

RIGHTS OF THE DEAD

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I. INTRODUCTION

Many legal rules suggest that the dead do not have rights. Often, the dead cannot marry,¹ 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 even though 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 Article asks why the law gives decedents certain legal rights but not others. While many legal rules favoring the dead may be explained simply as an attempt to control the behaviors of living persons, such an explanation is incomplete because it ignores cultural norms, including an innate desire among the living to honor the wishes of the dead even when those wishes negatively impact their own interests. The fact that courts and legislatures often use "rights" language when creating legal rules that benefit decedents' interests suggests that the desire to honor the wishes of the dead does not spring solely out of a self-interested desire in having one's own wishes honored at death. The use of this language would be unnecessary if the true goal of a proposed

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1. Posthumous marriage is legal in France with governmental approval. Craig S. Smith, *Paris Journal: A Love That Transcends Death Is Blessed by the State*, N.Y. TIMES, Feb. 19, 2004, at A4 (noting that while the new spouse is not entitled to the decedent's assets, posthumous weddings can legitimize children born after their father's death, making them his heirs under French law).

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 argues 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 are cultural norms, including dignity and respect for decedents' wishes. In reaching this conclusion, this Article adopts an Interest Theory approach to rights. Interest Theory recognizes persons currently incapable of making choices, such as the mentally incapacitated and infants, as potential right-holders.² Using Interest Theory, this Article argues that the dead, although unable to make real-time choices, are capable of being legal right-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, the dead are granted *de facto* 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 receive legal protection, death does not necessarily cut off all interests, and consequently, it does not end all legal rights. Recognition of posthumous legal rights gives the dead significant moral standing within our legal system, as would be expected if lawmakers are driven by a desire to treat the dead with dignity.

The law also strives to honor a decedent's wishes and to protect his interests because society has chosen, within limits, to adhere to the principle of autonomy. This is why courts often consider a decedent's wishes when determining the disposition of his corpse or property.³ Of course there are legal limits to autonomy, even for the living, and the law is constantly struggling with the exact boundaries of these limits. With the dead, autonomy is more limited than with the living, both because there is no individual who can speak out contemporaneously about the decedent's desires and because the ability to make choices and change preferences dies with the decedent. This Article provides a first cut at defining the boundaries of both posthumous autonomy and

2. Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J.L. & JURIS. 29, 30 (2001).

3. See, e.g., *Sherman v. Sherman*, 750 A.2d 229, 235 (N.J. Super. Ct. Ch. Div. 1999); *Estes v. Woodlawn Mem'l Park, Inc.*, 780 S.W.2d 759, 762 (Tenn. Ct. App. 1989); *Smart v. Moyer (In re Estate of Moyer)*, 577 P.2d 108, 110 (Utah 1978).

posthumous legal rights. Using examples from a wide variety of legal disciplines, the Article develops a series of principles that will help judges, legislators, and legal scholars think about the legal treatment of decedents' interests, including the way the law *should* treat decedents' legal interests.

Part II begins by defining "right." It then examines what it means to have an interest and to be a legal right-holder and spends some time discussing what sort of rights might accurately be characterized as posthumous rights. Part III of the Article proposes that while a desire to control, protect, and punish the living may explain many legal rules, concerns about dignity and autonomy also play a vital role in the creation of posthumous legal rights. In addition to making this claim, this Part also elucidates factors that lawmakers do and should consider when determining whether a posthumous interest should be recognized as a posthumous legal right. A review of several cases and statutes reveals that the following principles limit the creation and strength of posthumous rights: impossibility, the right's importance, time limits, and conflicts of interest between the living and the dead. Additionally, there may be enforcement problems that further limit the practical value of posthumous rights. Where a decedent's wishes are not clearly preserved in a written document, the legal system relies on proxies to enforce the decedent's wishes.⁴ Where a proxy is unavailable, courts sometimes employ a best interests test to enforce the legal rights of the dead.⁵ Finally, the Article concludes that the current legal trend is toward giving the dead more rights and suggests that this is acceptable given changing social norms and understandings of death. As more questions about posthumous legal rights arise, this Article provides judges, legislators, and legal scholars a starting point in the consideration of whether a posthumous legal right should be recognized.

II. RIGHTS TALK: SOME DEFINITIONS AND A FRAMEWORK

This Part provides important definitions for the ensuing discussion and develops a framework for talking about posthumous rights. It begins by defining a legal right and then argues that the dead can be legal right-holders if one adopts an Interest Theory of rights, which recognizes that a person's interests can survive death and that these interests may be

4. See, e.g., Roderick T. Chen & Alexandra K. Glazier, *Can Same-Sex Partners Consent to Organ Donation?*, 29 AM. J.L. & MED. 31, 40 (2003) (noting that all states recognize the right to select a healthcare proxy for healthcare decisions).

5. See, e.g., *In re Guardianship of Grant*, 747 P.2d 445, 457 (Wash. 1987) (directing analysis based on best interests).

recognized by the law.⁶ Next, this Part further refines the definition of a posthumous right. In particular, it focuses on the timing of a right's accrual and how timing might affect whether a right can properly be called a posthumous right. It also distinguishes between situations where a decedent may appear to be a legal right-holder, but instead is merely a third-party beneficiary. In these instances, the decedent does not have a posthumous claim-right or power, and hence, cannot be said to have a posthumous right even if some benefit is flowing to the decedent.

A. Defining a Legal Right and Determining Who Can Be a Legal Right-Holder

Establishing a succinct and agreed-upon definition of a "right" has eluded lawyers and philosophers for centuries. Often, courts, legislatures, and citizens talk of rights in a loose sense without carefully defining the term. In the early 1900s, Wesley Hohfeld, a leader in legal rights talk,⁷ lamented the looseness of rights language in the law.⁸ In response to what he saw as indiscriminate use of the term, he categorized "rights" into rights (now commonly called claim-rights or claims), privileges, powers, and immunities.⁹

But using Hohfeld's 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, and these distinctions can be difficult to

6. Kramer, *supra* note 2, at 30.

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

8. 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." WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 36 (Walter Wheeler Cook ed., 1919).

9. 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. 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 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 obligation or duty to refrain from sitting in the park. Hohfeld also distinguishes between powers and immunities. For a more detailed explanation, see generally *id.* at 60-61.

tease out.¹⁰ Therefore, this Article will talk about all Hohfeldian claim-rights, privileges, powers, and immunities as “rights” in a very loose way, as many courts, scholars, and citizens seem to have done since his time.¹¹

Additionally, Hohfeld considers legal relations between two persons, who are presumably living.¹² He does not discuss posthumous rights¹³ or the rights of future generations, trees, animals, and all of the other things to which legal scholars, judges, or legislators might ascribe rights. While Hohfeld explicitly states that rights must belong to persons and not things,¹⁴ he fails to discuss the necessary and sufficient characteristics of right-holders.¹⁵ For this reason, it is not perfectly clear whether Hohfeld was concerned about moral rights,¹⁶ legal rights, or both.¹⁷ It is also not clear whether a Hohfeldian right-holder is a legal

10. 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). *Id.* at 60 (providing this example).

