 2004)(holding that in order for the release to apply to the decedent’s heirs, “the agreement must manifest the unequivocal intention of such heirs to be so bound . . . [because the d]ecedent’s unilateral decision to contractually waive his right of recovery does not preclude his heirs,

While pre-mortem contracts that survive death can inure to either the benefit or detriment of the estate, most contracts that survive death impose fairly heavy financial obligations upon the estate, and therefore upon the surviving beneficiaries.¹²⁸ The survival of contracts that impose obligations upon the estate, and consequently the living, are important because they highlight how decedents can have the power, most likely against the wishes of the heirs who would rather retain value in the estate, not only to bind the decedent (by virtue of binding his or her estate), but also to bind the decedent's living heirs. In these situations, the law balances the wishes of the decedent and the wishes of the promisee against the wishes of the living heirs and rules in favor of the promisee and the decedent. This is another example of the principle of autonomy at work.

The Will Theorist might predict that the law operates in this way because it wants people to enter freely into contracts without having to assume the risk that one party will die and leave the living party with a partly performed contract but no payment. Even if this is the case, however, there might be other ways to protect against this harm without recognizing a decedent's contractual rights and obligations. If the default rule were that all contracts ended upon death absent a specific provision relating to death, we would imagine that a provision ensuring the enforcement of a contract after the death of the promisee would simply become a standard contract provision. In this way we would expect that all contracts would simply operate as pre-mortem contracts with intended post-mortem effects. The Dignity Theory of posthumous rights recognizes the importance of autonomy, even if a person is dead. By honoring the decedent's wishes, even to the detriment of living persons, the law is respecting the ability of people to make autonomous decisions that extend beyond the grave. In recognizing these interests and giving the estate claim-rights, privileges, powers and immunities, the law is recognizing that the dead have rights.

IV. Conclusion

This paper suggests that the Dignity Theory of posthumous rights, based in part on the Interest Theory of rights, provides a more complete picture of posthumous rights than the Will Theory. The Will Theory ignores the innate human desire to treat the wishes of once-living persons with respect, it fails to recognize that interests can survive death, and it discounts the consistent use of posthumous rights language throughout the law. It is precisely these concerns, and not simply a desire to control the behaviors of the living, that make posthumous rights a reality. Respect and dignity, as tied to the principle of autonomy, appear to guide the law's thinking in this area. But the autonomy of the dead is not without its limits. Some posthumous rights are never recognized because it would be impossible for the decedent to exercise his or her rights, particularly given the weak proxies that the law currently recognizes. Furthermore, only important rights, and seemingly those less personal in nature, are likely to survive. But when public policy demands a better outcome for the living, posthumous interests are not recognized

who were not parties to the agreement and received no benefit in exchange for such a waiver, from instituting and prosecuting a wrongful death action").

¹²⁸ Counterexamples of this phenomenon include insurance contracts on the life of the decedents.

as posthumous rights. And posthumous rights, when granted, are limited in time so that their impact on the living is less severe.

For the most part, it appears that the law's grant of posthumous rights is, and should be, guided by the principle of autonomy within the limitations discussed in Section III. But changes in society, particularly changes in societal acceptance of mortality and changes in technology, appear to be constantly shaping and reshaping the acceptability of certain posthumous rights. Currently it seems as if the trend is to give the dead more rights, perhaps because technology is changing our view of the world or perhaps because modern American society has become less comfortable with its own mortality. It may be a combination of either or both of these things. Nonetheless, the granting or removing of posthumous rights will always have something to do with the struggle between the interests of the living and the interests of the dead. At any given time the living must decide how many rights they are willing to bestow upon the dead, keeping in mind that they may want to safeguard some of their own posthumous rights. This constant battle, tempered by the factors of time, the fundamental nature of rights, and impossibility, leads to a unique balancing act. It will be interesting to see what the future holds.