

Legacy Control

Author : Alexander Boni-Saenz

Date : July 14, 2020

Andrew Gilden, *The Social Afterlife*, 33 **Harv. J. L. & Tech.** 229 (2020), available at [SSRN](#).

The COVID-19 crisis has compelled many of us to move our lives (further) online, creating new social interactions and communities, as well as a larger digital footprint. The pandemic has also forced us to confront the risks and realities of mortality for ourselves and our loved ones. This highlights an important question: What will happen to our digital legacy after death? Legacy has both economic and noneconomic aspects, and inheritance law has primarily focused on the former. The latter, however, has risen to prominence with the growth of intellectual property rights and social media, both of which often have a stronger cultural or emotional legacy component. The law as it stands is thus ill-suited to deal with the noneconomic aspects of legacy. In *The Social Afterlife*, Professor [Andrew Gilden](#) tackles this problem with skill and nuance, and his sensible solution is to embrace contextual testation, in which control of each asset is allocated based on the unique socioeconomic context in which it arose. In the process, he provides the reader with an indispensable theoretical roadmap for understanding who might control our legacies.

The Article starts by describing four potential models of legacy stewardship. The first is the traditional model of freedom of disposition, in which the decedent controls who gets what. The decedent possesses the best information about their own social life, but such deference also risks too much dead hand control. The second model is family inheritance, in which control flows to the decedent's family members. These individuals may also have special knowledge about the decedent, but are also tempted to exclude other relevant stakeholders in the decedent's legacy, as many celebrity estates have. Empowering family members also hazards their exposure to harmful aspects of a decedent's life hiding in cyberspace. Does a grieving widow want to know about her husband's AshleyMadison.com account, on which he may have been pursuing affairs with younger women?

Third, the public domain model subjects a decedent's property to common ownership. This model recognizes that people outside the immediate family may also have a vested interest in the legacy of the decedent, especially in the case of public figures. Yet the public domain, as the name implies, may fail to provide strong privacy protections and risks that the decedent's assets will simply flow to the most powerful market actor. Finally, there is the consumer contract model, in which various third-party intermediaries, such as Apple, set the ground rules—through their terms of service—for how the assets they host are handled after death. These third parties may be best able to cater to the needs of their users and reduce the transaction costs of legacy stewardship, but some might be suspicious of entrusting them with such important decision-making power, given their incentives to maximize profit.

All of these models exist in some form in the law now, and the Article performs a synthesis of these different approaches through the concept of a Decentered Decedent. This is a contextual model of legacy stewardship, in which postmortem decision-making power is allocated based on the specifics of the socioeconomic context in which the relevant asset exists. Central to this model is the idea that it is important to avoid "context collapse," or the situation in which the various aspects of an individual's life collide in ways that destroy carefully constructed social separations created by that individual. For example, someone may wish to keep socializing with family members or coworkers to Facebook while separately participating in kinky sex communities solely on websites devoted to that purpose. The

policy aim, then, is to maintain these separations at death as well as in life.

The Decentered Decedent framework provides a robust theoretical defense of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). This Uniform Act, which has been adopted by a majority of states but which has been subject to some criticism, sets up a multi-tiered system of decision-making authority over digital assets. The highest priority goes to any online tools that contain a user's expressed wishes for posthumous control. An example is the Facebook Legacy Contact tool, in which an individual can designate a person to take over aspects of their Facebook account in the event of their death. A decedent's express wishes in a will or trust get second priority. Third priority goes to an intermediary's terms of service, and this is the most controversial provision. The reason why is that it hands control over to the intermediary instead of family members who might otherwise control assets under intestacy statutes. As it better preserves the decedent's heterogeneous social lives, however, Professor Gilden finds the RUFADAA to be a promising approach. He goes on to suggest several potential legal tweaks as well, such as legislating the substance of online tools, imposing fiduciary duties on intermediaries, or decoupling the economic and noneconomic aspects of an asset when possible.

In many ways, the Decentered Decedent model is a commonsense extension of the nonprobate revolution to digital assets. Just as life insurance companies manage the insurance payout after death outside of probate, perhaps so too should a social media site independently manage the control of a user's account after death. But what if context collapse is actually a good to be pursued rather than an evil to be avoided? While we are indeed multifaceted beings, it might be beneficial to acknowledge that fact through a full accounting of a person's life—or multiple lives—after death, especially if that person had a prominent position in society or culture. Even if a person did not, knowing the unfiltered truth about loved ones may help foster a deeper understanding of lifetime behavior or decisions that may have been perplexing or hurtful at the time due to incomplete information. In short, the revelation of secrets at death may have more ambiguous effects, at least for the living. If this is the case, then maybe context collapse is not so injurious after all.

However one might come out on that question, what is not in doubt is that Professor Gilden has deepened our theoretical understanding of legacy and the governance mechanisms we might employ to manage it. That makes *The Social Afterlife* necessary reading for those interested in how inheritance law, intellectual property law, and Internet law all shape legacy control.

Cite as: Alexander Boni-Saenz, *Legacy Control*, JOTWELL (July 14, 2020) (reviewing Andrew Gilden, *The Social Afterlife*, 33 **Harv. J. L. & Tech.** 229 (2020), available at SSRN), <https://trustest.jotwell.com/legacy-control/>.