

THE RESURRECTION WILL NOT BE TELEvised:
LEGAL REMEDIES FOR POSTHUMOUS DEEPFAKES

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Advancements in the development of deepfakes, synthetic media designed to appear authentic, have spawned a series of use cases ranging from the innocuously entertaining to the injuriously exploitative. On the latter end of this spectrum, a relatively understudied application is posthumous deepfakes, the digital manipulation of the image and likeness of the deceased. The content possibilities within this category, including for purposes as varied as celebrity productization and abusive puppeteering, are virtually limitless. But few remedial proposals for the deepfake phenomenon have fully accounted for the unique dignitary and property harms raised by posthumous deepfakes. This Note details those harms and considers the relevant remedies that may be pursued by surviving kin and other rightsholders associated with the deceased person being targeted. Based on current limitations with those remedies, this Note proposes that the tort of appropriation and the right of publicity are ideally suited to being statutorily federalized and reformed to protect the distinct dignitary and property interests implicated by posthumous deepfakes.

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“Wholesale resurrection may be possible through the use of immense simulators In all cases we would have the opportunity to recreate the past and to interact with it in a real and direct fashion.” – Hans Moravec¹

INTRODUCTION

Nearly fifteen years after being slain by a hail of bullets in Las Vegas,² Tupac Shakur triumphantly reemerged on stage at the 2012 Coachella Valley Music and Arts Festival.³ Clad only in sagging pants, Timberlands, and a gold chain, he greeted the crowd of 80,000 with an energetic “What the f— is up, Coachella!”⁴ This resurrection was, however, no ordinary miracle. Thanks to the wizardry of visual effects and holographic projection, the late iconic rap artist delivered a posthumous performance of hits, such as his posthumous 1998 single “Hail Mary,” alongside the physically present and no less iconic Snoop Dogg and Dr. Dre.⁵ The visual effects studio behind the recreation was later recognized for its efforts with the prestigious Cannes Lions Titanium Award,⁶ but among those in the Coachella crowd and those who watched recordings of the performance online, reactions were more mixed.

A common sentiment was a palpable sense of unexplainable discomfort,⁷ and for some, unease about “grafting a false image” of a live Tupac performance onto his discography rather than letting the

¹ HANS MORAVEC, *MIND CHILDREN: THE FUTURE OF ROBOT AND HUMAN INTELLIGENCE* 123–24 (1988) (predicting how artificial intelligence would be used to simulate the deceased).

² *Tupac Shakur Dies*, HISTORY (Nov. 13, 2009), <https://www.history.com/this-day-in-history/tupac-shakur-dies> [<https://perma.cc/PSU7-ZATG>].

³ Aaron Dodson, *The Strange Legacy of Tupac’s ‘Hologram’ Lives on Five Years After its Historic Coachella Debut*, ANDSCAPE (Apr. 14, 2017), <https://andscape.com/features/the-strange-legacy-of-tupacs-hologram-after-coachella/> [<https://perma.cc/BNW7-DQ7N>].

⁴ *Id.*

⁵ *Id.* (explaining that the projection of Tupac Shakur was not a three-dimensional hologram, but instead a two-dimensional projection technique aptly named “Pepper’s Ghost” that creates a holographic effect).

⁶ *Digital Domain Announces Cannes Lions Titanium Award Win for ‘Virtual 2Pac at Coachella,’* BUS. WIRE (June 25, 2012, 7:45 AM), <https://www.businesswire.com/news/home/20120625005481/en/Digital-Domain-Announces-Cannes-Lions-Titanium-Award> [<https://perma.cc/34J7-7BH4>].

⁷ Brett Michael Dykes, *A First-Hand Account of Hologram Tupac’s Coachella Performance: ‘I Was Completely Freaked Out’*, UPROXX (Apr. 17, 2012), <https://uproxx.com/music/a-first-hand-account-of-hologram-tupacs-coachella-performance-i-was-completely-freaked-out/>.

late rapper's music "speak for itself."⁸ In any event, the posthumous performance was likely a once-in-a-lifetime event—Dr. Dre later clarified that this unique tribute was only intended for that event, and the "hologram" of Tupac was archived for exclusive access by Tupac's estate, which had approved the original use.⁹

The virtual performance of Tupac was groundbreaking for many reasons, but perhaps its most lasting impact will be its warning of the advancements in technological ability to virtually resurrect and manipulate the deceased. In modern times, this ability has most prominently manifested in the form of "deepfakes," synthetic audiovisual media that appear authentic and are developed using a machine learning technique known as "deep learning."¹⁰ This technology has grown by leaps and bounds through advancements in artificial intelligence, spawning an eclectic assortment of use cases that range from the entertaining (e.g., face-swapping apps) to the exploitative (e.g., nonconsensual deepfake pornography).¹¹ In turn, these use cases have spurred a proliferation of proposals to control for deepfake harms through various regulatory, tort, and governance mechanisms.¹² However, few of these proposals have tethered remedies to the unique harms posed by posthumous deepfakes.