11. Today, “courts are no less reluctant to use the term ‘right’ in situations which do not describe a correlative relationship between legal right and duty than they were in Hohfeld’s day.” Nicholas Bamforth, *Hohfeldian Rights and Public Law*, in *RIGHTS, WRONGS AND RESPONSIBILITIES* 1, 21 (Matthew H. Kramer ed., 2001).

12. HOHFELD, *supra* note 8, at 60.

13. Although, interestingly, Hohfeld argues for changes to California law which would more effectively carry out the testator’s intent. *Id.* at 59-60 & n.90.

14. *Id.* at 74-76 (referring to *in rem* cases and stating that all rights must belong only to persons and not things).

15. Jeremy Waldron, *Introduction to THEORIES OF RIGHTS* 1, 7-9 (Jeremy Waldron ed., 1984).

16. Moral rights are rights claimed on the basis of a moral principle, whereas legal rights are claims made against another by relying on laws. Moral rights may or may not be protected by the law. For example, I may arguably have a moral right to healthcare, but not a legal right. Similarly, a right granted by the law might be a legal right, but not a moral right. Yet, moral and legal rights sometimes converge. For example, there is both a law and a moral principle that prohibit unjustified murder. A brief discussion on the difference between moral and legal rights can be found in Tom L. Beauchamp, *Ethical Theory and Bioethics*, in *CONTEMPORARY ISSUES IN BIOETHICS* 1, 37-38 (Tom L. Beauchamp & LeRoy Walters eds., 3d ed. 1989).

17. Hohfeld claims to be talking about legal rights. HOHFELD, *supra* note 8, at 27-31.

person, a moral person, or both.¹⁸ To fill this void, two different theories have emerged: the Interest Theory and the Will Theory.¹⁹

Will Theorists argue that legal rights exist only where one is sentient and capable of making choices.²⁰ According to this school of thought, “the essence of a right consists in opportunities for the right-holder to make normatively significant choices relating to the behavior of someone else.”²¹ Because the dead are incapable of making significant choices and lack the ability to form interests, a Will Theorist would argue decedents cannot be right-holders.²² Even living persons who are comatose or senile cannot be legal right-holders under the Will Theory because they are incapable of forming and expressing their wishes in a way that allows them to exercise a legal right.²³ This is not to say that the law cannot protect persons or things that are incapable of being legal right-holders. A Will Theorist may believe that the comatose, senile, or dead should receive the benefit of legal protections, but he

18. “There are two legal categories of persons: natural and juridical. ‘Natural person’ is the term used to refer to human beings’ legal status. . . . [J]uridical person’ is used to refer to an entity that is not a human being, but for which society chooses to afford some of the same legal protections and rights as accorded natural persons. Corporations are the best example of this category Both designations, ‘natural’ and ‘juridical,’ signify legal personhood as opposed to moral personhood.” Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 372-74 (2007). The dead most likely would be considered juridical persons. While arguments might be made to the contrary, given that the dead are genetically human, I do not take up this argument here. For purposes of this Article, it is sufficient to say that the dead are treated as legal persons, even if not natural persons.

19. Waldron, *supra* note 15, at 9. Waldron refers to the “Interest Theory” as the “Interest” or “Benefit” Theory of rights and the “Will Theory” as the “Choice Theory” of rights. I adopt the terms Interest Theory and Will Theory because they appear to be the most prevalent in the recent literature. See generally Matthew H. Kramer, *Getting Rights Right*, in RIGHTS, WRONGS AND RESPONSIBILITIES, *supra* note 11, at 28 (discussing the differences between the Interest Theory and the Will Theory).

20. For a discussion on the use of the Will Theory of rights in the law, see, for example, Kramer, *supra* note 2, at 29.

21. *Id.*; see also Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 249 (1981) (“[The dead] have no present desires 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.”).

22. See Kramer, *supra* note 2, at 30; see also Partridge, *supra* note 21, at 246-47. 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?” *Id.* at 247. I reject the application of this argument to legal interests and legal rights. The law currently gives non-sentient beings, like persons in a persistent vegetative state, legal rights. This, I believe, is correct.

23. Kramer, *supra* note 2, at 30.

would not call these protections legal rights, or at least not legal rights held by the comatose, senile, or dead person.²⁴

Instead, a Will Theorist might argue that laws appearing to grant the dead posthumous rights are really aimed at controlling the behavior of living persons.²⁵ 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.²⁶ While there is certainly some truth to this characterization of posthumous rights, the Will Theory ultimately fails to completely explain many legal rulings, and its underlying theory of rights does not comport with ordinary legal or social discourse.

In contrast, an Interest Theory of legal rights would permit the conclusion that a person who is unable to make choices, such as a comatose person, can be a legal right-holder because he still has interests even if he is unable to express them.²⁷ For example, while in a persistent vegetative state, Terry Schiavo was by almost all medical accounts non-sentient.²⁸ Yet, Interest Theorists might argue that Terry Schiavo was a legal right-holder. The court hearing her case seemed to agree.²⁹

24. *Id.* at 31 (“[T]he Will Theorists’ position . . . is jarringly and gratuitously at odds with ordinary patterns of discourse. In this respect (as well as in other respects not broached here), the Interest Theory is superior.”).

25. See Kramer, *supra* note 2, at 30.

26. 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, 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 2009 maximum estate tax rate is 45% for estates over \$3.5 million. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38. While still substantial, this tax rate is lower than it has been in recent history, and the exclusionary amount is much higher. See generally M.C. Mirow & Bruce A. McGovern, *An Obituary of the Federal Estate Tax*, 43 ARIZ. L. REV. 625 (2001) (discussing the history of the federal estate tax).

27. 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 JOEL FEINBERG, *The Rights of Animals and Unborn Generations*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 159, 162-63 (1980) [hereinafter FEINBERG, *Animals and Unborn Generations*]; Kramer, *supra* note 2, at 30-31; and Aaron-Andrew P. Bruhl, Note, *Justice Unconceived: How Posterity Has Rights*, 14 YALE J.L. & HUMAN. 393, 405-07 (2002).

28. See, e.g., Jacob Goldstein & Noah Bierman, *Autopsy: Schiavo Damage 'Massive,'* MIAMI HERALD, June 16, 2005, at 1A. Autopsies later confirmed this. *Id.*

29. *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp.2d 1378, 1383-85 (M.D. Fla. 2005) (referencing Terry Schiavo's “legal rights” and “constitutional” rights many times throughout the opinion).

Interest Theorists have also argued that trees,³⁰ animals,³¹ unborn generations,³² and the dead³³ can be legal right-holders.³⁴ These are possible but not necessary conclusions of Interest Theory.³⁵ Joel Feinberg, a prominent philosophical proponent of the Interest Theory, has argued that the dead have interests that can be helped or harmed after death.³⁶ Aristotle agreed: “[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 his descendants generally.”³⁷ These ideas also comport with current legal and social discourse. Hence, while not all Interest Theorists need necessarily agree that the dead can be legal right-holders, this Article argues that the dead can, and in fact *should*, be characterized as legal right-holders.³⁸

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 mean that a harm to the decedent’s interest, namely his reputation, has not occurred.³⁹ One might respond that while the decedent’s *reputation* is harmed in this example, the *decedent* is not harmed because he cannot know about the defamatory comments after his death. But knowledge of a legal harm is not required for a legal harm to occur. Take, for example, a living landowner whose land is trespassed upon by a harmless

30. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* viii (1996).

