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**Facebook's Afterlife**

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# FACEBOOK'S AFTERLIFE\*

JASON MAZZONE\*\*

*People spend an increasing part of their lives using Facebook and other online social networking sites. However, virtually no law regulates what happens to a person's online existence after his or her death. This is true even though individuals have privacy interests in materials they post to social networking sites; such sites are repositories of intellectual property, as well as materials important to family members and friends; and historians of the future will depend upon digital archives to reconstruct the past. In the absence of legal regulation, social networking sites determine on their own what, if anything, to do with a deceased user's account and the materials the user posted to the site. Yet allowing social networking sites to set their own policies with respect to decedents' accounts does not adequately protect the individual and collective interests at stake. The law, particularly federal law, can and should play a stronger role in regulating social networking sites and in determining the contours of our digital afterlives.*

INTRODUCTION .....	1644
I. THE SOCIAL NETWORK .....	1645
A. <i>Facebook: An Overview</i> .....	1645
B. <i>Individual and Collective Interests</i> .....	1648
1. Property .....	1648
2. Copyright.....	1649
3. Privacy .....	1652
4. Other People's Property and Privacy.....	1656
5. Relational Interests .....	1656
6. Legacies .....	1659
7. Summary.....	1660
II. POLICIES AND RESPONSES.....	1660
A. <i>Facebook's Policies</i> .....	1661
B. <i>Other Online Services</i> .....	1663

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1644	<i>NORTH CAROLINA LAW REVIEW</i>	[Vol. 90]
	C. <i>Evaluating Facebook's Policies</i> .....	1667
III.	LAWS OF SOCIAL NETWORKS.....	1673
IV.	REGULATING THE SOCIAL NETWORK.....	1677
	A. <i>Policy Reforms</i> .....	1677
	B. <i>Legal Regulation</i> .....	1681
	CONCLUSION .....	1685

## INTRODUCTION

More than one billion people currently use social networking sites.<sup>1</sup> They will all die. As people spend an increasing part of their lives in online communities, what happens to a person's online existence after his or her death is of increased importance. For one thing, individuals have privacy interests in materials they post to social networking sites. For another, such sites are the repositories of photographs and other intellectual property. In addition, a social networking site may hold materials important to family members and friends of the deceased. Further, when we post to Facebook instead of writing diaries and letters, historians of the future will depend upon digital archives to reconstruct the past.

There is virtually no law that determines how a decedent's account at a social networking site is to be handled. In the absence of any governing legal rules, social networking sites are in the midst of figuring out on their own what, if anything, to do with a deceased user's account and materials the user posted to the site. With more than 800 million users, Facebook is the largest of the social networking sites.<sup>2</sup> Since it launched in early 2004, Facebook has taken different approaches to handling the accounts of deceased users. Currently, Facebook "memorializes" a deceased user's Facebook page.<sup>3</sup> This allows confirmed friends of the decedent to post comments to the page, with the idea that the page will serve as a tribute site to the decedent. Memorialization, however, deactivates access to other materials, notably those posted by the account holder during his or her life and previously accessible to the decedent's

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1. *It's a Social World: Top 10 Need-to-Knows About Social Networking and Where It's Headed*, COMSCORE (Dec. 21, 2011), [http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/it\\_is\\_a\\_social\\_world\\_top\\_10\\_need-to-knows\\_about\\_social\\_networking](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/it_is_a_social_world_top_10_need-to-knows_about_social_networking) (reporting that 1.2 billion people worldwide use social networking sites).

2. *Newsroom: Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited May 4, 2012).

3. See *infra* Part II.A.

friends. Facebook users have registered a variety of complaints about the company's handling of deceased users' accounts. For example, some users would like to be able to determine in advance what will happen to their own Facebook pages when they die. Friends and family members of deceased Facebook users have complained that memorialization removes too much content from the decedent's page and expressed the desire to have continued access to everything the deceased user posted during life. On the other hand, memorialization has also been criticized for providing a forum for commentary that lingers in cyberspace and remains associated with the deceased user's name.

Drawing particularly upon the experience with Facebook's treatment of deceased users' accounts, this Article examines whether and how the law should play a greater role in regulating our digital afterlives. Part I provides an overview of social networking sites and identifies the individual and collective interests that these sites implicate. Part II examines Facebook's approach to deceased users' accounts. It also discusses briefly the policies of other social networking sites, as well as those of other types of online services. Part II then turns to reactions among users to Facebook's policy and some of the difficulties that the policy has created. Part III discusses the small number of laws that govern the disposition of a deceased user's social networking account and identifies their shortcomings. Part IV offers some proposals for regulating a deceased user's account, shows how these proposals could be implemented, and discusses their benefits.

## I. THE SOCIAL NETWORK

This Part begins with an overview of Facebook's main features. It then identifies the individual and collective interests that Facebook and other social networking accounts may implicate. As this Part shows, individuals may have property and privacy interests in a social networking account. There may also be group interests, including those that arise from the relational nature of online social networking.

### A. *Facebook: An Overview*

Facebook is a social networking service and website whose mission is "to give people the power to share and make the world

more open and connected.”<sup>4</sup> Facebook was created in February 2004 by Mark Zuckerberg at Harvard University, and was initially designed to connect Harvard students to each other.<sup>5</sup> Facebook now has more than 800 million users around the world.<sup>6</sup> Users who register for an account at the site obtain a Facebook “page” on which they can create a personal “profile” with photographs, a list of interests, and birthday, contact, and other personal information.<sup>7</sup> Users can then invite other Facebook users to become their Facebook “friends,”<sup>8</sup> people who are then part of the user’s own online social network.

Facebook provides several mechanisms for users to communicate with each other. A Facebook user can post status updates (e.g. “I’m heading to the gym!”) for others to see. Other users can then comment on those status updates or click to activate a thumbs-up icon to show that they “like” the update.<sup>9</sup> A “news feed” shows updates of friends’ statuses on each user’s homepage; thus each individual user can see what his or her friends have most recently posted.<sup>10</sup> Facebook users can also send private messages to each other<sup>11</sup> and communicate directly via a live chat feature.<sup>12</sup> In addition, each Facebook account has a “wall,” where other users can post messages and comments.<sup>13</sup> A Facebook user can “poke” his or her friends to say hello or otherwise get the friend’s attention; this results in an icon appearing on the friend’s page.<sup>14</sup> Facebook users may also

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4. *Facebook: About*, FACEBOOK, <https://www.facebook.com/facebook?sk=info> (last visited May 4, 2012).

5. Sarah Phillips, *A Brief History of Facebook*, GUARDIAN (U.K.) (July 24, 2007), <http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia>; Alan J. Tabak, *Hundreds Register for New Facebook Website*, HARVARD CRIMSON (Feb. 9, 2004), <http://www.thecrimson.com/article/2004/2/9/hundreds-register-for-new-facebook-website>.

6. *Newsroom: Company Info Fact Sheet*, *supra* note 2.

7. *Help Center: Profile*, FACEBOOK, <https://www.facebook.com/help/profile> (last visited May 4, 2012).

8. *Help Center: Friends*, FACEBOOK, <https://www.facebook.com/help/friends> (last visited May 4, 2012).

9. *Help Center: Like*, FACEBOOK, <https://www.facebook.com/help/?page=103918613033301> (last visited May 4, 2012).

10. *Help Center: Home Page and News Feed*, FACEBOOK, <https://www.facebook.com/help/newsfeed> (last visited May 4, 2012).

11. *Help Center: Messages*, FACEBOOK, <https://www.facebook.com/help/messages> (last visited May 4, 2012).

12. *Help Center: Chat*, FACEBOOK, <https://www.facebook.com/help/chat> (last visited May 4, 2012).

13. *Help Center: Wall*, FACEBOOK, <https://www.facebook.com/help/wall> (last visited May 4, 2012).

14. *Help Center: Pokes*, FACEBOOK, <https://www.facebook.com/help/pokes> (last visited May 4, 2012).

join groups with other users with whom they share a tie (e.g. college) or a common interest,<sup>15</sup> RSVP to an event, or interact on a “community page” organized around a specific topic (e.g. cooking).<sup>16</sup>

Facebook permits users to specify their own privacy settings and thereby control who can see specific parts of their pages.<sup>17</sup> For example, a Facebook user can specify that his or her status updates are only visible to his or her confirmed Facebook friends. Facebook generates revenue through advertising and it does not charge users any fees to access and make use of the site. “It’s free and always will be,” is a slogan the company has championed.<sup>18</sup>

The average Facebook user has 190 Facebook friends and is connected to eighty community pages, groups, and events.<sup>19</sup> More than half of all Facebook users log on to the site in any given day.<sup>20</sup> In addition to the billions of status updates that have been posted on Facebook, the site is also a repository for other content. For example, more than 250 million photographs are uploaded to Facebook each day.<sup>21</sup>

With so many people a part of Facebook, it is no surprise that large numbers of users have died and left a Facebook account behind. According to one estimate, 375,000 Facebook users in the United States die every year.<sup>22</sup> This number will increase significantly in coming decades because as Facebook matures, so will its users: currently the average age of Facebook users in the United States is thirty-eight.<sup>23</sup>

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15. *Help Center: Groups*, FACEBOOK, <https://www.facebook.com/help/groups> (last visited May 4, 2012).

16. Alex Li, *Connecting to Everything You Care About*, FACEBOOK BLOG (Apr. 19, 2010, 3:03 PM), <https://www.facebook.com/blog.php?post=382978412130>.

17. *Help Center: Privacy*, FACEBOOK, <https://www.facebook.com/help/privacy> (last visited May 4, 2012).

18. Chloe Albanesius, *Relax, Facebook Will Not Charge You for Access*, PCMAG.COM (Sept. 26, 2011), <http://www.pcmag.com/article2/0,2817,2393560,00.asp>.

19. Lars Backstrom, *Anatomy of Facebook*, FACEBOOK (Nov. 21, 2011, 8:04 PM), [https://www.facebook.com/note.php?note\\_id=10150388519243859](https://www.facebook.com/note.php?note_id=10150388519243859).

20. David Wilson, *More Than Half of Facebook Users Need Their Dose Daily: Chart of the Day*, BLOOMBERG (Feb. 3, 2012, 12:00 AM), <http://www.bloomberg.com/news/2012-02-03/facebook-turns-into-daily-habit-for-more-users-chart-of-the-day.html>.

21. *Newsroom: Overview*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=21> (last visited May 4, 2012).

22. Rob Walker, *Things To Do in Cyberspace When You're Dead*, N.Y. TIMES MAG., Jan. 9, 2011, at 30, 32; see also Nathan Lustig, *How We Calculated That Three Facebook Users Die Every Minute*, ENTRUSTET (Sept. 3, 2010), <http://blog.entrustet.com/2010/09/03/how-we-calculated-that-three-facebook-users-die-every-minute> (estimating that, in 2010, over 385,000 Facebook users would die that year).

23. KEITH N. HAMPTON ET AL., PEW INTERNET & AM. LIFE PROJECT, SOCIAL NETWORKING SITES AND OUR LIVES 10 (2011), available at <http://pewinternet.org/~>

*B. Individual and Collective Interests*

A social networking site consists of individuals who post materials via a membership account building relationships among the site's members. Accordingly, social networking sites may implicate both individual and collective interests. This Section identifies those interests and discusses the extent to which social networking sites address them.

## 1. Property

An account at a social networking site is, like any online account, intangible property. Like tangible property, intangible property can be left to named beneficiaries in a will and in the case of intestacy it passes to the decedent's heirs.<sup>24</sup> Yet the terms of use governing a social networking site typically specify who owns the property in the account. In general, a site's operator, rather than the individual subscriber, retains ownership of the actual account.<sup>25</sup> Facebook's terms of use (called "Statement of Rights and Responsibilities"), to which every user must agree in accessing the Facebook site, do not specifically state that Facebook retains ownership of individual Facebook accounts. Nonetheless, several key provisions make clear that, according to Facebook, accounts are not property owned by individual users. For one thing, Facebook imposes numerous

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/media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf. The percentage of users of social networking sites over the age of thirty-five is growing at twice the rate of users aged eighteen to thirty-five; half of all American users of social networking sites are over thirty-five. *Id.* at 8.