This Note aims to address that gap. Drawing on the legal relationship between death and dignity, it argues that posthumous deepfakes implicate both dignitary and property harms. The underlying technology of deepfakes is only becoming progressively sophisticated and democratized, and existing private remedies are unable to address the emergent harms. Accordingly, this Note proposes two potential reforms. First, the tort of appropriation should be refashioned with appropriate safeguards to enable surviving kin to bring civil actions against purveyors of posthumous deepfakes and against the deepfake content itself. Second, property interests in a

⁸ Jason Lipshutz, *Opinion: The Problem with the Tupac Hologram*, BILLBOARD (Apr. 16, 2012), <https://www.billboard.com/music/music-news/opinion-the-problem-with-the-tupac-hologram-494288/>.

⁹ Dodson, *supra* note 3.

¹⁰ RAINA DAVIS, TECHNOLOGY FACTSHEET: DEEPFAKES 1 (Chris Wiggins & Joan Donovan eds., 2020).

¹¹ Stuart A. Thompson, *Making Deepfakes Gets Cheaper and Easier Thanks to A.I.*, N.Y. TIMES (Mar. 12, 2023), <https://www.nytimes.com/2023/03/12/technology/deepfakes-cheapfakes-videos-ai.html> [<https://perma.cc/3M9K-FJXK>]; Samantha Cole, *AI-Assisted Fake Porn Is Here and We're All Fucked*, VICE: MOTHERBOARD (Dec. 11, 2017, 2:18 PM), <https://www.vice.com/en/article/gdydym/gal-gadot-fake-ai-porn> [<https://perma.cc/MJ57-3MLQ>].

¹² See generally Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1786–1819 (2019).

deceased's image and likeness require protection from deepfake exploitation through a federal posthumous right of publicity that may be licensed premortem but does not presumptively descend to the deceased's estate.

Part I explains the origins and mechanics of deepfakes, identifies the dignitary and property interests that arise from the deceased, and explores how posthumous deepfakes infringe these interests. Part II surveys the current legal landscape for relevant private remedies, considers their respective strengths and weaknesses, and identifies the tort of appropriation and the right of publicity as appropriate mechanisms to be legislatively tailored for posthumous deepfakes. Finally, Part III details two potential solutions that expand on existing mechanisms: 1) a modified tort of appropriation aimed at posthumous deepfakes; and 2) a federal right of publicity with a presumption against the inheritability of deepfake exploitation rights.

I. THE PROBLEM WITH POSTHUMOUS DEEPFAKES

By enabling the hyper-realistic manipulation of audiovisual media of individuals, deepfakes have generated new opportunities for both commemoration and exploitation of the deceased. These capabilities raise unique dignitary and property considerations that can be identified from how the law has approached the treatment of the deceased. This Part reviews the background of deepfakes in more depth, explores how the law's approach to the deceased manifests dignitary and property interests, and determines that the effects of posthumous deepfakes pose significant harm to these interests.

A. Defining Deepfakes

The “deep” in deepfakes refers to deep learning, a machine learning technique that models algorithms after the neural network of the human brain, or “neural nets.”¹³ Deep learning involves unsupervised learning, by which models are trained from unstructured data such as audiovisual media.¹⁴ A popular deep

¹³ DAVIS, *supra* note 10, at 3.

¹⁴ *Id.* Unsupervised learning is a method by which models with no designated objective are rewarded for learning about data they observe. Alexander Graves & Kelly Clancy, *Unsupervised Learning: The Curious Pupil*, GOOGLE DEEPMIND (June 25, 2019), <https://deepmind.google/discover/blog/unsupervised-learning-the-curious-pupil/> [https://perma.cc/MN6B-ZV95]. Unstructured data refers to qualitative data that requires specialized tools to be processed and analyzed. IBM Cloud Education, *Structured vs. Unstructured Data: What's the Difference?*, IBM (June 29, 2021),

learning technique for creating deepfakes involves generative adversarial networks, which pairs two neural nets: the first, called the generator, produces an image that is inputted into the second, called the discriminator, which is trained to classify an image as real or fake.¹⁵ The discriminator scores the image based on its probability of being real or fake, which the generator responds to by adjusting its output until the discriminator is unable to distinguish between a real image and the fake output.¹⁶ This method has been used to synthesize audiovisual media for “identity replacement,” which swaps a subject’s face onto a target person that preserves the original facial expression and bodily movements of the target, and for “identity reenactment,” which directly manipulates the facial expression and bodily movements of the subject person.¹⁷

In the earlier days of deepfakes, the only requirements for generating these outputs were open-source machine learning tools, a graphics processing unit, and hundreds of face images culled from public sources to train an algorithm.¹⁸ Since then, the accessibility and capabilities of this technology have markedly improved. Tools for generating deepfakes are more democratized than ever and available for the de minimis cost of a smartphone app.¹⁹ More sophisticated users can take advantage of actively supported open-source software to build their own models for generating deepfakes.²⁰ Exploitable content is also not difficult to source—the public accessibility of face and body images uploaded directly by the individual portrayed or by a member of their social network is often

<https://www.ibm.com/blog/structured-vs-unstructured-data/>
[<https://perma.cc/985C-R4JD>].