31. Kramer, *supra* note 2, at 30.

32. FEINBERG, *Animals and Unborn Generations*, *supra* note 27, at 159; *see also* Bruhl, *supra* note 27, at 411-12, 426 (arguing that future people enjoy some legal rights).

33. *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) [hereinafter FEINBERG, *Harm and Self-Interest*]; FEINBERG, *Animals and Unborn Generations*, *supra* note 27, at 173-76.

34. *See* Kramer, *supra* note 2, at 30 (“Because various aspects of the well-being of animals and dead people . . . can receive essential protection from legal norms, the Interest Theory lets us classify those creatures as potential right-holders.”).

35. Kramer, *supra* note 2, at 29.

36. FEINBERG, *Harm and Self-Interest*, *supra* note 33, at 65-67.

37. ARISTOTLE, *NICOMACHEAN ETHICS* 16-17 (Roger Crisp ed., Cambridge Univ. Press 2000). While Aristotle did not adopt an “Interest Theory” of rights per se, he did note that people often think that good and bad things can happen to someone after they die. *Id.*

38. Matthew H. Kramer specifically avoids asking the “should” question. Kramer, *supra* note 2, at 31.

39. *See, e.g.*, FEINBERG, *Harm and Self-Interest*, *supra* note 33, at 65-66. 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.* at 65.

trespasser without his knowledge.⁴⁰ In this hypothetical, the landowner's legal interest is harmed even if he never discovers the trespass.⁴¹

Similarly, even though a decedent will never know about any particular harm to his posthumous interests, that does not mean that a harm has not occurred or that such harm should not be protected against. In ruling that Elvis Presley's right of publicity survived his death, the New Jersey District Court said that "[i]f the right [of publicity] is descendible, the individual is able to transfer the benefits of his labor to his immediate successors and is assured that control over the exercise of the right can be vested in a suitable beneficiary."⁴² While the court notes that posthumous rights of publicity incentivize living persons to work hard,⁴³ it also notes that it is important for individuals to be able to choose an appropriate beneficiary, presumably one who will exercise the right of publicity judiciously and in a way that protects the decedent's interest in his reputation.⁴⁴

Others have also noted posthumous rights protect decedents' interests. In discussing his efforts to enhance protections for deceased celebrities in California, the attorney for Marilyn Monroe LLC said: "Ms. Monroe expressed her desires in her will—that the Strasberg family should be the protectors of her persona. The enactment of this legislation helps ensure that the wishes of Ms. Monroe and all other deceased personalities will now be fully respected."⁴⁵ What drives many posthumous rights is not only the recognition that some interests survive death, but also a desire to respect decedents' wishes.

However, the realization that some interests survive death does not necessarily lead to the conclusion that all interests must or should 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 the interest-holder.⁴⁶ Minimally, the

40. This is one of Mr. Feinberg's fine examples. *See id.*

41. *Id.* Let me take Mr. Feinberg's hypothetical one step further. Assume that the day after the unknown trespass occurs, 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. The law would allow the guardian to recover on the landowner's behalf.

42. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981) (quoting *Lugosi v. Universal Pictures*, 603 P.2d 425, 446 (Cal. 1979) (Bird, C.J., dissenting)).

43. *Id.* at 1361.

44. *Id.* at 1355.

45. Press Release, Loeb & Loeb LLP, Governor Schwarzenegger Signs Law Supporting Rights of Celebrity Estates (Oct. 12, 2007), <http://www.loeb.com/lawsupportingrightsofcelebrities/>.

46. FEINBERG, *Harm and Self-Interest*, *supra* note 33, at 64-65. Coincidentally, this idea is similar to the old common law rule that a personal action dies with the person. The true root of this

distinction between interests that survive death and those that die with the decedent turns on whether a record exists of the particular interest in question. The record could exist either in the mind of a surviving friend or family member, or it could be recorded in writing. But, if an interest is incapable of being known after death, then the law cannot protect it.

Furthermore, the simple fact that an interest survives death does not require that the law recognize this interest as a posthumous legal right.⁴⁷ 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 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 few suggestions about which surviving interests should be recognized as posthumous legal rights. This determination requires a theory about which sorts of posthumous rights should be recognized. This theory is developed in Part III.

B. *The Timing Problem*

One further problem in defining a posthumous right has to do with timing. It appears that the dead may accrue legal rights while they are still living, at death, or after death. The time that the right accrues could, in theory, affect the way the right is defined. For instance, perhaps there should be some difference between a cause of action that is recognized during one's life and then allowed to survive death, and a cause of action that accrues after someone has already passed away. The former may not be truly posthumous, but the latter might.

While members of many disciplines, namely physicians and theologians, consider death to be a process, the law has gone to great pains to define death as a singular moment in time.⁴⁸ This is because the moment of death changes a person's legal status. Death ends marriage,

common law rule is unknown. See T.A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 605-06 (1960).

47. See Kramer, *supra* note 2, at 47-48.

48. In an effort to define death in a way that keeps pace with modern technology, all states have adopted some form of the Uniform Determination of Death Act. See Kirsten Rabe Smolensky, *Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 41, 45. Under the Uniform Determination 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." UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 781 (1980). For a more complete discussion of the definition of death, see Smolensky, *supra*, at 45-51.

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.⁴⁹ Since defining the moment of death is legally important, it may also be important to consider when a decedent's right accrued—prior to, at, or after death.

Rights that come into being after someone has already passed away are clearly posthumous rights.⁵⁰ 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 Article, all rights recognized after a decedent's death, regardless of when they accrue, are considered posthumous rights. The timing of the emergence of the right does not affect the fact that the right is honored posthumously; it merely changes how one frames the right. For example, assume that a person's constitutional right is violated while they are alive. That person sues. The court might say that the plaintiff has a constitutional right to free speech. But if the plaintiff dies during the course of the suit and his claim is continued on his behalf, the court would say that the plaintiff has a posthumous right to have pending constitutional claims survive his death.

C. *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 right-holder. Sometimes a living person may be the holder of a right, the enforcement of which somehow benefits a decedent.⁵¹ In these situations, it is easy to think that the law is granting a posthumous right because the decedent is receiving a benefit. But in reality the decedent is only a third-party beneficiary.

Possible right-holders in cases involving decedents might include the decedent, the estate, heirs, the public, and the next of kin.⁵² Untangling the right-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

49. Smolensky, *supra* note 48, at 44.

50. See Kramer, *supra* note 2, at 47-48.

51. See DAN B. DOBBS, *THE LAW OF TORTS* § 407, at 1140 (2000).

52. See, e.g., *id.* § 294, at 804.

decedent's next of kin is the true right-holder.⁵³ Therefore, while the decedent's interests in retribution or the welfare of his heirs may be benefited by this rule, the decedent cannot be properly defined as the right-holder because the right to sue for wrongful death resides with the next of kin. Clues as to who the right-holder is can be found in who is granted standing to sue, who the remedy flows to, and who the court proclaims as the right-holder.⁵⁴

III. DIGNITY AND AUTONOMY AS DRIVING FORCES IN THE CREATION 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 Article not only draws attention to this conflict, but it attempts to explain the puzzling and often erratic development of posthumous rights.