24. The Uniform Probate Code provides: "Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition, to his heirs." UNIF. PROBATE CODE § 3-101 (amended 2010), 8 Part II U.L.A. 29 (1998). Under the Uniform Code, "[p]roperty" includes both real and personal property or any interest therein and means anything that may be the subject of ownership." *Id.* § 1-201, 8 Part I U.L.A. 36; *see also id.* § 2-203, 8 Part I U.L.A. 103-04 ("[T]he value of the augmented estate . . . consists of the sum of the values of all property, whether real or personal; movable or immovable, tangible or intangible, wherever situated . . ."); *Id.* § 3-709, 8 Part II U.L.A. 155 ("Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property."). Similarly, under the Internal Revenue Code, the "gross estate" of a decedent is "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." I.R.C. § 2031(a) (2006).

25. *See* F. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CALIF. L. REV. 1, 50 (2005) ("Though property rights may exist in virtual assets, the allocation of those rights will depend largely on the End-User License Agreements (EULAs) that mark out the terms of access to the world. Since EULAs are written by the corporate owners, their terms inevitably grant all rights to the owner of that world.").

restrictions on how a Facebook account can be used.<sup>26</sup> Users who violate the “letter or spirit” of Facebook’s terms lose access to the site.<sup>27</sup> Thus, what Facebook users possess is the ability to access the Facebook site via an account so long as they comply with Facebook’s terms. Facebook also prohibits transferring an account to somebody else, as well as sharing account passwords.<sup>28</sup> If the individual Facebook user does not own the account, there is no property subject to probate upon the user’s death.

## 2. Copyright

Beyond the social networking account itself, the individual materials the account holder posts to Facebook or another social networking site can constitute intellectual property in which the account holder may have an ownership interest. In particular, copyright law can apply to content posted on social networking sites. “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>29</sup> Digital works are eligible for copyright protection.<sup>30</sup> Poems, essays, photographs, videos, commentary, and even status updates are all potentially eligible for copyright protection.<sup>31</sup> Users do not depend upon the social networking site to obtain intellectual property rights. Under federal law, the copyright in a work belongs to the author of the work<sup>32</sup> at the moment of fixation and (for works created on or after January 1, 1978) lasts for the life of the author plus seventy years.<sup>33</sup>

Terms of use governing a social networking site may also address intellectual property issues.<sup>34</sup> Facebook’s terms of use specify that

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26. See *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last updated Apr. 26, 2011).

27. *Id.* para. 14.

28. *Id.* para. 4.

29. 17 U.S.C. § 102(a) (2006).

30. *Id.* § 101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).

31. See § 102(a) (setting out the classes of work eligible for copyright protection).

32. *Id.* § 201 (“Copyright in a work protected under this title vests initially in the author or authors of the work.”).

33. *Id.* § 302(a).

34. Because copyrights are subject to transfer, a social networking site could specify in its terms of use that if a user posts material to the site the user transfers ownership of the

users retain ownership of copyrights in the materials they post but that they grant Facebook a broad license to make use of the copyrighted material.<sup>35</sup>

A copyright is intangible property that can be bequeathed to others.<sup>36</sup> Thus, while under Facebook's terms of use, a Facebook user cannot leave the Facebook account to another in a will, the user can bequeath the copyright in material posted on the site. While some might wonder why anybody would want to inherit intellectual property rights in Facebook postings, the content posted on some Facebook pages is likely to be quite valuable. It is not hard to imagine that content a celebrity posts on a Facebook page would be valuable if offered for sale following the celebrity's death.<sup>37</sup> Further, even the postings of non-celebrities might be of value given what could be done with digital data in the future. There are, for example, already services that convert data into an interactive avatar, promising a digital version of oneself to interact with friends and family members

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copyright to the operators of the site. However, such a provision would likely not be sufficient by itself to effect a transfer under the Copyright Act. *See id.* § 204(a) ("A transfer of copyright ownership . . . is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.").

35. According to Facebook's terms of use:

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition: For content that is covered by intellectual property rights, like photos and videos (IP content) . . . you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.

*Statement of Rights and Responsibilities*, *supra* note 26, para. 2. Under this provision, Facebook's license is likely to be perpetual because as a practical matter, most content posted to Facebook is shared with others. Thus even when the individual Facebook user who created the content decides to terminate the relationship, the license survives by virtue of the content having been shared.

36. § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").

37. Beyond Facebook, some sites host virtual assets that have monetary value. In particular, at online role-playing sites such as Second Life, users accumulate wealth that can be exchanged for real dollars (and are subject to income tax). Avatars at these sites can also have significant monetary value. In recognition of the value of users' accounts, Second Life allows its account holders to bequeath their accounts and assets and has procedures for accomplishing the transfer. *See Linden Lab Official: Death and Other Worries Outside Second Life*, SECOND LIFE WIKI, [http://wiki.secondlife.com/wiki/Linden\\_Lab\\_Official:Death\\_and\\_other\\_worries\\_outside\\_Second\\_Life](http://wiki.secondlife.com/wiki/Linden_Lab_Official:Death_and_other_worries_outside_Second_Life) (last visited May 4, 2012).

after death.<sup>38</sup> On the horizon may be interactive holograms that look and sound like a deceased individual, based upon that individual's digital archive (including postings to social networking sites). Materials that today seem of only limited value could take on greater significance in the future.

Yet the distinction between owning intellectual property in content posted via a social networking account and not owning the account itself can present a practical difficulty. If material in which the copyright is owned is located only on a Facebook page, the beneficiary could be precluded from ever accessing the material. For instance, if the only copy of a copyrighted photograph is held in a deceased user's Facebook account and, under Facebook's terms of use, nobody but the original user may access the site, the photograph might never be available to the beneficiary who gains a copyright interest in it. This problem takes on particular importance in light of Facebook's policy of memorializing deceased user's accounts, where even confirmed friends of the user can no longer access photographs, written content, and other materials. When Facebook is the repository for the sole copy of the works protected by intellectual property, the effect of memorialization can be to render the value of the intellectual property rights (that are preserved) worthless.<sup>39</sup>

Because owning a copy of a work is separate from owning the copyright in the work,<sup>40</sup> the copyright owner has no right to compel the return of copies. The nineteenth century case of *Grigsby v. Breckenridge*<sup>41</sup> demonstrates the point. There, shortly before her

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38. See, e.g., LIFENAUT, <http://lifenaut.com/> (last visited May 4, 2012); VIRTUALETERNITY, <http://www.virtualeternity.com/> (last visited May 4, 2012).

39. Beneficiaries and heirs who inherit a copyright in a work do not—in the non-virtual world—necessarily inherit the physical form of the work as well. If an artist leaves the copyright in a valuable painting to his daughter, the daughter does not thereby obtain the painting itself if, for example, it was previously sold to a collector. Nonetheless, the copyright remains valuable because, among other things, it can be used to license copies of the original painting. A closer analogy, then, to the non-virtual world might be to the heir who obtains the copyright in a painting but the painting itself has been lost or is in a vault that can never be opened so that nobody can access and make use of the painting in a way that gives the copyright value. Even this analogy is not perfect, however, because Facebook retains access to all materials posted on its site even if nobody else does.

40. See 17 U.S.C. § 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.”).

41. 65 Ky. (2 Bush) 480 (1867).

death, Virginia Hart gave to a Mrs. Grigsby a collection of letters sent to Hart, some authored by Robert J. Breckenridge, Hart's husband. After Hart's death, Breckenridge sought to compel Grigsby to return the letters to him as the administrator of Hart's estate, surviving husband, and author of at least some of the correspondence. Rejecting Breckenridge's claim that he had a right to the letters, the court explained that while the author of a letter retains the right to publish the letter, the author has no claim once the letter is given to somebody else, in this case Virginia Hart. Under the law, "the recipient of a private letter, sent without any reservation" acquired "the general property, qualified only by the incidental right in the author to publish and prevent publication by the recipient, or any other person."<sup>42</sup> This "general property," the court added, "implies the right in the recipient to keep the letter or to destroy it, or to dispose of it in any other way than by publication."<sup>43</sup> Applying the same logic to the context of online social networks, an heir might inherit the copyright in materials posted online and that copyright would give the heir the reproduction, distribution, and other rights a copyright confers.<sup>44</sup> However, the heir would have no right to obtain a copy of the materials from the operator of the social networking site.

### 3. Privacy

Individuals may also have privacy interests in their accounts at social networking sites.<sup>45</sup> Identifying information—such as a person's name and image, educational background, hometown, and contact information—can implicate privacy concerns. Likewise, information about a person's location on particular days and at particular times can give rise to privacy interests. There may also be privacy interests in the materials individuals post to a social networking site, such as photographs and status updates. Such materials may be shared with a large group of other individuals and so they are not as private as a diary. Yet these materials are not typically as public as a newspaper article or a published book. Facebook postings are accessible to others, but not necessarily to the entire world: users control, to

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42. *Id.* at 486.

43. *Id.*

44. See 17 U.S.C. § 106 (setting out the exclusive rights of copyright owners).

45. For useful definitions of privacy, see ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968) ("Privacy is not simply an absence of information about us in the minds of others, rather it is the *control* we have over information about ourselves.").

varying degrees, which other people can access and view what they post.

An individual may likewise have a privacy interest in materials posted to his or her account page by other members of the social networking site. On Facebook, other people can post responses to what an individual says and post comments to a user's wall. Facebook users do not necessarily want those responses and comments associated with their own individual accounts, and therefore themselves, to be publicly accessible. In addition, there may be privacy interests in the social network itself. Members of a social networking site do not necessarily want the entire world to know who is in their individual circle of friends and acquaintances. Nor do users necessarily want the groups to which they belong, the events they have attended (or to which they have been invited), or the books, movies, music, and other things they have said they enjoy to be publicly known. A virtual social network might be a world apart from a real-life social network. A social networking site can raise privacy concerns precisely because it may serve as a forum for individuals to interact with people different from those with whom they interact in real life, to show another side of themselves, to say things they do not say in the real world, and to pursue alternative interests. Indeed, for some people a social networking site can be the forum for a very different kind of existence from the one they lead in the real world, an existence that is purposely kept separate from real world family, friends, and co-workers.<sup>46</sup>

Facebook tells users: "privacy is very important to us."<sup>47</sup> Although the name and profile picture of a Facebook user are always

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46. For a useful framework for understanding online social networks, labeled the "contextual integrity" approach to privacy, see generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010). Nissenbaum contends that "a right to privacy is neither a right to secrecy nor a right to control but a right to *appropriate* flow of personal information." *Id.* at 127. In her account, norms that are developed in specific settings give rise to expectations about whether and to whom information will flow. *Id.* at 137–47. Individuals experience a loss of privacy when information is shared in violation of those norms:

[W]hat bothers people, what we see as dangerous, threatening, disturbing, and annoying, what makes us indignant, resistant, unsettled, and outraged in our experience of contemporary systems and practices of information gathering, aggregation, analysis, and dissemination is not that they diminish our control and pierce our secrecy, but that they transgress context-relative informational norms.

*Id.* at 186.

47. *Statement of Rights and Responsibilities*, *supra* note 26, para. 1.

visible to the general public,<sup>48</sup> through its “privacy settings,”<sup>49</sup> Facebook gives users control over who is able to see other materials they post to the site.<sup>50</sup> A Facebook user can specify who can see the user’s wall<sup>51</sup> as well as who can write on it.<sup>52</sup> Each Facebook user can control who is able to become that user’s friend.<sup>53</sup> A Facebook user can also block friend requests and other communications from other users.<sup>54</sup>

Facebook’s privacy settings are a work in progress. Since the site launched in 2004, Facebook users have lodged complaints about the company’s privacy policies, and Facebook has made numerous changes to them.<sup>55</sup> The changes themselves have often also produced criticism, particularly when Facebook’s default privacy settings are modified and users find their accounts less protected than they had assumed.<sup>56</sup>

The law of privacy protects dignitary and reputational interests of individuals.<sup>57</sup> Under American law, however, these privacy

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48. *Information We Receive and How It Is Used*, FACEBOOK, <https://www.facebook.com/about/privacy/your-info#everyoneinfo> (last visited May 4, 2012). Users can prevent that information from showing up through Facebook’s search mechanisms. *Help Center: Basic Privacy Controls*, FACEBOOK, <https://www.facebook.com/help/privacy/basic-controls> (last visited May 4, 2012).