¹⁵ DAVIS, *supra* note 10, at 3. Other methods for creating deepfakes include variational autoencoders. *Id.*

¹⁶ *Id.*

¹⁷ Catherine Bernaciak & Dominic A. Ross, *How Easy Is It to Make and Detect a Deepfake?*, CARNEGIE MELLON UNIV.: SOFTWARE ENG’G INST.’S INSIGHTS (Mar. 14, 2022), <https://insights.sei.cmu.edu/blog/how-easy-is-it-to-make-and-detect-a-deepfake/> [<https://perma.cc/M4CP-ZLA4>].

¹⁸ Cole, *supra* note 11.

¹⁹ Thompson, *supra* note 11.

²⁰ Bernaciak & Ross, *supra* note 17 (“The two most widely used open-source software frameworks for creating deepfakes today are DeepFaceLab and FaceSwap. They are public and open source and are supported by large and committed online communities with thousands of users, many of whom actively participate in the evolution and improvement of the software and models. This ongoing development will enable deepfakes to become progressively easier to make for less sophisticated users, with greater fidelity and greater potential to create believable fake media.”) (internal citations omitted).

the presumptive default for social media platforms, which are automatically scraped by third parties.²¹ There are few remaining barriers to prevent anyone with a computer or smartphone from accessing a deepfake generation tool or developing their own with publicly available resources, and training it on anyone whose face images or voice audio can be found online or directly obtained.

The applications and impacts of deepfakes can be found across the cultural, social, and political landscape. On the more lighthearted side, a Belgian visual effects artist went viral on TikTok with a series of deepfake videos featuring Tom Cruise doing mundane activities, such as playing golf and performing a coin trick.²² In a campaign to promote awareness of deepfakes, the MIT Center for Advanced Virtuality produced a deepfake video of Richard Nixon delivering a contingency speech commemorating the hypothetical failure of the Apollo 11 mission in 1969.²³ Hollywood, long a bastion for visual effects creativity, has characteristically embraced the technology. Disney famously deployed a deepfake in the 2016 Star Wars film “Rogue One” by digitally recreating the Grand Moff Tarkin character, originally played by Peter Cushing who died in 1994, as well as the Princess Leia character, originally played by the late Carrie Fisher in the original Star Wars trilogy.²⁴

Deepfakes have also been deployed for more sinister purposes. Indeed, these darker uses of deepfakes were foreshadowed in how the term was coined. In 2017, u/deepfakes, the username of a Reddit user, gained notoriety for posting pornographic videos on the eponymous social media platform in which the faces of the original performers were digitally swapped for those of famous female

²¹ See Dave Gershgorn, *Is There Any Way Out of Clearview's Facial Recognition Database?*, THE VERGE (June 9, 2021, 10:30 AM), <https://www.theverge.com/22522486/clearview-ai-facial-recognition-avoid-escape-privacy> [<https://perma.cc/2DSQ-QSC9>].

²² Bianca Britton, *Deepfake Videos of Tom Cruise Went Viral. Their Creator Hopes They Boost Awareness*, NBC NEWS (Mar. 5, 2021, 10:00 AM), <https://www.nbcnews.com/tech/tech-news/creator-viral-tom-cruise-deepfakes-speaks-rcna356> [<https://perma.cc/A8UY-E4EN>] (describing the popularity of apps such as Reface, Facetune, and Snapchat that can be used for face-swapping and image editing).

²³ Francesca Panetta & Halsey Burgund, *In the Event of Moon Disaster*, MIT CTR. FOR ADVANCED VIRTUALITY (Nov. 2019), <https://moondisaster.org/> (interactive page walking user through a deepfake demonstration; click “Tap Now” in bottom-right corner to begin).

²⁴ See Dave Itzkoff, *How ‘Rogue One’ Brought Back Familiar Faces*, N.Y. TIMES (Dec. 27, 2016), <https://www.nytimes.com/2016/12/27/movies/how-rogue-one-brought-back-grand-moff-tarkin.html> [<https://perma.cc/7FSB-KFXK>].

celebrities.²⁵ Nonconsensual deepfake pornography has become an industry unto itself: perpetrators exploit images of nonconsenting people, predominantly women, to generate sexually explicit content for websites that host tens of millions of visitors.²⁶ Disinformation campaigns have increasingly weaponized deepfakes, including one heavily promoted by Russia that featured Ukrainian President Volodymyr Zelenskyy commanding his soldiers to surrender to Russia.²⁷ Savvy criminals are also using the technology to commit deepfake-enhanced fraud. In one case, the CEO of a UK energy company was deceived into wiring hundreds of thousands of dollars based on a phone call with whom he believed was the CEO of the parent company but was actually a voice imitation.²⁸

It was only a matter of time before the deceased became subject to deepfake recreation. In extravagant fashion for the former couple, Kanye West gifted Kim Kardashian with a holographic recreation of her late father, Robert Kardashian, who delivered a birthday message from beyond the grave.²⁹ Other examples further blur the lines between commemoration and exploitation. The entertainment agency BASE Hologram scheduled a music tour featuring holographic performances of the late singer Amy Winehouse, prompting mixed reactions from fans and accusations of Winehouse being treated as a “show pony.”³⁰ In a particularly heartbreaking

²⁵ Cole, *supra* note 11.