As discussed above, this Article adopts an Interest Theory approach to the creation of posthumous legal rights. An Interest Theory approach is superior to other philosophical theories of "rights" because it acknowledges that the dead can have interests that survive death. There is wide support in case law and legislative history for this idea.⁵⁵ For example, courts care very deeply about testamentary wishes, particularly those regarding mortal remains, and often go to great lengths to ensure that the decedent's wishes are respected. It appears that dignity and

53.

Wrongful death statutes create a new action in favor of certain beneficiaries who suffer from another's death as a result of a tort. . . . Because the statute creates a new cause of action and vests it in the survivors (or their representative), the wrongful death recovery does not go to the deceased's estate

Id.

54. 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 right-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. *Id.* While the decedent's interests may be furthered by a successful wrongful death action, the benefits of the suit do not flow to the estate. *Id.* In contrast, most survival statutes allow the estate to sue on behalf of the decedent. *Id.* 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 a posthumous right.

55. See, e.g., E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Martial Inclusion*, 41 ARIZ. L. REV. 1063, 1068-70 (discussing the principle that succession laws should reflect the desires of a deceased person); *Hecht v. Super. Ct. (Kane)*, 59 Cal. Rptr. 2d 222, 226 (Cal. Ct. App. 1996) (opinion certified for partial publication) (California Supreme Court denied review of this decision and simultaneously ordered that it not be officially published) (discussing the decedent's "fundamental right" to procreative liberty).

autonomy are the driving forces behind the creation of many posthumous legal rights.

However, posthumous legal rights are not without limits. Part III examines these limits by teasing out a series of factors that courts 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 Part 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.

A. Impossibility

When deciding whether to grant a posthumous legal right, impossibility is the first factor, and a threshold factor, that courts consider. 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.⁵⁶ In these situations, the law excuses the promisor because the thing promised simply cannot be done.⁵⁷ 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.⁵⁸ 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 death makes it impossible for a decedent to exercise these rights. This Part 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.⁵⁹

In contracts, impossibility generally occurs where there is pre-mortem contracting with post-mortem effect (hereinafter “pre-mortem

56. 30 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 77:72 (4th ed. 2004).

57. *Id.*

58. *Id.*

59. This Part examines the contracts and constitutional rights contexts only because these contexts frequently involve decedents' interests. The principles discussed in this Part are generally applicable to other contexts as well.

contracting”).⁶⁰ 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.⁶¹ These are generally held to be valid contracts.⁶² Similarly, contracts to make a will are enforced after the promisor’s death.⁶³ In both of these examples, the law is honoring the decedent’s ability to contract for a specific result after death. The recognition of these contractual rights honors the decedent’s autonomy to contract just as it would honor a living person’s contracting autonomy.

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.⁶⁴ Contracts that

60. *Id.*

61. C.T. Foster, Annotation, *Provision for Post-Mortem Payment or Performance as Affecting Instrument’s Character and Validity as a Contract*, 1 A.L.R.2d 1178, 1181 (1948) (analyzing only post-mortem payment or performance to be made at or after the death of the promisor).

62. *Id.* at 1182.

63. See 79 AM. JUR. 2D *Wills* § 312 (2002) (providing a complete discussion of the treatment of contracts to make a will); see also *United States v. Stevens*, 302 U.S. 623, 628 (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); *Hudson v. Hudson*, 701 So. 2d 13, 15-16 (Ala. Civ. App. 1997) (enforcing a decedent’s agreement with his ex-wife to leave his estate to her and their four children); *Cunningham v. Weatherford*, 32 So. 2d 913, 914 (Fla. 1947) (enforcing a promissory note of \$20,000 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”); *Exch. Nat’l Bank of Tampa v. Bryan*, 165 So. 685, 685-87 (Fla. 1936) (enforcing the decedent’s agreement to pay a woman \$100 per month for his care while living and \$50,000 at his death); *Horrigan v. Ladner (In re Estate of Horrigan)*, 757 So. 2d 165, 172 (Miss. 1999) (enforcing a grandfather’s promise to give his grandchildren realty in his will if they invested in various property improvements).

64.

‘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, where not personal in nature.

Bates v. Nat’l Bank of Detroit (In re Estate of Traub), 92 N.W.2d 480, 482 (Mich. 1958) (quoting *Buccini v. Paterno Constr. Co.*, 170 N.E. 910, 912 (N.Y. 1930) (Cardozo, J.) (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)); see also *Brearton v. DeWitt*, 170 N.E. 119, 120 (N.Y. 1930) (holding that an agreement by the decedent to pay the plaintiff \$1000 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. Am. Legion*,

are personal in nature, however, end without further obligation at the death of the promisor because it is impossible to complete the contract.⁶⁵ The classic example of a personal contract involves artwork. 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.⁶⁶ 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.⁶⁷ 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.⁶⁸ Under principles of autonomy this makes sense because the estate is capable of functioning as an accurate proxy and the law wants to honor the decedent's wishes.

Another example of impossibility comes from several constitutional cases. While constitutional rights are generally some of the most important legal rights a person can have, and perhaps should survive

370 So. 2d 700 (Miss. 1979) (examining when contracts terminate at the death of a party and when they do not); *In re Estate of Gaylord*, 552 P.2d 392 (Okla. 1976) (approving the sale of an estate's assets by an executor where the sale was the result of a contractual right of first refusal).

65. WILLISTON & LORD, *supra* note 56, § 77:72 (“Death cancels a personal services contract. Indeed, death does more than make a personal services contract impracticable, it makes performance itself impossible.”).

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,] [w]here 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.

Id. § 77:70. 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. *Id.* § 77:72 (providing a list of contracts held to be personal services contracts that terminated upon the death of the promisor).

66. *Id.* § 77:72. If the artist was paid in advance to complete the portrait, the patron may be able to successfully sue for any unearned compensation. *Id.*

67. *Id.* § 77:76.

68. See *Hasemann v. Hasemann*, 203 N.W.2d 100, 102 (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, 400-01 (N.C. Ct. App. 1983) (holding that the defendant husband must comply with various 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 *Sopko v. Slackman (In re Estate of Roccamonte)*, 808 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”). In a Hohfeldian sense, the dead have not only legal rights, but legal duties.

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.⁶⁹

Shortly after death, a person's name is removed from the list of registered voters, thereby ending that person's right to vote.⁷⁰ In many ways removing a decedent's name from the list of registered voters makes sense because a decedent cannot form a preference for a particular candidate after death. 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 and 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 hypothetical in which extending voting rights to a decedent might seem possible.

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 the law honors other pre-mortem preferences after death, then perhaps it should also honor a decedent's voting preferences as well. The answer could be, as Jefferson once suggested, that we do not want the

69. See, e.g., Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1281-83.

70. 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 (West 2007) ("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 such 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.").

dead controlling or significantly influencing the lives of the living.⁷¹ But this already happens in many instances, particularly through wills.