49. *Help Center: Basic Privacy Controls*, *supra* note 48; *Privacy Settings*, FACEBOOK, <https://www.facebook.com/settings/?tab=privacy> (last visited May 4, 2012) (accessible only when logged into a Facebook account).

50. *Help Center: Basic Privacy Controls*, *supra* note 48.

51. *Id.*

52. *Help Center: Who Can Post to My Wall? How Do I Block People from Posting?*, FACEBOOK, <https://www.facebook.com/help/?faq=207589362639270> (last visited May 4, 2012).

53. *Help Center: Basic Privacy Controls*, *supra* note 48.

54. *Id.*

55. *See, e.g.*, Chris Cox, *Making It Easier To Share with Who You Want*, FACEBOOK BLOG (Aug. 23, 2011, 2:00 PM), <https://blog.facebook.com/blog.php?post=10150251867797131> (“You have told us that ‘who can see this?’ could be clearer across Facebook, so we have made changes to make this more visual and straightforward.”); Larry Magid, *Facebook Changes Privacy Controls*, HUFFINGTON POST (Aug. 23, 2011, 3:53 PM), [http://www.huffingtonpost.com/larry-magid/facebook-changes-privacy-\\_b\\_934256.html](http://www.huffingtonpost.com/larry-magid/facebook-changes-privacy-_b_934256.html) (“In an effort to make things simpler and more obvious, Facebook is changing the way people control who has access to their posts, status updates, pictures and other content.”).

56. *See, e.g.*, Nick Bilton, *Price of Facebook Privacy? Start Clicking*, N.Y. TIMES, May 12, 2010, at B8 (reporting that since Facebook changed its privacy settings to require users to opt out if they wish to keep information private, “the company has come under a blitz from privacy groups, government officials and its own users, who complain that the new policy is bewildering and the new opt-out settings too time-consuming to figure out and use”).

57. In his influential 1960 law review article, William Prosser divided the tort of invasion of privacy into four separate categories: (1) intrusion upon the seclusion of

interests do not survive death<sup>58</sup>: a privacy claim cannot be asserted on a deceased person's behalf.<sup>59</sup> Thus, as a legal matter, any recognized privacy interest a user has in a social networking account or in materials posted via that account terminate with the user's death.<sup>60</sup> (In some circumstances, however, survivors can make out a claim for

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another; (2) public disclosure of private facts; (3) placing another in a false light before the public; and (4) appropriation of name or likeness. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); see also WILLIAM L. PROSSER, *THE LAW OF TORTS* 804 (4th ed. 1971) ("To date the law of privacy comprises four distinct interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.'"). Prosser's four-part categorization of privacy rights was adopted in the Second Restatement of Torts and it has been accepted by nearly all courts in the United States. See RESTATEMENT (SECOND) OF TORTS § 652A (1977).

58. See J. THOMAS MCCARTHY, 2 *THE RIGHTS OF PUBLICITY AND PRIVACY* § 9:1 (2d ed. 2011) ("[C]lassic 'privacy' rights die with the person whose privacy was allegedly invaded."). There is, however, a growing trend of states recognizing commercial rights of publicity claims after death. See *id.* § 9:18 ("[A] total of 20 states recognize a postmortem right of publicity: 14 by statute and six by common law.").

59. See *Fitch v. Voit*, 624 So. 2d 542, 543 (Ala. 1993) ("[T]his Court has not recognized a 'relational right of privacy . . .'"); *Hendrickson v. Cal. Newspapers, Inc.*, 121 Cal. Rptr. 429, 431 (Ct. App. 1975) ("It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded. Further, the right does not survive but dies with the person." (internal citations omitted)); *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 814 (R.I. 1996) ("[T]he right to privacy dies with the person."); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) ("[T]he right to privacy is a personal right. As such, the right . . . may not be assigned to another, nor may it be asserted by a member of the individual's family, even if brought after the death of the individual."); RESTATEMENT (SECOND) OF TORTS § 652I, cmt. a (1977) ("The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his.").

60. Other countries allow for privacy interests to survive death. See RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 127–30 (2010) (discussing German and Italian laws that protect the reputations of deceased persons). For an exploration of the differences between European and American notions of privacy, see generally James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2009) ("Continental privacy protections are, at their core, a form of protection of a right to respect and personal dignity . . . . By contrast, America . . . is much more oriented toward values of liberty, and especially liberty against the state."). A striking example of the European approach to privacy is the right to be forgotten that the European Commission proposed in early 2012. See Jeffrey Rosen, *The Right To Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012) (discussing the proposed right). Among other things, this right would give an individual Facebook user the right to require Facebook to delete material the individual had posted but later decided he or she did not want to remain available—even if that material has been further distributed by other Facebook users. *Id.* at 89–90.

their own privacy-related injuries.<sup>61</sup>) Nonetheless, it is not hard to imagine why Facebook users and consumers of other social networking sites could be concerned about what will happen to their materials after they die. Many people care about the legacy they will leave behind, even if privacy claims enforced through law cannot be the vehicle for shaping it.

#### 4. Other People's Property and Privacy

Besides the interests of the individual account holder, other people may have interests in materials posted by a Facebook user. For one thing, other people can be the authors or creators of some of the materials that are posted on an individual's Facebook page, giving rise to intellectual property interests. Much of what happens on Facebook is a conversation. Facebook users post reactions to each other's status updates and comment on other people's walls. Photographs and other materials an individual uploads to the site could be the works of somebody else and therefore that person's copyrighted content.

One person's Facebook account might also implicate the privacy interests of other people. A Facebook page could be the place where somebody discloses private information about others in a way that implicates privacy concerns (perhaps, in some instances, giving rise to a cause of action under the law). A Facebook page can also be the site where others post information about themselves with an expectation that that information will not be shared with the entire world.

#### 5. Relational Interests

A collective interest may also arise by virtue of the fact that any particular individual's Facebook page has a group dimension. Participants in social networking sites do not typically keep their participation entirely private. The point of posting information is for

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61. See, e.g., *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 160 (2004) (holding that Exemption 7(C) of the Freedom of Information Act, which excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy," extends to surviving family members' right to personal privacy with respect to their close relative's death-scene images). The Court in *Favish* was careful to note that it was protecting the privacy interests of surviving family members, not of the deceased. See *id.* at 166 (explaining that the surviving family members "invoke their own right and interest to personal privacy. They seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased.").

others to see it. Likewise, people join social networking sites not just to share information about themselves, but to see what other people are saying and doing and to interact with other participants. Each participant has an interest in maintaining his or her group of networked friends because without that group, the individual's own activities are much less meaningful. Thus, the group as a whole has an interest in the activities of individual members because they are the building blocks of the group. To be sure, when viewed in isolation, the group's interest in any particular individual member might be weak: the loss of one member might not affect the overall composition of the group much, and somebody else might appear to replace a member whose contributions have disappeared. Nonetheless, because in the aggregate the group depends upon the activities of individual members, there is a collective interest in what those individual members do. Imagine, for example, if Facebook were to announce that because of resource issues, each Facebook user would lose twenty percent of their Facebook friends and those friends would be selected at random by Facebook. Such a change would significantly disrupt existing online ties and would generate massive resistance. This is because individuals have a stake in maintaining the networks of which they are a part.

Freedom of association is the legal doctrine that recognizes and protects group affiliation and activity, at least from governmental interference. The Supreme Court has distinguished two kinds of associational freedom: intimate and expressive. The relationships among users of an online social networking site do not easily fall into either of these two categories.

Freedom of intimate association, reflective of the constitutional guarantee of "zones of privacy,"<sup>62</sup> gives individuals the right to enter and maintain certain intimate relationships free of governmental interference. The Court has explained that "the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage; the raising and education of children; and cohabitation with one's relatives."<sup>63</sup> Although the Court has declined to set the doctrine's outer limits, it has identified the characteristics of relationships that support a claim to intimate association as "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation,

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62. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984).

63. *Id.* at 619 (citations omitted).

and seclusion from others in critical aspects of the relationship.”<sup>64</sup> A group of individuals connected through a social networking site would not ordinarily satisfy these requirements. The group is likely too large, insufficiently selective, and, in most cases, lacks the requisite degree of seclusion. Intimate relationships, of the kind represented by familial ties, require investments of time and resources that cannot easily be extended to each of the dozens or hundreds of people that are part of an online social network. While an intimate relationship does not necessarily endure forever, intimate ties have a permanence that sets them apart from online relationships that are both easily formed and easily dissolved. Intimate partners often live together; members of an online social network might never meet in person.

Freedom of expressive association is a First Amendment doctrine that protects groups that “engage in some form of expression, whether it be public or private.”<sup>65</sup> People who are members of social networking sites obviously engage in expression: they post information about themselves, read what other people have posted, and communicate with each other. Nonetheless, it is not clear whether a group of individuals connected through a social networking site could claim the same kinds of interests that freedom of expressive association protects.<sup>66</sup> The type of group represented by individuals who are connected via an online social network is quite different from those traditionally protected by the law of freedom of association. The Supreme Court’s cases on freedom of association have involved groups that are either (1) well-defined—for example, the Jaycees<sup>67</sup> and Rotary<sup>68</sup> (both service organizations), and the Boy Scouts;<sup>69</sup> (2) organized for identifiable political purposes—for example, political

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64. *Id.* at 620.

65. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *see also Roberts*, 468 U.S. at 622 (noting that associational freedom is “implicit in the right to engage in activities protected by the First Amendment”).

66. Peter Swire offers a useful account of how constitutional protections for freedom of association could apply to three kinds of laws governing social networking sites: limits on using online social networks for political campaigns; laws imposing specific privacy rules upon social networking sites; and “do not track” rules prohibiting social networks from monitoring online activity or displaying targeted advertising. *See* Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371, 1395–1401 (2012).

67. *See Roberts*, 468 U.S. at 623–25 (holding that under a strict scrutiny analysis a state law prohibiting gender discrimination was constitutional as applied to the Jaycees).

68. *See Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548–49 (1987) (holding that state anti-discrimination law was constitutional as applied to Rotary).

69. *See Boy Scouts*, 530 U.S. at 656–59 (holding unconstitutional a state law prohibiting discrimination based on sexual orientation as applied to the Boy Scouts).

parties<sup>70</sup> and Students for a Democratic Society;<sup>71</sup> or (3) both well-defined and politically active—like the NAACP.<sup>72</sup> By contrast, a group of individuals connected through a social networking site is very loosely defined. Membership requires only the click of a button, there are no leaders or meetings, and individuals can leave the group as they please. A person's Facebook friends can include one-night stands, celebrities they have never met, and others with whom there is no tie beyond accepting the friend request. There is also no single organization. You and I might be friends on Facebook, but your entire group of Facebook friends is not likely to be exactly the same as mine. While a group of Facebook friends might share common beliefs (for example, similar political leanings), the group is not “organized for specific expressive purposes.”<sup>73</sup>

## 6. Legacies

Beyond a particular user's “friends,” there can also be societal interests in social networking accounts because they might be the principal or even the only source that future generations use in order to find out about people who lived before them. When we do not leave physical materials behind—letters, photographs, diaries, and so on—digital materials take on increased significance. For example, because historians will depend heavily upon digital evidence to reconstruct the past, there are already concerns about the adequacy of current data preservation measures.<sup>74</sup> Of course, not everything

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70. See *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) (holding that a state court injunction prohibiting a rival set of delegates from attending the 1972 Democratic National Convention violated the associational freedom of the enjoined delegates and of the National Democratic Party); *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973) (explaining that the “freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments” and that “[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom”).

71. See *Healey v. James*, 408 U.S. 169, 181–82 (1972) (holding that the Central Connecticut State College's refusal to recognize, and allow the use of campus facilities to, a local chapter of Students for a Democratic Society violated the students' First Amendment rights to associational freedom).

72. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–62 (1958) (holding that an order requiring the NAACP to divulge its membership list constituted “a substantial restraint upon the exercise by petitioner's members of their right to freedom of association” and that the order was therefore unconstitutional).

73. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

74. Roy Rosenzweig, *Scarcity or Abundance? Preserving the Past in a Digital Era*, 108 AM. HIST. REV. 735, 758 (2003) (“Historians . . . need to act more immediately on preserving the digital present or . . . they will be struggling with a scarcity, not an overabundance, of sources.”); Robert Lee Hotz, *A Data Deluge Swamps Science Historians*, WALL ST. J., Aug. 28, 2009, at A6 (“Usually, historians are hard-pressed to

posted to Facebook will be of interest to future historians: not all people are significant enough to make the pages of history, and much of the content on Facebook, where there is little in the way of curating, is mundane. But some of what is posted will be valuable to historians of the future, especially in the absence of other sources to understand and analyze the past. Even individual materials, themselves unimportant, can be the basis for future large-scale studies of communities or other collectivities. In announcing in 2010 that it would archive all public “tweets” (short messages sent via the online service, Twitter), the Library of Congress explained: “Individually tweets might seem insignificant, but viewed in the aggregate, they can be a resource for future generations to understand life in the 21st century.”<sup>75</sup> Postings to social networking sites can serve a similar function.

### 7. Summary

Social networking sites implicate a variety of potential individual and collective interests. These interests do not necessarily find strong protection in current laws. Nor are they necessarily in harmony. For example, one person’s postings to a social networking site can be the basis for creating and maintaining robust relationships, but those postings might undermine the privacy of somebody else. In the same way, the societal interest in preserving postings to social networking sites for future historical study can be in tension with the privacy interests of individual users. Regulation of social networking sites therefore likely involves choices about which interests to protect with some tradeoffs. These considerations bear on the examination in Part II of the current policies of social networking sites with respect to the accounts of deceased users and the proposals for reform discussed in Part IV.

## II. POLICIES AND RESPONSES

This Part examines how Facebook treats the accounts of deceased users and compares Facebook’s policies with those of other

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find any original source material about those who have shaped our civilization. In the Internet era, scholars . . . might have too much. Never have so many people generated so much digital data or been able to lose so much of it so quickly . . . .”); Christopher Beam, #Posterity, SLATE MAG. (Apr. 20, 2010, 7:03 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2010/04/posterity.html](http://www.slate.com/articles/news_and_politics/politics/2010/04/posterity.html) (discussing opportunities for and limitations on digital data mining by future historians).

75. Matt Raymond, *The Library and Twitter: An FAQ*, LIBR. CONGRESS BLOG (Apr. 28, 2010), <http://blogs.loc.gov/loc/2010/04/the-library-and-twitter-an-faq/>.

online services. It then discusses how Facebook users have responded to those policies and the concerns they have raised about how Facebook handles deceased users' accounts and the information posted to a deceased user's Facebook page.

A. *Facebook's Policies*

Facebook currently allows anybody to submit a form reporting a Facebook user's death.<sup>76</sup> Submission of the form results in the deceased user's Facebook page automatically being "memorialized." Nobody can then log into or edit the page. The page is also made "private" so that only previously confirmed Facebook friends of the deceased user can see it or locate it through Facebook's search mechanism. Confirmed Facebook friends may continue, without limitation, to post messages to the deceased user's Facebook wall, with the idea that the wall becomes a memorial to the decedent.<sup>77</sup> In order to "protect the deceased's privacy," Facebook removes "sensitive information such as contact information" and, notably, status updates from a memorialized page.<sup>78</sup> Memorialization stops the name and profile photo of the deceased person from appearing as a suggested friend in the list of "People You May Know," but it does not stop the "Tag a Friend" feature from identifying the faces of a deceased person in photographs that another user uploads to the site.<sup>79</sup>

As an alternative to memorialization, "verified family members" or an estate's executor may make a "special request" that a deceased user's account be closed so that the user's Facebook page disappears entirely from the site.<sup>80</sup> This step requires the person making the request to prove that he or she is an "immediate family member" or

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76. *Report a Deceased Person's Profile*, FACEBOOK, [https://www.facebook.com/help/contact.php?show\\_form=deceased](https://www.facebook.com/help/contact.php?show_form=deceased) (last visited May 4, 2012).

77. *Id.*

78. Max Kelly, *Memories of Friends Departed Endure on Facebook*, FACEBOOK BLOG (Oct. 26, 2009, 11:48 AM), <http://www.facebook.com/blog.php?post=163091042130>.

79. Facebook says, "We're very sorry for any discomfort this feature has caused . . . . Unfortunately, we do not have the technical ability to determine whether the person shown in the photo is deceased. As always, you have the option to delete any photo that you have uploaded to Facebook." *Help Center: Privacy: Deactivating, Deleting, and Memorializing Accounts*, FACEBOOK, <https://www.facebook.com/help?page=842> (follow "The 'Tag a Friend' feature is asking me to tag a deceased friend in a photo" hyperlink) (last visited May 4, 2012).

80. *Id.* (follow "A deceased person's account is appearing in 'People You May Know.' How do I report this?" hyperlink). It is not clear how Facebook verifies that the person making this request is indeed a family member.

the lawful representative of the decedent's estate.<sup>81</sup> It is not clear what standards Facebook uses to decide whether to honor the request to close an account rather than memorialize it.<sup>82</sup>

Facebook's current policy represents a change in how the company previously handled the accounts of deceased users. In the initial period after Facebook began, accounts of deceased users were deleted after thirty days.<sup>83</sup> Facebook changed this deletion policy after friends of victims of the Virginia Tech shootings in 2007 protested the pending deactivation of the victims' pages, which had become tribute sites.<sup>84</sup> John Woods, a Virginia Tech student, led the opposition through a group he formed called "Facebook Memorialization Is Misguided: Dead Friends Are Still People."<sup>85</sup> While the group's page claims success in "manag[ing] to convince Facebook to change its policy," it complains of "several oddities surrounding memorialization": that a deceased user's interests and favorite books, movies, shows, and "about me" quotes are deleted; that users cannot identify themselves as having met other individuals through the deceased user; and that the deceased user's groups are deleted.<sup>86</sup> Facebook adopted its existing approach to memorialization, limiting the material that remains on a deceased user's page and who can see that information, in the fall of 2009.<sup>87</sup>

There is no mechanism for a Facebook user to determine in advance what should happen to his or her account after death. For example, a Facebook user cannot specify that his or her account

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81. *Help Center: How Do I Submit a Special Request for a Deceased User's Account on the Site?*, FACEBOOK, <https://www.facebook.com/help/?faq=265593773453448> (last visited May 4, 2012).

82. After *The Consumerist* drew attention to a woman's unsuccessful efforts to have Facebook remove the page of her deceased brother, a Facebook spokesperson responded: "[A]ll the user has to do is identify themselves as the next of kin and we are happy to close the account." Ben Popken, *Update: Facebook Agrees To Take Down Dead Relative's Page*, CONSUMERIST (Feb. 21, 2009, 4:52 PM), <http://consumerist.com/2009/02/update-facebook-agrees-to-take-down-dead-relatives-page.html> (quoting Barry Schnitt, Facebook Communications). This statement does not, however, reflect the policy on the Facebook site.

83. Kristina Kelleher, *Facebook Profiles Become Makeshift Memorials*, BROWN DAILY HERALD (Feb. 22, 2007), <http://www.browndailyherald.com/features/facebook-profiles-become-makeshift-memorials-1.1674763#.TxLqXc317Ec>.

84. Monica Hortobagyi, *Slain Students' Pages To Stay on Facebook*, USA TODAY (May 9, 2007, 9:53 PM), [http://www.usatoday.com/tech/webguide/internetlife/2007-05-08-facebook-vatech\\_N.htm?csp=34](http://www.usatoday.com/tech/webguide/internetlife/2007-05-08-facebook-vatech_N.htm?csp=34).

85. *Facebook Memorialization Is Misguided: Dead Friends Are Still People*, FACEBOOK, <https://www.facebook.com/group.php?gid=2785485042&v=info> (last visited May 4, 2012) (accessible only when logged into a Facebook account).

86. *Id.*

87. Kelly, *supra* note 78.

should be deleted, that certain content should be removed, or that a designated person should be entrusted to manage the account. However, Facebook does offer a “Download Your Information” feature that allows users to download and store on their own computers (or other device) a copy of the content (current at the time the download occurs) from their own Facebook page.<sup>88</sup>

### B. Other Online Services

Before turning to how Facebook users have responded to its handling of deceased users' accounts, it is useful to consider briefly what other sites do with accounts of individuals who have died. MySpace is a social networking site that launched in August 2003 and had around 33 million U.S. users in the fall of 2011.<sup>89</sup> In addition to allowing individuals to connect with others, MySpace has a popular music section that allows artists to post and sell music. Millions of artists make use of the site to promote their work.<sup>90</sup> MySpace allows the next of kin or the executor to submit a death certificate or obituary and request that a deceased user's profile be removed entirely or preserved on the site.<sup>91</sup> Like Facebook, MySpace has no mechanism in place for individuals to specify in advance what should happen to their accounts when they die.

Beyond social networking sites, the issue of control of digital content arises in other online environments. Many popular sites provide no information about what happens to accounts of deceased users.<sup>92</sup> Sites that do provide information have varied policies. Web-

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88. *Help Center: Download Your Information*, FACEBOOK, <https://www.facebook.com/help/?topic=download> (last visited May 4, 2012). Included in the download are the following: profile information, wall posts, photos and videos uploaded to the account, friend lists, notes the account holder has created, events to which the account holder RSVP'd, sent and received messages, and comments on the user's wall posts and photos. *Id.* (follow “When I download my information from Facebook, what is included in the file?” hyperlink).

89. Emily Steel, *Myspace Downsizes Party*, WALL ST. J., Sept. 19, 2011, at B7.

90. *See Music*, MYSPACE, <http://www.myspace.com/music> (last visited May 4, 2012).

91. *What if My Friend/Loved One Passed Away?*, MYSPACE, [http://myspace2.custhelp.com/app/answers/detail/a\\_id/369/kw/deceased/session/L3Nuby8xL3RpbWUvMTMxODUyMzUzMC9zaWQvZmxEemp0R2s%3D](http://myspace2.custhelp.com/app/answers/detail/a_id/369/kw/deceased/session/L3Nuby8xL3RpbWUvMTMxODUyMzUzMC9zaWQvZmxEemp0R2s%3D) (last visited May 4, 2012).

92. *See, e.g.*, DELICIOUS, <http://www.delicious.com/> (last visited May 4, 2012) (providing a virtual bulletin board); DZONE, <http://www.dzone.com/links/index.html> (last visited May 4, 2012) (offering a link-sharing site for software architects); FOURSQUARE, <https://foursquare.com/> (last visited May 4, 2012) (offering a location-based social networking application for mobile devices); SLASHDOT, <http://slashdot.org/> (last visited May 4, 2012) (allowing users to post news stories about science and technology); TECHNORATI, <http://technorati.com/> (last visited May 4, 2012) (hosting a search engine specific to blogs); YELP, <http://www.yelp.com/> (last visited May 4, 2012) (offering a

based e-mail services have terms of use that govern access and ownership claims following the death of the account holder. According to the terms of service governing Yahoo!, “You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.”<sup>93</sup> Yahoo! owns Flickr, a site that hosts more than five billion photographs submitted by users. Yahoo!’s terms of service also apply to Flickr accounts. In a rare case testing the enforceability of Yahoo!’s terms of service, in 2005, a probate judge ordered Yahoo! to turn e-mails over to the family of a U.S. Marine killed in Iraq.<sup>94</sup> After Justin Ellsworth was killed in Fallujah by a roadside bomb, his father, John, asked Yahoo! to permit him to access his deceased son’s e-mail.<sup>95</sup> John Ellsworth wanted to use the e-mails to create a memorial for his son.<sup>96</sup> Until the court order, Yahoo! refused the request on the ground that disclosing a subscriber’s e-mails would violate its own privacy policy.<sup>97</sup>

Gmail and Hotmail, by contrast, do have mechanisms in place that provide for account access, under certain circumstances, by a representative of a deceased user’s estate. (Hotmail also provides similar access to an individual with a power of attorney for an incapacitated user.)<sup>98</sup> Gmail, owned by Google, has a policy that appears strict. “[I]n rare cases we *may* be able to provide the Gmail account content to an authorized representative of the deceased user,” Google says.<sup>99</sup> This limitation exists, the company explains, because

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business rating and review site); WORDPRESS.COM, <http://wordpress.com/> (last visited May 4, 2012) (providing a host for blogs).