²⁶ Kat Tenbarge, *Found Through Google, Bought with Visa and Mastercard: Inside the Deepfake Porn Economy*, NBC NEWS (Mar. 27, 2023, 11:56 AM), <https://www.nbcnews.com/tech/internet/deepfake-porn-ai-mr-deep-fake-economy-google-visa-mastercard-download-rcna75071> [<https://perma.cc/6LGT-UK36>].

²⁷ Bobby Allyn, *Deepfake Video of Zelenskyy Could Be 'Tip of the Iceberg' in Info War, Experts Warn*, NPR (Mar. 16, 2022, 8:26 PM), <https://www.npr.org/2022/03/16/1087062648/deepfake-video-zelenskyy-experts-war-manipulation-ukraine-russia> [<https://perma.cc/64VD-S4VF>].

²⁸ Nick Statt, *Thieves Are Now Using AI Deepfakes to Trick Companies into Sending Them Money*, THE VERGE (Sept. 5, 2019, 1:14 PM), <https://www.theverge.com/2019/9/5/20851248/deepfakes-ai-fake-audio-phone-calls-thieves-trick-companies-stealing-money> [<https://perma.cc/6LGT-UK36>].

²⁹ Alyx Gorman, *Kim Kardashian's Father Resurrected as Hologram in Birthday Present from Kanye West*, THE GUARDIAN (Oct. 29, 2020, 11:18 PM), <https://www.theguardian.com/lifeandstyle/2020/oct/30/robert-kardashian-resurrected-as-a-hologram-for-kim-kardashian-wests-birthday> [<https://perma.cc/7YSH-2LFT>].

³⁰ The proposed tour was ultimately cancelled due to “unique challenges and sensitivities.” Olive Pometsey, *The Strange Truth Behind The Amy Winehouse Hologram Tour*, GQ MAG. (Feb. 21, 2019), <https://www.gq-magazine.co.uk/article/amy-winehouse-hologram-tour> [<https://perma.cc/L3GJ-FEN6>].

case, the parents of Joaquin Oliver, a victim of the Parkland school shooting in 2018, commissioned a deepfake video of their late son encouraging people to vote in the 2020 election for politicians supporting gun control policies.³¹ As the underlying technology continues to mature in sophistication and accessibility, the virtual recreation and manipulation of the deceased seems primed for further growth and acceleration.

B. The Legal Relationship Between Death and Dignity

Posthumous deepfake cases prompt the question of how we should conceive of the interests at stake, which requires examining both the dignitary and property dimensions.³² The notion of dignitary interests arises from a class of torts known as “dignitary torts,” which are broadly focused on protecting various “dimensions of individual dignity,” or the values that comprise individual worth.³³ This class engages a range of key dignitary interests, including liberty and personal autonomy, as well as protection from speech or conduct that is patently disrespectful, causes embarrassment or humiliation, or lowers others’ regard for the affected individual.³⁴

The deceased occupy an unusual position in the law. Despite lacking the traditional rites of legal personhood,³⁵ deceased persons are subject to a rich framework of statutory rules and jurisprudence that govern their treatment. This body of law, as one might term it,

³¹ Tamara Kneese, *How Data Can Create Full-On Apparitions of the Dead*, SLATE (Nov. 2, 2020, 6:14 PM), <https://slate.com/technology/2020/11/robert-kardashian-joaquin-oliver-deepfakes-death.html> [<https://perma.cc/DQZ3-L9SC>].

³² The privacy interests implicated by posthumous deepfakes are outside the scope of this Note.

³³ Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 322 (2019).

³⁴ *Id.* at 353–54 (the dignitary torts protect “three distinct core interests ... At the core are protections against interferences with liberty and personal autonomy; protections against speech or conduct that embarrasses, humiliates, or shows blatant disrespect; and protections against communications that diminish the regard that others have for the plaintiff.”).

³⁵ See Kim D. Ricardo, *Necrophilia: A New Social-Harm Taxonomy of U.S. Laws*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 351, 356 (2021) (“After death, the corpse occupies an ambiguous legal space where it is not entirely clear what remaining rights or interests the body has. Nor is it clear whether the deceased or her representative can or should be allowed to vindicate any surviving interests that may have been threatened or violated after death. A dead person (and the body that represents that dead person) is someone/something between subject of the law and object of the law.”).

generally involves balancing the interests of the deceased person, their surviving kin, and society.³⁶ In weighing this tripartite set of interests, a distinct theme emerges: recognition and protection of the dignitary interests of the deceased, particularly in how their memory and remains are honored. While this honorific process engages the interests of multiple stakeholders, they are ultimately all connected by the nexus of the deceased's dignitary interests. This theme manifests prominently in the laws surrounding three distinctly posthumous activities: the treatment of human remains, the use of death photos of the deceased, and the protest of funerals. The ways in which the law has balanced and safeguarded the dignitary interests of the deceased in these contexts crystallizes key lessons for how dignitary interests are implicated by posthumous deepfakes and how the law should adapt in response.