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.

This concern suggests that a "fix" to the problem of impossibility is simply to create a better proxy than a "Republican ticket for all time" vote. For example, in the voting context, a strong proxy might counter the second concern raised above. 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. In this way, posthumous voting might be possible.

Of course, there might still be concerns with this solution. One might be opposed to posthumous voting rights because the decedent does not have to live with the consequences of his decision. This fact may distort his preferences in ways that have severe negative consequences for the living. This is problematic and likely what keeps posthumous voting at bay. Where the interests of the dead conflict with the interests of the living, the law is less likely to honor decedents' autonomy. This is discussed further in Part III.D.

Yet, it is likely that the dead occasionally vote. And, except in instances of widespread fraud, there seems to be little concern.⁷² Imagine that a woman dies the day before the election, but has already mailed in her absentee ballot. Should her vote count? While no such scenarios have been reported, it is reasonable to assume that the dead do occasionally vote given the administrative hassle involved in confirming the living status of every voter who voted by absentee ballot. This means that some decedents are, by an accident of sorts, granted the right to vote.

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

72. 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 William W. Bedsworth, *A Criminal Waste of Space: "Meet Me in St. Louis,"* ORANGE COUNTY LAW., Apr. 2001, at 44.

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.⁷³ The right to marry, however, does not extend to someone who is dead.⁷⁴ 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.⁷⁵ While the power to marry and the marriage itself end at death, some of the privileges of marriage continue beyond death.⁷⁶

An examination of the posthumous privileges of marriage, 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 two years after their spouse's death, thereby reaping the tax benefits of being married.⁷⁷ If a wage-earning spouse dies, the surviving spouse will continue to receive social security benefits even if the survivor never worked a day in his or her life.⁷⁸ Furthermore, estates passing entirely to a spouse do not owe estate taxes at the time of the decedent's death.⁷⁹

73. This Article does not attempt to enter into the debate of whether gay marriage is a constitutional right. The Article 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, 12 (1967).

74. Except, perhaps, in France. Smith, *supra* note 1 (noting that posthumous marriage is legal in France).

75. See *Moss v. Davis*, 794 A.2d 1288, 1292-93 (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 Acker*, 48 Pa. D. & C.4th 489, 501-02 (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).

76. See *infra* notes 77-80 and accompanying text.

77. See INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUBL'N NO. 559, SURVIVORS, EXECUTORS, AND ADMINISTRATORS 8 (2009), available at <http://www.irs.gov/pub/irs-pdf/p559.pdf> (for use in preparing 2008 tax returns).

78. 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. SOC. SEC. ADMIN., PUBL'N NO. 05-10024, SOCIAL SECURITY: UNDERSTANDING THE BENEFITS 15-16 (2009), available at <http://www.ssa.gov/pubs/10024.pdf>.

79. Internal Revenue Service, Estate Tax, <http://www.irs.gov/businesses/small/article/0,,id=164871,00.html> (last visited July 25, 2009).

While many of these measures benefit a surviving spouse, they also coincide with the decedent's presumed wishes.⁸⁰

Although the right to marry and the right to vote both end at death because of impossibility, some marital benefits survive death while none of the decedent's voting interests do. This is because 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 at the death of a spouse, traditionally the male breadwinner, 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.⁸¹ In this way, the law consciously extends some of the interests of marriage beyond death. It does not do the same for voting interests because the state burdens lean in the other direction. There is a potential 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.⁸² The relative importance of rights admittedly varies from person to person and from situation to situation, but there is some basic ordering of rights with which most of us can agree.⁸³ Society has aggregated these individual

80. *See id.*

81. *See supra* notes 77-80 and accompanying text.

82. *See* Naoki Kanaboshi, *Competent Persons' Constitutional Right to Refuse Medical Treatment in the U.S. and Japan: Application to Japanese Law*, 25 PENN ST. INT'L L. REV. 5, 23-30 (2006) (discussing the importance and protection of the right of bodily freedom in the United States).

83. Common interests are also more likely to be recognized. For example, an interest in the care and support of one's surviving spouse is assumed to survive death even if specific instructions are not left. This is why we have intestacy rules that give substantial portions of an estate to the spouse. Spitzko, *supra* note 55 at 1070-71 (noting that the drafters of the 1990 Uniform Probate Code used empirical studies regarding the preferences of married couples to determine what share of an

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 Subpart addresses each of these examples in turn and then suggests how the law might rank interests so that the most important interests receive legal protection posthumously.

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.⁸⁴ 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.⁸⁵ 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.

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, society should not be powerless to protect this sacred right.

This explanation, 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 a decedent's constitutional claims on the

intestate estate should go to the spouse). Uncommon interests are less likely to be legally recognized. For example, if I have an interest in posthumously converting my home into a museum to display my Chinese Export Silver collection, it is unlikely that this interest will be recognized unless I specifically provide for such arrangements in my will. Uncommon interests that are not in writing often die with the decedent.

84. For example, the United States Supreme Court has held that a state statute prohibiting the anonymous distribution of campaign literature violated an individual's freedom of speech guaranteed by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344, 357 (1995).

85. *See, e.g., id.* at 340-41.

public's behalf. 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.⁸⁶ 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.⁸⁷

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.⁸⁸ It generally includes the right to procreate, the right to purchase and use contraceptives, and the right to abortion.⁸⁹ 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.⁹⁰ But

86. In *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, 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. (emphasis added) (citation 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.

87. *Id.* Her husband, as executor of her estate, pursued her claim even though the dollar amount in controversy did not make pursuit of the case financially beneficial. He was most likely also the primary beneficiary of the estate. In cases where the executor is not also the beneficiary, it might violate the executor's fiduciary duties to the heirs to continue to pursue such a small monetary claim at the expense of enormous legal fees.

88. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.3 (1997).

89. *Id.* at §§ 10.3.1-3.3.

90. See *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259, 270 (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

posthumous conception is only allowed where there is a clear intent on the part of the decedent to reproduce posthumously.⁹¹ 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.⁹² 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.⁹³ Alternatively, if the decedent has specifically provided that his sperm be used to conceive children after his death, his wishes are honored even if his next of kin object.⁹⁴

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.⁹⁵ 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 others, if the law is to honor the decedent's clearly expressed intent. . . .

. . . .

. . . [T]he decedent's right to procreate with whom 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

death using frozen sperm should be declared his heirs); *see also* *Hecht v. Super. Ct. (Kane)*, 20 Cal. Rptr. 2d 275, 282-83 (Cal. Ct. App. 1993).

91. *Hecht*, 20 Cal. Rptr. 2d at 282.

92. 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." 760 N.E.2d at 269 (citation omitted).

93. *Hecht*, 20 Cal. Rptr. 2d at 282.

94. *Id.* at 288 (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.") (citations omitted).

95. *Id.* at 283-84 ("[T]he will evidences the decedent's intent that Hecht, should she so desire, is to receive his sperm stored in the sperm bank to bear his child posthumously.").