93. *Yahoo! Terms of Service*, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (last visited May 4, 2012).

94. *See In re Ellsworth*, No. 2005-296,651-DE (Mich. Prob. Ct. Apr. 20, 2005).

95. *See Ariana Eunjung Cha, After Death, a Struggle for Their Digital Memories*, WASH. POST, Feb. 3, 2005, at A1.

96. *See id.*

97. Susan Llewelyn Leach, *Who Gets To See the E-Mail of the Deceased?*, CHRISTIAN SCI. MONITOR, May 2, 2005, at 12, *available at* <http://www.csmonitor.com/2005/0502/p12s02-usju.html>.

98. *Microsoft Answers: My Family Member Died Recently/Is in a Coma, What Do I Need To Do To Access Their Hotmail Account?*, WINDOWS LIVE (Mar. 15, 2012), <http://answers.microsoft.com/en-us/windowslive/forum/hotmail-profile/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6>.

99. *Accessing a Deceased Person’s Mail*, GMAIL, <http://mail.google.com/support/bin/answer.py?hl=en&answer=14300> (last visited May 4, 2012).

At Google, we're keenly aware of the trust users place in us, and we take our responsibility to protect the privacy of people who use Google services very seriously. Any decision to provide the contents of a deceased user's email will be made only after a careful review, and the application to obtain email content is a lengthy process.<sup>100</sup>

The process for obtaining a decedent's e-mails requires the estate's representative to submit identifying information and a death certificate. Google conducts an initial review of those materials and according to its policy, "[i]f we are able to move forward based on our preliminary review, we will send further instructions outlining Part 2. Part 2 will require you to get additional legal process including an order from a U.S. court and/or submitting additional materials."<sup>101</sup> Hotmail, owned by Microsoft, appears to have a more lenient approach. It preserves e-mails for one year after notification of a user's death and allows individuals who can show they are "the users next of kin and/or executor or benefactor of their estate, or that you have power of attorney" and who submit either "[a]n official death certificate for the user, if the user is deceased" or "[a] certified document signed by a medical professional . . . if the user is incapacitated" to obtain "the release of Hotmail content, including all emails and their attachments, address book, and Messenger contact list."<sup>102</sup>

Millions of people operate blogs.<sup>103</sup> Yet many popular blog hosting services provide little information about what they do with blogs when the blog owner dies. For example, Blogger, which is owned by Google, provides no specific information on its site about disposition of a deceased blogger's account.<sup>104</sup> Nothing in Google's general "Terms of Service" (to which Blogger users must agree) pertains to a user's death.<sup>105</sup> A separate "privacy policy" states that Google will only share personal account information when "we have a good-faith belief that access, use, preservation or disclosure of the

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100. *Id.*

101. *Id.*

102. *Microsoft Answers: My Family Member Died Recently/Is in a Coma, What Do I Need To Do To Access Their Hotmail Account?*, *supra* note 98.

103. The blog hosting service Tumblr alone hosts 40 million blogs. Jenna Wortham, *Public Outcry over Antipiracy Bills Began as Grass-Roots Grumbling: Protests Started Before Widespread Media Attention*, N.Y. TIMES, Jan. 20, 2012, at B1.

104. See *Blogger Help Center*, GOOGLE, <http://support.google.com/blogger/?hl=en> (last visited May 4, 2012).

105. See *Policies & Principles: Google Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms/> (last modified Mar. 1, 2012).

information is reasonably necessary to . . . meet any applicable law, regulation, legal process or enforceable governmental request.”<sup>106</sup> Blogs contain intellectual property, such as commentary, photographs, movies, and so on. While Blogger’s terms of use make clear that all intellectual property rights remain with the user,<sup>107</sup> there is no specific way for an administrator of an estate to access that content.<sup>108</sup>

Other interactive websites have a variety of policies. At the video sharing site YouTube, which is also owned by Google, users upload sixty hours of video every minute.<sup>109</sup> YouTube permits individuals with a power of attorney, as well as parents of a deceased minor, to access a deceased user’s account and its content.<sup>110</sup> Inactive YouTube accounts are subject to deletion after six months.<sup>111</sup> LinkedIn, a professional networking site, allows anybody to submit a “Verification of Death” form which results in the deceased member’s profile being closed. No death certificate is required, though the form does require providing the e-mail address of the deceased user.<sup>112</sup>

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106. *Privacy Policy*, GOOGLE, <http://www.google.com/policies/privacy/> (last modified Mar. 1, 2012) (listing other reasons to share information, such as investigating violations of the terms of service, addressing fraud and security issues, and protecting against harm to the rights and safety of Google and its users).

107. *Google Terms of Service*, GOOGLE para. 4, [http://www.google.com/apps/intl/en-GB/terms/user\\_terms.html](http://www.google.com/apps/intl/en-GB/terms/user_terms.html) (last visited May 4, 2012) (“Google claims no ownership or control over any Content submitted, posted or displayed by you on or through Google services. You or a third party licensor, as appropriate, retain all patent, trademark and copyright to any Content you submit, post or display on or through Google services and you are responsible for protecting those rights, as appropriate.”).

108. Google also states in its terms of service:

You agree that Google may at any time and for any reason, including a period of account inactivity, terminate your access to Google services, terminate the Terms, or suspend or terminate your account. In the event of termination, your account will be disabled and you may not be granted access to Google services, your account or any files or other content contained in your account.

*Id.* para. 10.

109. *Statistics*, YOUTUBE, [http://www.youtube.com/t/press\\_statistics](http://www.youtube.com/t/press_statistics) (last visited May 4, 2012).

110. *See YouTube Death Policy: How To Access and Delete YouTube Accounts*, ENTRUSTET, <http://blog.entrustet.com/digital-executor-toolbox/how-to-access-and-delete-youtube-accounts/> (last visited May 4, 2012).

111. Evidently, the six-month policy is designed not to respond to the death of users but to prevent people from “squatting” on a desirable account user name. *See YouTube Help: YouTube Username Policy*, YOUTUBE, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=151655> (follow “Username Squatting” hyperlink) (last visited May 4, 2012) (“In general, users are expected to be active members within the YouTube community.”).

112. *Help Center: Deceased Member—Verification of Death Form*, LINKEDIN, <https://>

Twitter, with 200 million accounts and 230 million tweets per day,<sup>113</sup> promises to close the account of a deceased user and provide family members with an archive of the user's public Tweets. To trigger these steps, individuals must supply Twitter with information about, among other things, their relationship to the deceased user and a public obituary.<sup>114</sup>

### C. Evaluating Facebook's Policies

Facebook users have raised a variety of concerns over Facebook's treatment of deceased users' accounts. One problem identified by many Facebook users is that memorialization of an account is too easy. Not everyone who knew the deceased user wants his or her page to be memorialized but all it takes is one person—anyone—to submit a death report to Facebook and memorialization results. Thus, well-meaning (and even not so well-meaning) friends, family members, colleagues, and even near-strangers, can thwart the wishes of others to keep a page active.<sup>115</sup> Disagreement about memorialization can trigger or reflect deep divisions among friends and family members.<sup>116</sup> Because the procedure for having a page

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[help.linkedin.com/app/answers/detail/a\\_id/2842/kw/death%20of%20a%20member/ls/1431%2C1440%2C1765%2C2974](http://help.linkedin.com/app/answers/detail/a_id/2842/kw/death%20of%20a%20member/ls/1431%2C1440%2C1765%2C2974) (last visited May 4, 2012).

113. Tom Loftus, *Twitter Shares Active User Numbers*, WALL ST. J. (Sept. 8, 2011, 5:33 PM), <http://blogs.wsj.com/digits/2011/09/08/twitter-shares-active-user-numbers/>.

114. *Help Center: How To Contact Twitter About a Deceased User*, TWITTER, <https://support.twitter.com/groups/33-report-a-violation/topics/148-policy-Msinformation/articles/87894-how-to-contact-twitter-about-a-deceased-user> (last visited May 4, 2012).

115. One user has complained: “[M]y recently deceased brother’s page was memorialized without our authorization. [W]e can still see his page, but cannot see his ‘Info’ or any posts from him anymore. We need to get it back to the way it was before. We are not sure how this even happened.” Jill Goodfellow, Comment to *Facebook Memorialization Is Misguided: Dead Friends Are Still People* (June 3, 2010, 4:10 PM), *supra* note 85. Another user reported: “I wish we had some rights! My uncle passed away last year and his account was put away in a memorial site that is not fair because alot of us feel that was a comfort page for us even his parents are disapointed that the page was terminated.” Valerie Borg-Flammini, Comment to *Memories of Friends Departed Endure on Facebook* (May 4, 2011, 3:16 PM), *supra* note 78 (errors in original).

116. Consider this Facebook exchange from 2010:

Cindy Washburn (June 8, 2010, 3:29 PM): Just joined today in an effort to stop the memorialization of Nick’s account. Please don’t do this to family and friends. This is one of the few ways we can still be close to him and those who loved him. Please reconsider what you will be taking from us.

Robin DiBella Bernath (June 8, 2010, 5:08 PM): thanks “stepmonster” with love from “mommie dearest”

Comments to *Facebook Memorialization Is Misguided: Dead Friends Are Still People*, *supra* note 85.

memorialized is so simple, it had led to some people using it as a way to prevent others from accessing the page.<sup>117</sup> Living Facebook users have even been reported as dead and had their pages memorialized.<sup>118</sup>

Facebook users also complain that they are unable to add a deceased person as a Facebook friend in order to access the memorialized site.<sup>119</sup> Some Facebook users have found themselves defriended before memorialization goes into effect, evidently because a surviving relative or friend had obtained temporary access to the account and made a determination about who should be able to continue to visit the page.<sup>120</sup> Facebook users complain also that memorialization turns spouses, fiancés, and others formerly identified by Facebook with a special status into mere “friends” of the

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117. One Facebook user said: “[M]y daughter was killed in a car crash on Dec[ember] 13, 2009 and her friend turned her facebook site into a memorial sight [because she didn’t like one of my daughter’s friends having access . . . .]” Doreen Brothers, Comment to *Memories of Friends Departed Endure on Facebook* (Sept. 3, 2010, 6:09 PM), *supra* note 78.

118. Lauren Morgan, *The Social Media Afterlife*, HUBZE BLOG (Oct. 26, 2011), <http://hubze.com/2011/10/the-social-media-afterlife/>.

119. Here are two examples:

My cousin recently passed away . . . . I wasn’t his friend on [F]acebook yet and so [I] sent them a message requesting that they add me to his friends list so that I could participate in his remembrance and help me with my grieving . . . . [N]ot only did they not add me, but they memorialized his account so that I can no longer find him in the search engine nor look at any of his pictures or post on his wall. It was like losing him twice.

Cristina de Almeida, Comment to *Facebook Memorialization Is Misguided: Dead Friends Are Still People* (Apr. 30, 2009, 8:33 AM), *supra* note 85.

My sixteen year old son, Kaleb, died in a car accident in October 2008. I didn’t request his page be removed. However, I did request that [F]acebook let me become his friend so I could see and read the postings of his friends. In someway this gives me comfort to know that people still miss Kaleb. It’s hard to explain how I feel. Sadly FB would not agree to let me be a friend. They memorialized his profile. Why couldn’t FB just let me, his mom, be a friend??? What would it hurt???

Vivian Payne, Comment to *Facebook Changes Policy on Deceased User’s Accounts?*, ALL FACEBOOK, <http://www.allfacebook.com/facebook-changes-policy-on-deceased-users-accounts-2009-02> (last visited May 4, 2012) (on file with the North Carolina Law Review).