1. *The Treatment of Human Remains*

The case law on the treatment of human remains is generally characterized by a concern for protecting the integrity of the deceased based on a dignitary interest shared by the deceased, surviving kin, and society. As in life, the third-party possessory interest in a human body is heavily restricted posthumously. One Florida court clarified that although the next of kin was historically viewed as having a property interest in a deceased's remains for the purpose of lawful disposal, it is now widely accepted as a matter of law that the next of kin's interest is not a property interest per se, but rather a possessory interest limited to burial or other permitted means of disposal.³⁷ Moreover, this mission-driven interest has been judicially recognized as a "duty to protect the dignity of the human

³⁶ See HUGH Y. BERNARD, *THE LAW OF DEATH AND DISPOSAL OF THE DEAD* xi–xii (1966) ("The law touching death and its immediate incidents involves the weighing of many diverse interests—those of the deceased himself, so far as they are known to the living; the surviving spouse or next of kin, if any; and society as a whole as represented by public authorities, and as its wishes respecting the dead are expressed in statute, decisional law, and custom.").

³⁷ See *State v. Powell*, 497 So. 2d 1188, 1191–92 (Fla. 1986); see also *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 242–43 (1872) ("Although, as we have said, the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it. . . .").

body in its final disposition,”³⁸ a characterization that speaks to the dignitary nature of the interest and the responsibilities it gives rise to.

The protection of this limited interest traces back to universal customs regarding respect for the deceased and treatment of their remains.³⁹ Whether based on cultural values and symbolism, such as the rituals of mummification in ancient Egypt as an archetypical example, a common thread in funeral and disposal customs around the world is the idea that the deceased have not truly passed.⁴⁰ This residual living interest in the deceased for the treatment of human remains has been protected by criminal, civil, and constitutional levers, the design and effects of which have emphasized the tripartite nature of the dignitary interest that rests with the deceased.

On the criminal side, protection of this interest is embodied in a surfeit of laws prohibiting the failure to properly bury or dispose of remains, as well as the mutilation, destruction, indecent treatment or handling, and abuse of a corpse.⁴¹ Some prohibitions apply generally, while others, such as over the abandonment of a corpse, are specifically reserved for persons having an interest in or duty towards the body.⁴² The particularly grotesque crime of necrophilia, which is generally defined as sexual conduct with a corpse,⁴³ illustrates the species of harms that are targeted for remedy by this prohibition. As one legal survey concluded, the collection of laws outlawing this activity have been justified on grounds ranging from crimes against nature, to sex crimes, to violations of the rights of surviving kin.⁴⁴ The social harm at issue is the community social norms that would be violated by the sexual desecration of a corpse.⁴⁵ Unlike other legal responses based on social revulsion to certain sexual practices, this category can be said to be anchored by more objective standards such

³⁸ Newman v. Sathyavaglswaran, 287 F.3d 786, 796 (9th Cir. 2002).

³⁹ See Tyler Trent Ochoa & Christine Newman Jones, *Defiling the Dead: Necrophilia and the Law*, 18 WHITTIER L. REV. 539, 542 (1997).

⁴⁰ *Id.*; see also Brownlee v. Pratt, 68 N.E.2d 798, 800–01 (Ohio Ct. App. 1946) (“The policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times, having its more immediate origin in the ecclesiastical law. This salutary rule recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher.”).

⁴¹ 22A AM. JUR. 2D *Dead Bodies* § 80 (2023); see, e.g., Condon v. Wolfe, 310 F. App’x 807, 820–23 (6th Cir. 2009) (upholding the constitutionality of Ohio’s criminalization of the treatment of a human corpse in a manner that outrageous community sensibilities).

⁴² 22A AM. JUR. 2D *Dead Bodies* § 80 (2023).

⁴³ Ricardo, *supra* note 35, at 392.

⁴⁴ *Id.* at 367.

⁴⁵ *Id.* at 373.

as lack of consent and the next of kin's possessory interest in the deceased.⁴⁶ In particular, the lack of consent directly implicates the liberty and autonomy aspect of human dignity by infringing the principle of control over one's body.⁴⁷ As these legal protections highlight, society as an external actor, and implicitly the deceased as well, shares an interest in protecting the dignity of the deceased separate and apart from the possessory interest of the next of kin.