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.⁹⁶

But the intent to reproduce may not always be written and clear. Assume, for example, a situation where a man afflicted with cancer deposits his sperm at a sperm bank prior to his receiving radiation treatment. During his treatment he dies. A year later his wife wishes to conceive and visits 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 is no other writing documenting 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 evidenced his clear intent to procreate with his wife, but given the language in *Hecht*⁹⁷ and *Woodward*,⁹⁸ chances are good that the court will rule the other way.

In reaching this conclusion, 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.⁹⁹ Similarly, if a 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 question in the bulk of the estate to be distributed among the heirs.¹⁰⁰

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.¹⁰¹ Persons in this

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

97. *Id.* at 226-28.

98. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 269-70 (Mass. 2002).

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

100. *See Carpenter v. Carpenter*, 267 S.W.2d 632, 641-42 (Mo. 1954) (holding that because the decedent's will expressed no clear intent as to who should bear the burden of federal estate taxes on testamentary bequests, then the tax burden should be prorated among the beneficiaries).

101. *See Steven Ertelt, Brain Dead Woman Susan Torres Gives Birth to Baby Girl*, LIFENEWS.COM, Aug. 2, 2005, <http://lifeneews.com/nat1507.html> (reporting that Susan Torres, a brain dead woman, was kept on life support for almost three months until her fetus could be delivered).

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.¹⁰² 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.¹⁰³ As a result, her intent, as expressed in her advanced directive, not to be kept on life support is ignored. But in *Hecht*¹⁰⁴ and *Woodward*,¹⁰⁵ 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.¹⁰⁶ 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, courts refuse to use a substituted judgment standard.¹⁰⁷ Instead they focus solely on the man's explicitly expressed intent.¹⁰⁸ While the outcomes are different in

102. See, e.g., KAN. STAT. ANN. § 65-28, 103 (1992); TEX. HEALTH & SAFETY CODE ANN. § 166.033 (Vernon 2001 & Supp. 2008).

103. See, e.g., MINN. STAT. ANN. § 145C.10(g) (West 2005) ("When a patient lacks decision-making capacity and is pregnant, and in reasonable medical judgment there is a real possibility that if health care to sustain her life and the life of the fetus is provided the fetus could survive to the point of live birth, the health care provider shall presume that the patient would have wanted such health care to be provided . . .").

104. *Hecht v. Super. Ct. (Kane)*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

105. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

106. Sexism is another way to explain this disjunction.

107. See, e.g., *Hecht*, 20 Cal. Rptr. 2d at 283-84 (explaining that because a man has a property interest in the use of his sperm for reproduction, his express intent regarding posthumous use of his sperm should be honored).

108. See, e.g., *Hecht v. Super. Ct. (Kane)*, 59 Cal. Rptr. 2d 222, 226-27 (Cal. Ct. App. 1996).

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 pre-mortem decisions about what happens to their bodies after death. But when the courts are suspect of the result a decedent's decisions might create, as in the case of the brain dead pregnant woman with an advanced directive, courts circumscribe a decedent's true intent.¹⁰⁹ 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 so?

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.¹¹⁰ 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.¹¹¹ Therefore, 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.

Because the harm is less after death, the man's corresponding interest in his posthumous reputation may be less deserving of legal protection. In essence, the interest is less important. 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

109. See Daniel R. Levy, *The Maternal-Fetal Conflict: The Right of a Woman to Refuse a Cesarean Section Versus the State's Interest in Saving the Life of the Fetus*, 108 W. VA. L. REV. 97, 105-06 (2005) (noting that states designed the pregnancy exception to living-will statutes largely because of their interest in protecting the life of the fetus).

110. FEINBERG, *Harm and Self-Interest*, *supra* note 33, at 65-66.

111. *Id.*

death (even if the interest survives death) is enough to prevent the law from recognizing that particular posthumous right. Sometimes, it is not. How should courts distinguish between these cases?

It appears that an interest's decrease in value after death may be greater if the right is more personal in nature or causes more severe emotional distress. For example, if the causation of emotional distress is a significant reason for the granting of a particular legal right, then we might expect that right to not be protected posthumously. Or, if the right is personal in nature, then it might be more likely to die with the person.¹¹² This is the basis for the Latin maxim: *Actio personalis moritur cum persona*.¹¹³ The rationale for this principle is 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 proper because a substantial portion of the interest's value resided with the decedent and died 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 technological advancements. 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.

The creation of more posthumous rights also seems related to technological advancement. With the growing use of railroads, wrongful death statutes came into being.¹¹⁴ The inventions of radio and television gave birth to the right of publicity in 1953 or 1954¹¹⁵ and eventually led to the creation of a posthumous right of publicity as early as the mid-1970s.¹¹⁶ The growth of assisted reproductive technologies in the 1970s, 80s and 90s led courts to recognize a posthumous right to reproductive autonomy in the 1990s.¹¹⁷ These are all examples of rights once

112. See, e.g., *supra* notes 67-69 and accompanying text.

113. "[A]ctio personalis moritur cum persona" means "a personal action dies with the person." Smedley, *supra* note 46, at 605.

114. *Id.* at 624 & n.90.

115. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:4 (2d ed. 2009).

116. 2 *id.* § 9:5.

117. While artificial insemination has been around for over one hundred years, technological advancements in gamete storage, in vitro fertilization, and other advanced reproductive technologies

considered so personal in nature that they died with the decedent. Now, technological advancements have created new interests and strengthened the value of these interests to persons both living and dead.

C. Time

The passage of time is the third factor that courts should consider in examining the rights of the dead. And, in most instances, the rights of the dead are time-limited.¹¹⁸ The longer a decedent has been dead, the less likely a court is to extend a certain right to him. This is because a decedent's interests (and perhaps the importance of those interests) decrease over time, while the interests of a living person can increase or decrease over time.¹¹⁹

It makes sense that the interests of a decedent, and therefore his corresponding rights, would decrease over time. First, a decedent's interests 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 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 has.¹²⁰

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

have led to the realization that it may become relatively common for children to be born after the death of at least one genetic parent.

118. William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 147-51 (2005).

119. 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.

120. A clever person might argue that a decedent's interests may increase over time if a new fact comes to light about the decedent's interests or if there is an important societal change. For example, the interests of an environmentalist who died in the 1960s might increase because of environmentalism's increased popularity today. But this claim must fail. While *society's* interest in environmentalism may have increased in the past four decades making it more likely that the environmentalist's interests may be fulfilled, the decedent's dedication to the environment cannot have increased during the same period of time.

die, as memories fade, and as once-strong connections to the decedent become more tenuous. As Professor Matthew Kramer said:

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.¹²¹

Once this influence fades, the decedent's legal rights also tend to fade.

The law bears out this principle. Take, for example, the time limits on the posthumous right of publicity. The right of publicity “is a right inherent to everyone to control the commercial use of identity.”¹²² 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.¹²³ Some states, however, have created a statutory right of posthumous publicity.¹²⁴

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).¹²⁵ The majority of states recognizing explicit durations of publicity rights provide for a duration of forty to one hundred years.¹²⁶ This suggests that certain rights of the dead are limited in time. The wide variety of the time limits, however, suggests that determining the appropriate time limit for a descendible right of publicity is not easy. Similarly, determining the level of protection for posthumous rights is bound to be difficult for courts and legislatures.