120. One user wrote:

My father passed away on March 11, 2011. I contacted [F]acebook on March 14, 2011 to delete his account after his wife had gotten into his account and started defriend[ing] all of his blood relatives and also posting improper things that the family did not feel needed to be on there . . . . [M]y father’s mother was removed from even being able to see his account.

Helen Henderson Volpe, Comment to *Memories of Friends Departed Endure on Facebook* (Apr. 27, 2011, 10:35 AM), *supra* note 78.

deceased.<sup>121</sup> On the other hand, users also complain that they face social pressure to maintain a dead person as a Facebook friend, even though doing so may be personally uncomfortable.<sup>122</sup>

Facebook users complain about the inability to determine in advance what will happen to their own pages when they die. One user said: "How 'bout allowing me to decide? I write a will when I am alive, why can't I tell Facebook what to do in the event of my death . . . . My dece[n]dants should be allowed to learn about my life and get a sense of who I was through Facebook."<sup>123</sup> Another said he could not "understand why a family member would even want to pursue closing what will probably be the most comprehensive memorial a person could have."<sup>124</sup> Some Facebook users want their pages to be accessible even to people not already accepted as friends.<sup>125</sup>

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121. This concern is reflected in the two following comments:

My fiance was killed in accident this June. And his page was added or turned into Memorial page. Along with this change, it brought changes to my page too. It deleted his name from my relationship status . . . .

Oxana Kurilo, Comment to *Memories of Friends Departed Endure on Facebook* (Aug. 21, 2010, 1:27 PM), *supra* note 78.

My husband passed away in a freak rock-slide accident when we wanted to go rock climbing just over a month ago. I wonder at the possibility of having him linked to my 'widowed' status? If I choose the widowed option it takes away the 'relationship' link I had with him and boils it down to having him listed as one of my friends. Somehow, that's not enough. I wish to memorialize his account, but would love to keep a link to his memorialized account as his wife.

Carlien Kahl, Comment to *Memories of Friends Departed Endure on Facebook* (Sept. 5, 2010, 11:38 PM), *supra* note 78.

122. "My problem," one woman wrote, "is that I want to unfriend my best friend's father who past away last year. I feel badly but it upsets me to see his profile but I don't want to hurt the feelings of his children and ex-wife by unfrinding him. It sucks." Helena Fleming, Comment to *Memories of Friends Departed Endure on Facebook* (June 7, 2011, 10:39 AM), *supra* note 78.

123. CG, Comment to *Facebook Changes Policy on Deceased User's Accounts?*, *supra* note 119 (on file with the North Carolina Law Review).

124. Rodney, Comment to *Facebook Changes Policy on Deceased User's Accounts?*, *supra* note 119 (on file with the North Carolina Law Review).

125. One man explained this desire:

I'm fairly new here, and, while many people from my past have found me, there are many more that might not have. Are the people who haven't found me out of luck if they decide to try and look me up after my death? Will they never know what was going on in my life during the time I was on Facebook? Sad to think that you might never know the fate of a person you're trying to locate just because they've passed on.

Mike Davis, Comment to *Memories of Friends Departed Endure on Facebook* (Feb. 24, 2011, 5:48 AM), *supra* note 78.

Facebook users have raised objections to what gets posted on the wall of a memorialized page. Living Facebook users can control what gets posted to their walls. Once the Facebook user dies, however, the wall becomes an open forum for confirmed friends to post anything at all. Many Facebook users have complained that posts to a memorialized site harm the memory or posthumous reputation of the deceased account holder.<sup>126</sup> Surviving family members have also used walls to air grievances among themselves.<sup>127</sup>

Facebook users consider access to the page of a deceased person to be an element of the grieving process.<sup>128</sup> They therefore protest their inability to access other parts of a deceased user's page besides the wall. "Let our loved ones live on," pled one user. "It is part of the grieving process."<sup>129</sup> Many Facebook users complain specifically about losing access to a deceased person's past status updates. One wrote: "[B]y removing status updates, you are deleting a good portion of the person. They reflect what the person is going through at the

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126. Here is one example:

I had a dear long time friend pass 2 days ago tragically and the friends whom posted his death notice and funeral arrangements were very helpful, but I found a post by a so called friend that went into the details of his depression, mental illness, suicide by hanging himself from a bike rack! I am furious his network is enormous and family and friends do not need to see that pe[r]son[al], private info, people please use common sense of what ur post may effect the privacy of the family! Can facebook teach users to protect delicate information like that from being posted?

Mary Bucher, Comment to *Memories of Friends Departed Endure on Facebook* (Sept. 11, 2010, 1:18 AM), *supra* note 78 (errors in original).

127. One user wrote:

[P]lease help—I need to delete my husband's memorial page on Facebook. His death, drowning as a result of a heart attack, was accidental, unfortunately on our honeymoon in front of me and the children, and his family continues to blame me, his bride of 4 1/2 days, for his death. Their venom is exposed on his page, and I need for it to disappear. It is dishonoring my husband and my self and children, and I need for it to stop. Help!!

Dani, Comment to *Facebook Changes Policy on Deceased User's Accounts?*, *supra* note 119 (on file with the North Carolina Law Review).

128. See Ab D. Phillip & Jesse North, *Parents of Dead Students Use Facebook to Connect*, IND. DAILY STUDENT (Nov. 28, 2007, 12:00 AM), <http://www.idsnews.com/news/story.aspx?id=57899&search=facebook&section=search>. This article quotes a mother speaking of her deceased daughter's Facebook page this way: "It's almost like having an open diary . . . . It's good for when you don't have a photo album handy, just go to the page and look there. Look at some happy times." *Id.*

129. Joan Drisdale Powell, Comment to *Memories of Friends Departed Endure on Facebook* (May 2, 2010, 7:44 PM), *supra* note 78.

moment, what's on their mind."<sup>130</sup> Some users equate Facebook postings with physical letters written to them personally.<sup>131</sup> Others complain specifically about losing access to posts by a dying friend or relative that reflected that person's struggle with illness or pending death.<sup>132</sup> Users have also complained about losing access to other digital content posted on Facebook, including photos<sup>133</sup> and poetry.<sup>134</sup>

Many users view a deceased person's Facebook page as something that belongs to them, or as something in which they have a stake. From this perspective, a Facebook page is not just the creation of the individual Facebook user but has instead a collective dimension. Accordingly, the death of the registered Facebook user should not result in diminished access to the page for the living. One woman complained, for example, that she wanted to access some of her son's posts during his illness in order to compile them into a book.<sup>135</sup> A man sought to reactivate his wife's memorialized account

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130. Mike Davis, Comment to *Memories of Friends Departed Endure on Facebook* (Feb. 24, 2011, 5:48 AM), *supra* note 78. Another user wrote: "Why remove the status updates and posts? With them removed, I can't look back on all the fun silly things they put on their walls when they were alive that made them who they were, making it virtually impossible to look back on all the great times we had." Jake MacLean, Comment to *Memories of Friends Departed Endure on Facebook* (June 2, 2011, 6:31 PM), *supra* note 78.

131. One said:

My 19 year old son's FB was memorialized . . . following his sudden tragic death. There was absolutely no warning given about all his comments and postings being deleted. All his friends and our family have now been caused the additional pain of losing all his written contributions to our lives without having the opportunity to save them first. This is the age of the internet, where people don't write letters any more, and for FB to remove them without reason or warning is unforgivable.

Rachel Cooper, Comment to *Memories of Friends Departed Endure on Facebook* (July 13, 2010, 7:06 AM), *supra* note 78 (errors in original).

132. One Russian user said: "It is a torture not to be able to see what [my brother] wrote while going through his fight with melanoma, since you have erased his posts—by what right?!" Zhanna P. Rader, Comment to *Memories of Friends Departed Endure on Facebook* (Jan. 7, 2011, 9:50 AM), *supra* note 78.

133. One user wrote: "Before the internet we looked at old letters and photos physically, but with the internet age, all this is done on the computer, with you deleting everything without or permission, it is like YOU ARE ROBBING AND ERASING our relatives memories FOREVER!" Jake MacLean, Comment to *Memories of Friends Departed Endure on Facebook* (June 2, 2011, 6:31 PM), *supra* note 78.

134. *E.g.*, Sarah Lyons, Comment to *Memories of Friends Departed Endure on Facebook* (June 23, 2010, 11:35 AM), *supra* note 78 ("My boyfriend passed away and someone memorialized it which is fine, but he had some poems that his family, friends and I would like to have that he wrote as statuses.").

135. Mary Catherine Alford, Comment to *Memories of Friends Departed Endure on Facebook* (July 11, 2010, 1:24 PM), *supra* note 78 ("My son, Peter Williamson, died last December, and another son had his FB put in memorial status. Today I went to read some

in order to add notes, video, and other content to her Facebook page.<sup>136</sup> Yet another Facebook user wanted ongoing access to the photos of a deceased family member and of his own friends.<sup>137</sup> For many Facebook users, losing access to content is an additional loss they experience individually. One woman wrote that she felt “robbed and violated” when she lost access to her brother’s page.<sup>138</sup> Another Facebook user explained that the ability to write on a deceased friend’s wall was a way to maintain a connection to her:

My friend passed away ten months ago and we continue to write on her wall whenever we miss her. I know it’s probably not the easiest way to deal with it, but I don’t ever want to lose this communication with my friend, it makes me feel like I’m still connected to her in some way.<sup>139</sup>

Some people have obtained the password of a deceased Facebook user and therefore been able to access his or her page. One woman reported, for example, that she obtained her deceased son’s password from his cousin and that she felt “very fortunate that [Facebook] is available for us to keep in contact with his friends and read the things they post daily on his page.”<sup>140</sup> People who manage to access an account in this manner become especially outraged when somebody else reports the death to Facebook, the page is memorialized, and they can no longer log on to it.<sup>141</sup> Some users have

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of his old posts during his illness (I am hoping to compile some of these in a book) and none of his posts are there - only other peoples posts to his wall. How can I see his old posts???? I am so sad if I have lost these!”).

136. Jhoni Tuerah, Comment to *Memories of Friends Departed Endure on Facebook* (June 8, 2010, 11:50 AM), *supra* note 78.

137. Wanda Rogerson, Comment to *Memories of Friends Departed Endure on Facebook* (June 25, 2010, 1:40 AM), *supra* note 78.

138. Evangeline Thompson, Comment to *Memories of Friends Departed Endure on Facebook* (Jan. 18, 2011, 10:41 PM), *supra* note 78.

139. jayden, Comment to *Facebook Changes Policy on Deceased User’s Accounts?*, *supra* note 119 (on file with the North Carolina Law Review).

140. Sue J., Comment to *Facebook Changes Policy on Deceased User’s Accounts?*, *supra* note 119 (on file with the North Carolina Law Review).

141. One woman wrote:

My fiance passed away, quite quickly, from cancer recently. Somebody reported his account as deceased, yet his mom and I still use it . . . . I am upset that I am unable to login to his account (when he was alive, we both had eachothers passwords, and logged in together all the time) . . . and I liked being able to send him messages on there (my way of talking to him). I’m unsure what else to do.

Lisa Marie, Comment to *Facebook Changes Policy on Deceased User’s Accounts?*, *supra* note 119 (on file with the North Carolina Law Review). Another user says:

sought, unsuccessfully, to simply take over a deceased individual's account and turn it into a memorial page that they control.<sup>142</sup>

The complaints registered about Facebook's handling of deceased users' accounts reflect many of the interests in social networking sites identified in Part I of this Article. Individual Facebook users are concerned about their inability to determine, consistent with their own preferences, what will happen after they die to materials they have posted at the site. Friends of deceased Facebook users complain about the loss of access to a decedent's postings; members of the network consider themselves to have a stake in preserving Facebook pages of those who have passed. Heirs have complained about their inability to access content that they consider valuable. In sum, Facebook's policy for handling accounts of deceased users fails to protect many of the individual and collective interests that exist with respect to online social networks. The law can play a role in safeguarding interests that are not adequately protected through private arrangements. The next Part examines the limited role that the law currently plays in regulating how online services handle accounts of deceased users. We will then be in a position to identify ways in which the law might play a stronger role.