On the civil side, tort litigation regarding the abuse or mishandling of remains has consolidated in the vehicle of infliction of emotional distress.⁴⁸ Invariably, these suits have been chiefly reserved for the deceased's relatives and next of kin as those most directly positioned to be harmed by corpse-related negligence, as well as being the interest holders in the protection and proper disposal of the body.⁴⁹ This theory of harm has supported claims against institutions tasked with handling bodies, such as funeral homes and crematoriums for negligently commingling remains, failing to track the identities of remains in their possession, and misappropriating body parts.⁵⁰ The essence of these claims is a

⁴⁶ See Ochoa & Jones, *supra* note 39, at 543.

⁴⁷ Abraham & White, *supra* note 33, at 354.

⁴⁸ See Constance Frisby Fain, Annotation, *Civil Liability of Hospital for Negligent Handling, Transportation, and Disposition of Corpse*, 86 A.L.R. 5th 693 § 2 (2001) (“[A] number of jurisdictions currently acknowledge a cause of action for the infliction of emotional distress based on negligent mishandling of a corpse.”); see also RESTATEMENT (SECOND) OF TORTS § 868 (AM. L. INST. 1979) (“One who is entitled to the disposition of the body of a deceased person has a cause of action in tort against one who intentionally, recklessly or negligently mistreats or improperly deals with the body, or prevents its proper burial or cremation. The technical basis of the cause of action is the interference with the exclusive right of control of the body ... [I]n reality the cause of action has been exclusively one for the mental distress.”).

⁴⁹ Fain, *supra* note 48, § 2; see also *Christensen v. Superior Ct.*, 820 P.2d 181, 193 (Cal. 1991) (expanding the class of plaintiffs beyond the family members who specifically contracted for funeral and crematory services and who held statutory disposal rights: “When misconduct in the provision of funeral-related services occurs in secret and its consequences are not apparent to members of the decedent's family, permitting recovery for the emotional distress suffered by all close family members for whom mortuary services are performed when the misconduct comes to light, regardless of which family member held the statutory right or actually contracted for the services, should be allowed.”).

⁵⁰ See, e.g., *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 673 (N.D. Ga. 2003) (the plaintiffs alleged that the defendant crematorium was liable for “improperly cremating bodies, commingling the remains of the bodies in its custody, and fraudulently returning to families non-human materials such as concrete dust that were represented as being human remains”);

violation of the reasonable expectation of the surviving kin that the remains will be treated with appropriate dignity and respect.⁵¹ This cause of action is therefore predicated on a familiar underlying concern: the dignitary interests of the deceased, which in this context includes protection from patently disrespectful conduct.⁵²

At the constitutional level, this interest has been further sheltered with due process rights based on the bodily dignity of the deceased. One factor behind this jurisprudence was the widespread adoption by states of amendments to the Uniform Anatomical Gift Act (UAGA) in 1987 that authorized coroners to remove organs from corpses without express consent.⁵³ This reform effort was designed to address a critical organ shortage,⁵⁴ but prompted legal challenges in certain instances where the surviving kin objected to this bodily intrusion. Earlier decisions largely upheld these organ removal regimes. In one case, the Supreme Court of Florida observed that an impugned corneal tissue removal to support sight-restoring corneal transplants only required an “infinitesimally small intrusion” that did not ultimately affect the appearance of the deceased lying in repose.⁵⁵

But subsequent decisions weighed in favor of the dignitary interests through the implicated due process rights. In another case involving post-mortem corneal tissue removal without notice or consent vis-à-vis the surviving widow, the Sixth Circuit determined that Ohio law, including rights to burial and disposal under the UAGA, conferred rights in the deceased body that qualified as a “legitimate claim of entitlement” protectable by the Due Process Clause of the Fourteenth Amendment.⁵⁶ The surviving widow was

Christensen, 820 P.2d at 185–86 (the plaintiffs alleged that the defendant crematorium cremated multiple bodies together and in pottery kilns, removed gold and other valuable metals from bodies, failed to track the identity of remains, and mutilated remains by removing and selling body parts).

⁵¹ See, e.g., *Christensen*, 820 P.2d at 198.

⁵² See *Abraham & White*, *supra* note 33, at 354.

⁵³ See Traci McKee, *Resurrecting the Rights of the Unclaimed Dead: A Case for Regulating the New Phenomenon of Cadaver Trafficking*, 36 STETSON L. REV. 843, 851–54 (2007).

⁵⁴ *Id.* at 853.

⁵⁵ *State v. Powell*, 497 So. 2d 1188, 1191 (Fla. 1986); see also *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 127–29 (Ga. 1985) (dismissing a challenge to the removal of a deceased infant’s corneal tissue without notice or opportunity to object on the basis that the quasi-property interest in a deceased person was subject to modification by the state legislature, which was within its rights to support sight-restoring corneal transplants).