121. Kramer, *supra* note 2, at 47.

122. 1 MCCARTHY, *supra* note 115, § 1:3.

123. Restatement (Second) of Torts § 652A (2002).

124. See *Montgomery v. Montgomery*, 60 S.W.3d 524, 527-28 (Ky. 2001) (applying Kentucky's posthumous right of publicity statute); see also Drennan, *supra* note 118, at 147-51 (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).

125. Drennan, *supra* note 118, at 147-51 (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)).

126. *Id.*

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. In these cases, there appears to be an unspoken balancing test that helps courts determine whether a living person's interests override a decedent's autonomy even if those interests would not normally override a living person's autonomy. This Subpart attempts to further define this conflict and some factors that courts should consider when balancing the interests of the living and the dead. In particular, it will look at limits on testamentary powers, posthumous medical privacy, and pre-mortem contracting.

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 "a testator may dispose of his or her property in any way he or she desires[, and] [t]his right allows a testator to decide whether his or her heirs will receive any property from his or her estate and the extent to which each will receive."¹²⁷ "There is no such thing as a legal right in any relative, other than the surviving spouse, of a testator, to the latter's bounty."¹²⁸ 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.¹²⁹ Furthermore, a testator may arbitrarily give a greater share of his estate to one child than to another.¹³⁰

127. 96 AM. JUR. PROOF OF FACTS 3D *Intentional Omission of Child from Will* § 3 (2007).

128. *Heller v. Ripperger (In re Estate of Heller)*, 11 N.W.2d 586, 591 (Iowa 1943). See generally John B. Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 882-85 (1960) (discussing whether a will is automatically revoked by a subsequent marriage); Percy Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 172, 192-93 (1928-29) (discussing common law rights of survivorship as restraints on testamentary power).

129.

When a child is omitted from a will, the question to be addressed is whether this omission was intentional. There are a couple of different fact patterns that are common in these types of cases. The first question to address is whether the child was born before the execution of the will. If the execution of the will occurred first, the child may be treated as an after-born child under the pretermission statute. If the will was executed

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. 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.”¹³¹ In *In re Estate of Keffalas*, the court held that a bequest to the decedents’ three eldest unmarried sons was valid even though it was conditioned on each of them marrying someone of “true Greek blood and descent and of Orthodox religion.”¹³² 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 *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).¹³³ Even though the right to marry is a constitutional right,

after the birth, many pretermission statutes will not apply. However, every jurisdiction has found that if the omission was intentional, the omitted child is not entitled to receive from the estate.

96 AM. JUR. PROOF OF FACTS 3D, *supra* note 127 § 1 (footnotes omitted).

[T]he definition of pretermitted heir statute is a state law that grants an omitted heir the right to inherit a share of the testator’s estate, usually by treating the heir as though the testator died intestate. . . .

.....
 The purpose of a pretermitted heir or omitted child statute is to protect the omitted heir from being disinherited unintentionally. However, these statutes do not regulate or control a testator’s power to make the decision on how to dispose of his or her property postmortem.

Id. §§ 4, 6 (footnotes omitted).

130. *Id.* at § 3.

131.

There is no doubt that “a man’s prejudices are part of his liberty[.]” 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.

In re Estate of Keffalas, 233 A.2d 248, 250 (Pa. 1967) (citation omitted) (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, 272-73 (Ga. 1962) (upholding as valid a will provision that disinherited decedent’s daughter if she married a specifically named person). *But see* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* 179-80 (3d ed. 2004) (stating that conditions where testator’s “dominant motive” is to break up a family relationship are invalidated, as may be conditions designed to control the children) (internal quotation marks omitted).

132. *Keffalas*, 233 A.2d at 250-51.

133. *Id.* at 250.

courts have not treated conditional bequests as restraints on the living's constitutional rights.¹³⁴

Testamentary distributions conditioned on religious requirements are also generally valid,¹³⁵ as are conditions that the beneficiary retain the family name¹³⁶ or spell the family name in a particular way and refrain from using tobacco and liquor.¹³⁷ 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 death.¹³⁸ Sometimes, a provision in a testator's will destroying property is held to be invalid as against public policy.¹³⁹ In these cases, certain state interests trump a decedent's

134.

[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] [i]n the case at bar, 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 Ct. C.P. [Prob. Div., Mahoning County] 1974).

135. *In re Estate of Laning*, 339 A.2d 520, 524 (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, 31-32 (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*, MCGOVERN & KURTZ, *supra* note 131, at 179 (stating that certain conditions will not be upheld where it is difficult to determine if the condition has been met).

136. *Nat'l Bank of Commerce v. Greenberg*, 258 S.W.2d 765, 768 (Tenn. 1953).

137. *Holmes v. Conn. Trust & Safe Deposit Co.*, 103 A. 640, 642 (Conn. 1918).

138. See generally Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 796 (2005), for an excellent discussion on the right to destroy property.

139. *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 214 (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). The court also seems to apply a balancing test to the conflict between the rights of the dead and the rights of the living:

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.¹⁴⁰

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.

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.¹⁴¹ HIPAA controls the use of medical information except when state law is more protective of an individual's privacy than HIPAA.¹⁴² 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.¹⁴³ Even a spouse is not entitled to see his or her spouse's medical record.¹⁴⁴ Furthermore, physicians have a legal duty to keep medical information

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 provisions of the will be followed. No benefits are present to balance against this injury and we hold that to allow the condition in the will would be in violation of the public policy of this state.

Id. at 217.

140.

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.

Id. at 215.

141. The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 300gg-1 to -92 (2001); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §§ 160-164 (2008). For additional information regarding the interpretation of the regulations, go to the website for the U.S. Department of Health & Human Services, Health Information Privacy, <http://www.hhs.gov/ocr/privacy/index.html> (last visited July 25, 2009).

142. 45 C.F.R. §§ 160.201-.203.

143. *See id.* § 164.502. For more information on what qualifies as a lawful purpose, see 45 C.F.R. § 164.512.

144. Specifically, a spouse is not listed as an authorized entity to receive medical information under 45 C.F.R. §§ 164.502, .512.

confidential. Physicians violating this duty can be found liable in tort under both common law doctrine and varying state statutes.¹⁴⁵ Some courts have even found that people have a constitutional right to keep medical information private.¹⁴⁶

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.¹⁴⁷ If there are any restrictions on obtaining records after a person's death, they are state-based and vary widely. This is because HIPAA provides virtually no guidance when it comes to postmortem confidentiality.¹⁴⁸

State laws relating to the release of vital records, such as birth, marriage, and death¹⁴⁹ certificates, often restrict who can obtain a copy of these records.¹⁵⁰ 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.¹⁵¹ While concerns about identity theft may seem driven by a need to protect the living, these concerns could be alleviated by measures that combat identity theft without necessarily protecting the privacy of the dead. For example, some states have passed statutes that allow for the matching of birth and death certificates.¹⁵² Under these statutes, birth

145. See Jack Brill, Note, *Giving HIPAA Enforcement Room to Grow: Why There Should Not (Yet) Be a Private Cause of Action*, 83 NOTRE DAME L. REV. 2105, 2117, 2120-21 (2008); Richard L. Antognini, *The Law of Unintended Consequences: HIPAA and Liability Insurers*, 69 DEF. COUNS. J. 296, 301-02 (2002).