### III. LAWS OF SOCIAL NETWORKS

There is remarkably little regulation of what online services may do with a deceased user's account. No federal law specifically addresses this issue. Just five states have enacted any relevant legislation, and in only two of those states is there statutory law that specifically governs social networking sites like Facebook.

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My mother died after a 3 month battle with cancer . . . [T]hen one day apparently someone reported her as deceased, and the next time I tried to log into her account (We had her password and had been routinely logging in to message with people that were her friends, and weren't necessarily people I would want to add as mine, old college roommates that I had never met, old friends from high school, etc). They didn't even send an email to her account to verify . . .

Ashley Kaye Reynolds Taylor, Comment to *Memories of Friends Departed Endure on Facebook* (June 18, 2011, 8:46 PM), *supra* note 78.

142. One user explained:

[W]hy not just rename the account "In memory of... John Doe" I think that would make it obvious enough that the person was deceased, but at least people searching could find that person and learn they were dead... still be friends... and come in to pay their respects, find family members, leave their regrets.

Evangeline Thompson, Comment to *Memories of Friends Departed Endure on Facebook* (June 7, 2011, 5:44 AM), *supra* note 78.

Connecticut law provides for access to a decedent's e-mail. A provision of the code governing Probate Courts and Procedure, entitled "Access to decedent's electronic mail account," requires e-mail providers to turn over copies of all e-mails, sent and received, to the executor or administrator of the estate of the deceased, provided he or she was domiciled in the state at the time of his or her death.<sup>143</sup> All that is required to compel the transfer of these e-mails is a written request by the executor or administrator, accompanied by proof of death, or a court order with proper probate jurisdiction. This law is specific to electronic mail service providers and does not address social networking sites such as Facebook. The statute also does not require an e-mail provider to retain copies of a deceased user's e-mails. Rhode Island has a statute similar to that of Connecticut, also limited to e-mails.<sup>144</sup>

A provision of the Indiana Probate Code is more broadly worded. Entitled "Duty of custodian to provide electronically stored documents to personal representative," this provision requires "any person who electronically stores the documents or information of another person" to "provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian."<sup>145</sup> Upon receipt of either the written request by the personal representative of the estate or a court order with proper probate jurisdiction, the custodian must provide access to the electronically stored information. It is not clear from the text of the statute just how far this law reaches. In particular, while e-mails would constitute "documents," it is not evident that the law applies to the disposition of a social networking site like Facebook. There are no reported court cases resolving this question. In addition, the statute provides only for a right to obtain data held in an account; it does not provide for a right to access and use the account.

Oklahoma was the first state to enact a law governing a decedent's social networking account specifically. Effective November 1, 2010, the law, enacted as a regulation of telecommunications, provides: "The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased

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143. CONN. GEN. STAT. ANN. § 45a-334a (West Supp. 2011).

144. R.I. GEN. LAWS § 33-27-3 (2011).

145. IND. CODE ANN. § 29-1-13-1.1 (LexisNexis 2011).

person on any social networking website, any microblogging or short message service website or any e-mail service websites.”<sup>146</sup> Importantly, the statute grants the executor power only where otherwise authorized. Thus, authority to act on the decedent’s behalf must derive from a will or other legal mechanism. There is scant legislative history on this statute. Introduced on February 1, 2010, the proposed legislation passed unanimously in the House and Senate in less than three months with no amendments.<sup>147</sup> In sponsoring the legislation, Oklahoma State Representative Ryan Kiesel, stated: “[T]his legislation will bring Oklahoma probate law into the 21st century . . . . When a person dies, someone needs to have legal access to their accounts to wrap up any unfinished business, close out the account if necessary or carry out specific instructions the deceased left in their will.” Kiesel continued, “Digital photo albums and e-mails are increasingly replacing their physical counterparts, and I encourage Oklahomans to think carefully about what they want to happen to these items when they pass away.”<sup>148</sup>

Idaho is only the second state to adopt a law regulating a decedent’s social networking account. A provision of that state’s Uniform Probate Code, effective July 1, 2011, provides:

Except as restricted or otherwise provided by the will or by an order in a formal proceeding . . . a personal representative . . . may properly . . . [t]ake control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service website.<sup>149</sup>

The wording of the Idaho provision is thus identical to the Oklahoma law.<sup>150</sup>

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146. OKLA. STAT. ANN. tit. 58, § 269 (West Supp. 2012); see also *New Oklahoma Law Puts Control of Deceased’s Social Media Accounts in Estate Executors*, INT’L BUS. TIMES (Dec. 2, 2010, 4:47 PM) <http://www.ibtimes.com/articles/88106/20101202/new-oklahoma-law-puts-control-of-deceased-s-social-media-accounts-in-estate-executors.html> (discussing the general tenets of the new law and the impetus behind passing it).

147. H.B. 2800, *Bill Tracking Reports*, OKLA. ST. LEGISLATURE, <http://www.oklegislature.gov/AdvancedSearchForm.aspx> (last visited May 4, 2012) (enter “HB2800” into the “Personal Bill Tracking Report” and select “2010 Regular Session” from the drop-down menu).

148. *House Approves Social Media Probate Legislation*, OKLA. HOUSE REPRESENTATIVES (Mar. 15, 2010), <http://okhouse.gov/OkhouseMedia/ShowStory.aspx?MediaNewsID=3505>.

149. IDAHO CODE ANN. § 15-3-715 (Supp. 2011).

150. In early 2012, the Nebraska legislature was also considering a bill modeled on the Oklahoma and Idaho statutes. Steve Eder, *Deaths Pose Test for Facebook*, WALL ST. J., Feb. 11, 2012, at A3.

While the Oklahoma and Idaho laws remain untested, there are significant impediments to these laws having any real practical effect. First, it is not clear that the laws are meant to override the terms of use that, as a matter of contract law, govern the relationship between a social networking site and its user and contain a forum provision and choice of law clause. Facebook users agree to litigate any claims in Santa Clara County under the laws of California.<sup>151</sup> Second, it is not clear that a state court would have jurisdiction sufficient to order access to the account. Operating a website accessible to users in a state does not necessarily subject the website operator to personal jurisdiction in that state's courts.<sup>152</sup> Unless (and it seems improbable)

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151. *Statement of Rights and Responsibilities*, *supra* note 26, para. 15. This provision states:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.

*Id.*

152. Whether and when courts in distant states have personal jurisdiction over website operators is unsettled. *See, e.g.*, *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (holding that a company that “anticipated, desired, and achieved a substantial California viewer base” at its website was subject to personal jurisdiction in California); *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003) (“[T]he mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant ‘purposefully availed’ itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.”); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (“[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts.”); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002) (holding that the purposeful availment requirement of personal jurisdiction analysis is satisfied “if the website is interactive to a degree that reveals specifically intended interaction with residents of the state” (citation omitted)); *Zippo Mfg. Co. v. Zippo DOT Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (distinguishing among “passive,” “interactive,” and “active” websites as the basis for determining whether jurisdiction is proper); *Penguin Grp. (USA), Inc. v. Am. Buddha*, 946 N.E.2d 159, 163 (N.Y. 2011) (ruling, on a question certified by U.S. Court of Appeals for the Second Circuit as to whether the situs of an injury for uploading a copyrighted work on the Internet under New York’s long-arm statute is the location of the infringing action or the residence or location of the principal place of business of the copyright owner, that the harm from online copyright infringement is felt in New York whenever the plaintiff is a New York copyright owner).

the relevant account data are located on servers in Oklahoma or Idaho, there is not likely to be *in rem* jurisdiction so as to permit a state court to require access to the account.<sup>153</sup> Third, Facebook and other social networking sites are likely to resist granting access to accounts of deceased residents of Oklahoma and Idaho in accordance with the laws of those states. Facebook has a strong interest in controlling what happens to data it holds and an interest also in a uniform policy that applies to all users' accounts.<sup>154</sup> (And it is unlikely that Facebook would be willing to allow a single state, or two states, to set the standard.) Among other things, and by definition, Facebook pages are not individual creations. Aside from the entirely friendless, every Facebook user is linked up to others; every page contains postings from other users. When Oklahoma and Idaho regulate social networking sites they are not just regulating the postings of their own citizens.

#### IV. REGULATING THE SOCIAL NETWORK

This Article proposes two ways to control what happens to content posted at a social networking site after the death of the account holder. One way is for Facebook and other sites to decide on their own to give users control. Another is for the law to regulate the disposition of online accounts and the accompanying content. Right now, the law is doing very little work at all and so, in the absence of legal regulation, those who are dissatisfied with how a social networking service treats a decedent's account are dependent upon the service changing its policies. This Part identifies ways in which Facebook and other social networking sites could, on their own, usefully alter their policies for handling decedents' accounts. Failing a change by the services themselves, legal regulation may be necessary. This Part also outlines a possible approach the law could take.

##### A. *Policy Reforms*

Facebook's current memorialization procedure is not the only approach the company could take to deceased users' accounts. A

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153. The analysis could be different if an account holder owned a property interest in the social networking account. In general, the law of the state where a person was domiciled at the time of death governs the disposition of the person's personal property and the state in which real property is located governs the disposition of real property. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 72 (8th ed. 2009).

154. Nonetheless, Facebook has been able, to some extent, to tailor its policies to the requirements of different jurisdictions. See Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1835 (2012) (using the term "glocalization" to describe this phenomenon).

significant shortcoming of Facebook (and other sites) when it comes to the disposition of deceased users' accounts is that there is no possibility for users themselves to exercise any control over what will happen to their account and its content once they die. Reform could, therefore, most usefully begin by giving individual account holders some choice in the same way that Facebook allows its subscribers to control their privacy settings. As with the privacy settings, there would be a default mechanism (it could be the present system of memorialization) for account holders who did not select one of the alternatives. There are a variety of options Facebook could offer, ranging from a complete shut-down of the account to the account's continued operation under the control of a designated individual. For example, users could be permitted to select in advance which portions of the Facebook page would remain visible and to whom, and whether or not friends could post to the page. Facebook could allow account holders to create messages in advance of death that would go out after the account holder passed away.

Were Facebook to provide a system of options, some users would elect to keep the account, and all of its existing content, visible but without the possibility of any additional content being added to it. Others would require certain content to be deleted. Some users would prevent any newcomers from viewing the page. Others would open the page to the entire Facebook world. Additional possibilities are imaginable. Rather than Facebook determining how individual privacy interests should operate across the board, individual account holders would have an opportunity to decide for themselves.

The administrative burden to Facebook itself would likely be small. A selection would be made in advance and once notification of death was received, the selected options would automatically take effect: content would disappear or remain as specified; access and privacy settings would automatically change; if the account holder had elected to turn over control to another individual, that individual would receive an automated message with access information.

Preserving digital content is not expensive but it is not free. Facebook depends on advertising for revenue. There would therefore likely be increased costs associated with maintaining content-rich accounts of individuals who do not purchase anything. Such costs would, of course, increase over time as more and more Facebook users die. Providing some options, then, beyond a default setting, could require advance payment of a fee in the same way that maintaining a website requires payments to a hosting service.

Facebook could also allow a user to designate a trusted individual with authority either to take over the account or to direct what happens to the account after the user's death. The named individual could, for example, close down the account (or inform Facebook that it should be closed), curate posted materials, or leave all of the content accessible.<sup>155</sup> The named individual could also be responsible for monitoring postings by others to the decedent's page and taking other actions to maintain the account.