⁵⁶ *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (“Although extremely regulated, in sum, these rights form a substantial interest in the dead body, regardless of Ohio’s classification of that

accordingly entitled to procedural due process rights, including a hearing, for this deprivation of a constitutionally protected interest.⁵⁷ In coming to its decision, the court eschewed discussion of the dignitary implications and focused on the procedural nature of the due process rights at issue.⁵⁸ However, its recognition of a constitutionally protected interest directly flowed from the legal possessory interest in the deceased for dignitary purposes.⁵⁹ The Ninth Circuit adopted this reasoning in a similar case involving corneal tissue removal from a deceased child, and expressly framed the constitutional interest in dignitary terms based on the protection of the deceased's bodily dignity in its disposition.⁶⁰ As the court concluded, the state of California "infringed the dignity of the bodies" of the deceased when it extracted their corneal tissue without the consent of the surviving kin.⁶¹ These cases exemplify the balancing of interests of the deceased, surviving kin, and society, but nevertheless share a common focus on upholding the integrity of the remains of the deceased on dignitary grounds.

2. *Death Images*

The dynamic of a dignitary interest in the deceased is similarly reflected in protections for honoring the image and memory of the deceased, which have been contested in the realm of accessing death images. In the seminal case *National Archives and Records Administration v. Favish*, the plaintiff filed a Freedom of Information Act (FOIA) request for, and was denied, the death scene photographs of the body of Vincent Foster, Jr., former deputy counsel to President Clinton.⁶² The Supreme Court upheld denial of the request. It

interest."); see also *Whaley v. Cnty. of Tuscola*, 58 F.3d 1111, 1114–16 (6th Cir. 1995), *cert. denied*, 516 U.S. 975 (1995) (recognizing a constitutionally protected interest in a deceased body under Michigan state law).

⁵⁷ *Brotherton*, 923 F.2d at 482.

⁵⁸ See *id.*

⁵⁹ See *id.* at 480–92.

⁶⁰ *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796 (9th Cir. 2002) ("Under traditional common law principles, serving a duty to protect the dignity of the human body in its final disposition that is deeply rooted in our legal history and social traditions, the parents had exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the corneas and other parts of the bodies of their deceased children.").

⁶¹ *Id.* at 798.

⁶² *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 160–61 (2004). The request was denied based on a FOIA exemption for

concluded that Foster's family had a privacy interest based on their legal and traditional control over the deceased's body and death images as well as their right to object to the public exploitation of such images.⁶³ As the court characterized this interest, family members have a "stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person."⁶⁴ Similar to how the possessory interest in the deceased has been framed in dignitary terms, namely as an interest in protecting the dignity of the deceased's remains and disposition thereof, the court in *Favish* framed the privacy interest of the surviving family in the closely related category of protecting the dignity of the bereavement process.

With the Supreme Court staking a broad conception of the dignitary rights arising from death images of the deceased, other courts have subsequently instrumentalized this privacy interest in other contexts.⁶⁵ In *Marsh v. County of San Diego*, the mother of a deceased child sued the former prosecutor and county responsible for the child's murder prosecution for violating her due process rights after the prosecutor made copies of photographs of the child's body and provided one copy to a media outlet.⁶⁶ The Ninth Circuit determined that her procedural due process rights had not been violated in part because a federal right to control the dissemination of death images was not clearly established at the time of the impugned conduct so as to preclude qualified immunity for government officials.⁶⁷ However, the court affirmed that her substantive due process rights had been violated pursuant to the constitutionally protected status of the "common law right to non-interference with a family's remembrance of a decedent," including a parent's right to protect the remains, images, and memory of their deceased child from gratuitous public exploitation by the government.⁶⁸ Based on these implicated dignitary interests, the offending conduct was sufficient to "shock the conscience" and

disclosures reasonably expected to be an "unwarranted invasion of personal privacy." *Id.*; see 5 U.S.C. § 552(b)(7)(C).

⁶³ *Favish*, 541 U.S. at 167.

⁶⁴ *Id.* at 168.

⁶⁵ See generally Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and A Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 135–36 (2006) ("The Court gave the green light to judges across the country to recognize family members' privacy rights over the images of their dead loved ones beyond the narrow confines of FOIA access disputes.").

⁶⁶ *Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1152 (9th Cir. 2012).

⁶⁷ *Id.* at 1158–60.

⁶⁸ *Id.* at 1154–55.

“offend the community’s sense of fair play and decency” so as to violate substantive due process.⁶⁹ Although framed in due process terms, the court’s invocation of the surviving family’s privacy interest as recognized in *Favish* reaffirmed the importance of protecting the dignity in the remembrance of the deceased. Similarly, in the realm of tort claims, the privacy interest of surviving kin in death images of the deceased has been affirmed as sustaining a common law invasion of privacy claim against law enforcement officers for gratuitously disseminating the grisly photographs of the victim of a fatal vehicle accident.⁷⁰

3. *Funeral Protests*

The same dignitary mindset informs how courts have scrutinized procedural restrictions on protest activities in proximity to funerals. These laws became subject to renewed focus and First Amendment challenges in the early 2000s in response to obscene picketing by the ideologically extremist Westboro Baptist Church, which had targeted military funerals to condemn homosexuality and the Catholic Church for its clergy scandals.⁷¹ These cases have generally turned on the nature of the restrictions and whether they were “content-neutral,” and therefore constitutionally valid under the First Amendment.⁷² In making these assessments, however, courts have also based their reasoning on the surviving family’s privacy interest and its dignitary implications. In one case upholding the constitutional propriety of a funeral protest ordinance in Ohio, the Sixth Circuit affirmed the lower court’s holding that the state held an important interest in protecting funeral attendees based on surviving family members’ privacy interest in the “character and memory of the deceased.”⁷³ Citing *Favish*, the court observed that concern for this interest is amplified by the funeral context, and that unwarranted interference with this “sacred ritual” would certainly infringe such

⁶⁹ *Id.*

⁷⁰ *Catsouras v. Dep’t of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 364–66 (Cal. Ct. App. 2010).