146. See, e.g., *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (holding that persons infected with HIV have a constitutional right to privacy regarding their condition).

147. Jessica Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 34 CONN. L. REV. 81, 113 n.128 (2001).

148. See *id.* at 86 (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. *Id.*

149. In Arizona, for example, 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. ANN. § 36-324(A) (Supp. 2008). 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. ARIZ. ADMIN. CODE § R9-19-405 (2006).

150. The Centers for Disease Control and Prevention maintains a list of where to write to obtain birth, marriage, divorce, and death records in each state. Centers for Disease Control & Prevention, *Where to Write for Vital Records*, <http://www.cdc.gov/nchs/w2w.htm> (last visited July 25, 2009). The list provides not only the address of the appropriate state agency, but often a link to that state agency's website. *Id.* Most state agencies provide the instructions and requirements for obtaining various certificates on their websites, many of which have a variety of restrictions.

151. See, e.g., CONN. GEN. STAT. ANN. § 19a-44 (West Supp. 2009).

152. See, e.g., *id.* (Connecticut law authorizes 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.").

certificates with a matching death certificate are marked “deceased” so that they cannot be used to perpetrate a fraud.¹⁵³ 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 individual privacy, including the medical privacy of the deceased. This concern 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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ And yet another set of states creates two types of death

153. *Id.*

154. Berg, *supra* note 147, at 100-08.

155. See e.g., ALA. CODE § 22-9A-22(a)(3)-(4) (2006); D.C. CODE § 7-220(c)-(d) (2001); MD. CODE ANN., HEALTH-GEN. § 4-220 (West 2002).

156. 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 Health and Statistics Center, <http://www.wvdhhr.org/bph/hsc/vital/> (last visited July 25, 2009). Pennsylvania limits access to legal representatives of the decedent’s estate, immediate family members, and “[e]xtended family members who indicate a direct relationship to the decedent.” Pennsylvania Department of Health, Health: Death Records, <http://www.dsf.health.state.pa.us/health/cwp/view.asp?a=168&Q=202275&pp=12&n=1> (last visited July 25, 2009). In New York City, access to death certificates is limited to the “spouse, parent or child” of the decedent, those with a “documented lawful right or claim,” a “documented medical need,” or a “New York state court order.” New York State Department of Health, Death Certificates, http://www.health.state.ny.us/vital_records/death.htm (last visited July 25, 2009).

157. See, e.g., CONN. GEN. STAT. ANN. § 7-51a(a) (West 2008) (making a certified death certificate available to any person one hundred years after the decedent’s death); FLA. STAT. ANN. § 382.025(2)(b) (West 2007) (making the death certificate available after fifty years).

certificates, making the 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.¹⁵⁸

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.

This Article 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 claims¹⁵⁹ and

158. See, e.g., Florida Department of Health, How to Order a Florida Death Certificate, http://www.doh.state.fl.us/planning_eval/vital_statistics/deaths.htm (last visited July 25, 2009); Centers for Disease Control & Prevention, Where to Write for Vital Records: Florida, <http://www.cdc.gov/nchs/w2w/florida.htm> (last visited July 25, 2009). There is a similar law in Arizona, although it is not clear who counts as an eligible person. See ARIZ. REV. STAT. ANN. § 36-324(A) (Supp. 2008) (“On written request . . . [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.”).

159. See *Herbert v. Kaiser Found. Hosps.*, 169 Cal. App. 3d 718, 725, 727 (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 also 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).

agreements related to the settlement of claims.¹⁶⁰ Pre-mortem assumption of risk agreements can also bind the next of kin.¹⁶¹

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.¹⁶² 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

160. 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.*, 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" was proper in this wrongful death action).

161. *See Coates v. Newhall Land & Farming*, 236 Cal. Rptr. 181, 184-85 (Cal. Ct. 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); *Turner v. Walker County*, 408 S.E.2d 818, 819 (Ga. Ct. 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). *But cf. Gershon v. Regency Diving Ctr.*, 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, 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").

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

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.

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 legal rights.

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

Assume that the law recognizes a particular interest and grants decedents a posthumous legal right. While the decision to grant that posthumous legal right might be grounded in a sense of respect, dignity and autonomy, there may still be an enforcement problem. 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. Part III.E examines 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 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. 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.¹⁶³ Furthermore, absent the naming of an

163. 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

independent executor in the will, the wishes of the decedent likely are aligned with the interests of his 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 interests.

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.¹⁶⁴ According to one study, surrogate decision-makers, whether spouses, children, or other family members, correctly predict the patient's wishes only sixty-six percent of the time.¹⁶⁵ The patients in this particular study had been diagnosed with a terminal illness and were presumably aware that they might become incapacitated.¹⁶⁶ 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. 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, besides 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,

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* 136-39 (1990).

164. Daniel P. Sulmasy et al., *The Accuracy of Substituted Judgments in Patients with Terminal Diagnoses*, 128 *ANNALS OF INTERNAL MED.* 621, 621, 626 (1998); Jeremiah Suhl et al., *Myth of Substituted Judgment: Surrogate Decision Making Regarding Life Support Is Unreliable*, 154 *ARCHIVES OF INTERNAL MED.* 90, 94 (1994).

165. See, e.g., Sulmasy et al., *supra* note 164, at 621. The study did find that surrogates were generally better at predicting the patients' wishes for more invasive procedures. *Id.* at 623.

166. *Id.* at 621-22.

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.¹⁶⁷ For example, if an offer is on the table and the offeree dies, the offeree's estate generally cannot accept the offer.¹⁶⁸ 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.¹⁶⁹ 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 \$2000 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 \$2000 for your car" and thereby create a binding contract.¹⁷⁰ *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 \$2000 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 \$2000 and *B* dies, *B*'s estate cannot call *A* and say, "The estate accepts your offer made to *B*. Here is the \$2000 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

167. See WILLISTON & LORD, *supra* note 56, § 77:71.

168. *Id.* § 77:68 ("An offeree's death terminates a revocable offer and renders ineffective a subsequent attempt by an administrator or personal representative to accept that offer.")

169. *Id.* § 77:71 ("An offeree's power of acceptance is terminated when the offeree or offeror dies . . ."). An exception is made 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. *Id.*

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

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. 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.

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. It should be noted, though, that these problems are not unique to posthumous rights, and they should not, in and of themselves, serve to limit posthumous rights.

IV. CONCLUSION

This Article suggests that dignity and autonomy play a large role in the granting of posthumous rights by lawmakers. While posthumous rights might be explained simply as a way to control the behaviors of the living, this theory ignores the innate human desire to treat the wishes of once-living persons with respect. The role of dignity and autonomy can be seen in the consistent use of rights language throughout the law, and these principles have played an important part in the development of posthumous rights.

But autonomy and respect are not without limits. A review of several cases and statutes reveals at least four principles—impossibility, the right's importance, time limits, and conflicts of interest between the living and the dead—that should guide lawmakers in determining which posthumous rights the law should recognize.

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 which courts and legislatures will need to continue to navigate with care.