A Facebook user can, of course, currently make plans to give control of his or her account to somebody else: all it takes is turning over the password. As seen, however, this is an uncertain solution because of the ease with which accounts are memorialized. There are also currently online "digital estate planning" services that store passwords and other information needed to access an online account and then release that information to a designated individual upon the death of the subscriber. One such service is Legacy Locker, which bills itself as "an easy-to-use digital safety deposit box" and says it "guarantees your online information and assets are distributed according to your wishes upon your death."<sup>156</sup> Another service, Deathswitch.com, releases account information to the named beneficiary upon notification of death or if the customer does not respond to an "are you still alive?" notice.<sup>157</sup> However, the problem for such services remains that for Facebook all it takes is one person to report the death of a user for the account to be memorialized, making access unavailable even to those with a password.<sup>158</sup> A

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155. One wrinkle is that American law has traditionally disfavored the ability of testators to direct that their property be destroyed. See Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 838 (2005) ("As a general matter, the law recoils at the idea of allowing the dead hand to destroy property."). It is therefore possible that a court would prohibit a personal representative from terminating an account. On the other hand, under the terms of service, an account at a social networking site is not likely to be the property of the account user. In addition, terminating the account would not destroy materials posted via the account if (as is allegedly true of Facebook) the social networking service retains copies of everything ever posted on its site. See Phil Wong, *Conversations About the Internet #5: Anonymous Facebook Employee*, RUMPUS (Jan. 11, 2010), <http://therumpus.net/2010/01/conversations-about-the-internet-5-anonymous-facebook-employee/>.

156. *Frequently Asked Questions*, LEGACY LOCKER, <http://legacylocker.com/support/faq> (follow "Is Legacy Locker the same as a will or estate? Or an electronic will?" hyperlink) (last visited May 4, 2012).

157. Michael S. Rosenwald, *Web Sites Ensure Online Lives Don't Disappear with 'Dearly Departed'*, WASH. POST, Jan. 25, 2010, at A1.

158. In light of this, it is not surprising that Legacy Locker's terms of service contain extensive disclaimer of warranty and limitation of liability provisions. *Terms of Service*, LEGACY LOCKER, <http://legacylocker.com/support/terms-of-service> (last updated Mar. 18, 2009).

different service, Entrustet, stores passwords and instructions for dealing with digital assets upon death, and also offers an “account incinerator” to destroy content that subscribers do not want to outlive them.<sup>159</sup> Again, though, the incinerator only works if the page has not already been memorialized.<sup>160</sup> Without the cooperation of Facebook, these kinds of workarounds are not likely to prove reliable.<sup>161</sup>

Providing account holders with the ability to determine, in advance, what happens to their accounts and content will satisfy many of the individual interests at stake in social networking accounts, whereas collective interests can be served, to some extent, with a default option that is geared more toward those interests. Thus, individual users would be able to select an option that matches their own individual interests, but users’ accounts for which an option is not selected would be handled in a manner that privileged collective interests over those of the individual. One default setting that would achieve this purpose is having all of the user’s content remain available unless the account holder selects otherwise. By way of default, the account would remain accessible to current friends. It could also become open to the entire world (for purposes of research and such) after some period of time, say ten years. The point is that unless an individual specified otherwise, the account would track collective interests. Many individuals would not specify an option (in the same way that many people do not alter privacy settings on Facebook<sup>162</sup> and many people die without having written a will), and thus the default mechanism would be important and widely relied upon. Accordingly, a default option geared toward collective interests would result in the preservation of a substantial amount of digital content.

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159. ENTRUSTET, <http://entrustet.com/account-incinerator> (last visited May 4, 2012).

160. In addition to the technical barrier to the effectiveness of the “account incinerator,” the service appears to run against the law’s traditional reluctance to permit testators to direct that property be destroyed. *See supra* note 155. One context in which the lawfulness of this service could be tested is if the service reneges on the deal and fails to carry out instructions to destroy an account; if the service is thereafter sued for breach of contract, a court might rule the contract unenforceable on public policy grounds.

161. Other approaches are imaginable. For example, a service other than Facebook could automatically backup all content posted by a user at Facebook and then post it on another site upon the death of the user. Technological workarounds of this kind would, however, present possible claims by Facebook of infringement of its own intellectual property; Facebook would also likely develop technological measures to prevent or limit the success of devices that copy content posted to its site.

162. *See* Emily Bazelon, *The Young and the Friended: Why Facebook Is After Your Kids*, N.Y. TIMES MAG., Oct. 16, 2011, at 15, 16 (reporting that “most people (and especially teenagers) never change” the default privacy settings on Facebook).

Facebook and other social networking sites could implement the changes proposed here on their own. Yet there are reasons to doubt that they will be inclined to do so in the absence of significant pressure. While Facebook, like most corporations, is responsive to consumer pressure, two current conditions likely entrench Facebook's current approach to deceased users' accounts. One is that Facebook is so overwhelmingly popular that individuals who do not like how Facebook handles the accounts of decedents cannot easily move to a different service. The second obstacle is that many people do not like to think about their own deaths. Thus, dissatisfaction with Facebook's current policy likely does not translate into a sufficient level of consumer pressure to force change.

### *B. Legal Regulation*

Legal regulation might well be needed to change the way that social networking sites handle the accounts of deceased users. Some states have already adopted regulations and others might follow, though the prospect of achieving protection for all Americans through state-by-state reform is far from certain. Federal law is likely a better solution. Given that social networking sites operate via national communications systems and engage in commerce that transcends state and national boundaries, Congress has ample authority under the Commerce Clause of the Constitution to regulate how these sites treat the accounts of deceased users.<sup>163</sup>

Congress could impose any number of requirements upon social networking sites. For example, federal law could require that social networking sites give users the option to specify what will happen to their accounts and the account content after they die. Alternatively, social networking sites could be required to permit a decedent's executor or other personal representative to gain access to the decedent's account. As with other matters pertaining to an estate, the personal representative would carry out the wishes of the deceased account holder, whether by maintaining the account, curating the material contained in it, or shutting it down.

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163. *See, e.g.*, *United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006) (stating that "the Internet is an instrumentality and channel of interstate commerce" and holding that Congress has power to criminalize the downloading of child pornography); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce" and holding that Congress has power to criminalize the use of the Internet to seek out minors for sexual activities).

Existing federal law provides a useful model for federal regulation of social networking sites.<sup>164</sup> The Health Insurance Portability and Accountability Act (“HIPAA”) is the federal statute that governs privacy in health records.<sup>165</sup> To implement HIPAA, the Department of Health and Human Services (“HHS”) has issued the HIPAA Privacy Rule.<sup>166</sup> The Privacy Rule prohibits healthcare providers and other covered entities from disclosing an individual patient’s health records to others except in designated circumstances.<sup>167</sup> This protection lasts after the death of the patient.<sup>168</sup> The Privacy Rule also gives individual patients and their personal representative a right of access to their own healthcare records.<sup>169</sup> Following a patient’s death, the regulations defer to state laws of representation. According to the Privacy Rule, if, under state law, “an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual’s estate, a covered entity must treat such person as a personal representative . . . with respect to protected health information relevant to such personal representation.”<sup>170</sup> States have well-developed laws to determine who qualifies as a personal representative of an estate,<sup>171</sup> including laws

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164. I am grateful to Peter Swire for suggesting this model to me.

165. Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 26, 29, and 42 U.S.C. (2006)).

166. See 45 C.F.R. §§ 160, 162, 164 (2011).

167. *Id.* § 164.502(a).

168. *Id.* § 164.502(f) (“A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual.”).

169. *Id.* § 164.502(g)(1).

170. *Id.* § 164.502(g)(4).

171. For example, in Minnesota, the appointment of a personal representative is determined in the following order:

- (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) other devisees of the decedent;
- (4) the surviving spouse of the decedent;
- (5) other heirs of the decedent;
- (6) 45 days after the death of the decedent, any creditor;
- (7) 90 days after the death of the decedent . . . any conservator of the decedent who has not been discharged.

that determine representation and access with respect to health records specifically.<sup>172</sup>

A HIPAA-style federal law regulating social networking accounts would permit a decedent's personal representative to present his or her qualifications to the operator of the social networking service. The personal representative would then be able to determine what happens to the account and attendant content. The personal representative would act in accordance with any directions provided by the decedent in his or her will. Absent such directions, the representative would handle the account in accordance with the best possible prediction of the decedent's wishes.

Social networking accounts differ in important respects from health records. In particular, many individuals can claim an interest in an online social network. Health records are considerably more personal. While family members of a patient might have strong reasons for seeking access to the patient's health records—for example, because the records can be useful for identifying and understanding diseases to which the patient's relatives might also be subject—the circle of individuals with compelling claims is necessarily small. Similarly, few individuals are privy to health records during a patient's life and few people therefore experience lost access to information once the patient dies. An online social network is quite different. Everyone who is part of the network suffers a loss if access is shut off when the account holder dies.

Nonetheless, a HIPAA-style federal statute regulating social networking services would confer several benefits. It would make

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MINN. STAT. ANN. § 524.3-203(a) (West Supp. 2012).

172. For example, under Arizona law, where no personal representative has been appointed, there is a priority list of individuals who may obtain access: first, the deceased patient's spouse; second, the trustee of a living trust created by the patient for the patient's benefit; third, the adult child of the deceased patient; and fourth, a parent of the deceased patient. ARIZ. REV. STAT. ANN. § 12-2294(D) (2003 & Supp. 2011). Hawaii law provides that, "[i]n the case of a deceased person, a personal representative of the deceased person's estate may obtain copies of or may authorize the health care provider to release copies of the deceased person's medical records upon presentation of proper documentation showing the personal representative's authority." HAW. REV. STAT. ANN. § 622-57(c) (LexisNexis 2007). The law also provides for next of kin to obtain access when a personal representative has not been appointed. *Id.* Wisconsin law gives a "person authorized by the patient" the right to access a patient's health care records (defined at WIS. STAT. ANN. § 146.81 (West Supp. 2011) to exclude mental health records). WIS. STAT. ANN. § 146.83(1)(c), (f) (West Supp. 2011). The law designates as a "person authorized by the patient" "the personal representative, spouse, or domestic partner . . . of a deceased patient" and states also that "[i]f no spouse or domestic partner survives a deceased patient, 'person authorized by the patient' also means an adult member of the deceased patient's immediate family." *Id.* § 146.81(5).

clear who is authorized to make decisions about the decedent's account. It would enhance the ability of users of social networking sites to protect their own privacy interests and to exercise control over the disposition of their intellectual property. It would also permit the preservation of content in a way that serves the interests of other people.

At the same time, the solution is not perfect. Many individuals will neglect to name a personal representative in advance or give that person instructions about how to handle the account. Thus, the personal representative designated by law might be somebody who is not in a good position to handle the account in the way the decedent would have wished. This may be particularly true where the decedent maintained a set of contacts and conducted activities apart from the family members who are likely to be first in line for designation as the personal representative.

The HIPAA-style statute is also geared toward the interests of the individual user. In the absence of additional measures, protecting interests held by other people, including other members of the social network, would therefore depend upon the user or his or her representative taking such interests into account. Some people will, of course, specify in advance that their accounts should remain accessible to others. With respect to people inclined to have their accounts shut down entirely, additional measures could protect the competing interests of other members of the online network in maintaining access to the content. One approach is for the law to permit account holders to require deletion or curtailed access only to some data, so that the law itself would preserve access (and even use rights) with respect to other data. For example, the law could preserve access to content posted more than one year prior to the death of the account holder so that the account holder's representative could only delete or limit access to recent postings. (Under this option, individual account holders would be able to curate their own accounts with the knowledge that should they die anything left up for more than a year would remain available.) Or, the law could prohibit a decedent's representative from deleting or disabling access to content that has been shared with more than a specified number of other members of the social network. Alternatively, the law could limit the power of the decedent's representative to remove or prevent access to content that the personal representative determines is harmful to the reputation of the decedent or is of an especially sensitive nature. An approach along one of these lines would serve to protect, to some degree, the

2012]

*FACEBOOK'S AFTERLIFE*

1685

interests of other members of the online social network but it does come at the cost of curtailing individual control. That cost might well be justified in light of the collective interests at stake and the fact that no more would be shared than the individual account holder made available during life.

## CONCLUSION

In the absence of legal regulation, social networking sites are not likely to adopt policies for handling the accounts of deceased users that significantly reflect the individual and collective interests at stake. State laws are likely to be an ineffective means of regulation. A federal statute, by contrast, that imposes some requirements upon social networking sites to give users a degree of control over what happens to their accounts when they die could provide significant benefits. Although such a statute is not likely to perfectly safeguard all of the varied interests at stake, it would represent a significant improvement over leaving social networking sites to decide on their own the contours of our digital afterlives.

1686

*NORTH CAROLINA LAW REVIEW*

[Vol. 90