⁷¹ *See, e.g., Phelps-Roper v. Strickland*, 539 F.3d 356, 358–59 (6th Cir. 2008) (“Phelps–Roper claims that she and other members of her church have picketed at funerals of American soldiers killed in Afghanistan and Iraq because of their belief that protesting at funerals is an effective way to convey the message of their church.”).

⁷² *See Snyder v. Phelps*, 562 U.S. 443, 456–57 (2011) (“Westboro’s choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach—it is “subject to reasonable time, place, or manner restrictions” that are consistent with the standards announced in this Court’s precedents.”).

⁷³ *Strickland*, 539 F.3d at 366.

interest.⁷⁴ Confronted with a similar challenge in Missouri, the Eighth Circuit agreed that the state had a common interest in protecting such privacy interests from public exploitation that outweighed any categorical right to protest funerals without restriction.⁷⁵ In both cases, the courts' reasoning affirmed the dignitary interests engaged by the funeral process and the corresponding importance of protecting the privacy interests held by surviving kin in honoring the deceased.

C. Property Interests in the Deceased

As for property interests in the deceased, the foregoing posthumous activities do not involve legal recognition of such a property interest *per se*.⁷⁶ However, this type of interest independently arises as a creature of statute through the right of publicity: a distinct category of intellectual property right established through state laws that provides every covered individual with the right to control the commercial uses of their identity.⁷⁷ Although states vary on this issue, a majority of them recognize the postmortem continuation of the right of publicity and that such right is inheritable by the next of kin.⁷⁸ That is to say, a deceased individual's image and likeness may be subject to protected commercial exploitation by their next of kin even if such use is not the individual's express wish.⁷⁹ Combined with the exploitative potential of posthumous deepfakes, this scenario raises both property and dignitary implications.

⁷⁴ *Id.*

⁷⁵ *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012).

⁷⁶ *See supra* Part I.B.1.

⁷⁷ J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2023).

⁷⁸ *Id.* § 9:17.

⁷⁹ One such case involved Albert Einstein, one of the most prominent scientists of the 20th century, who rejected efforts to commercially exploit his identity during his lifetime. His last will and testament did not provide for the use of his name or likeness, but otherwise bequeathed his estate to the Hebrew University of Jerusalem (which he had cofounded). The university proceeded to commercially license his image and likeness for various merchandise such as calculators and infant toys, while aggressively prohibiting unauthorized third-party uses. This exploitation has largely been protected by the unlimited statutory posthumous right of publicity in New Jersey where Einstein had been domiciled. Simon Parkin, *Who Owns Einstein? The Battle for the World's Most Famous Face*, *THE GUARDIAN* (May 17, 2022, 1:00 AM) <https://www.theguardian.com/media/2022/may/17/who-owns-einstein-the-battle-for-the-worlds-most-famous-face> [<https://perma.cc/GE93-EWFP>].

D. The Dignitary and Property Harms of Posthumous Deepfakes

Posthumous deepfakes are multifarious in the potential harms they portend for surviving family members and society. Existing case studies already point to any number of possible scenarios where the virtual image and likeness of a deceased person may be exploited for commercial or otherwise malignant reasons.⁸⁰ As discussed above, this Note groups these potential harms into two categories of focus: dignitary and property interests. Whereas property interests implicate the commercial exploitation of the deceased's image and likeness, dignitary interests summon many of the same considerations from the preceding legal review of dignity in the deceased. The purpose of that survey is less about directly analogizing a particular wrongdoing to a posthumous deepfake than it is about cross-referencing the similar dignitary harms that are engaged and warrant protection under the law. This subpart situates those interests in the context of posthumous deepfakes.

In the case of dignitary interests, posthumous deepfakes can trigger many of the same harms that have been recognized in past cases of transgressions related to the deceased. The mistreatment of human remains interferes with the bodily dignity of the deceased, the possessory interest and emotional well-being of the surviving kin, and community norms governing conduct towards the deceased. By contrast, funeral protests and disclosure of death images of the deceased intrude upon the rights of the surviving kin to protect the dignity of the deceased. Those actions compromise survivors' efforts to honor the character and memory of the deceased, including by protecting their image from gratuitous public exploitation. Moreover, they interfere with the societal interest in preserving such sacrosanct customs.

Posthumous deepfakes, when used non-consensually to exploit and manipulate the image and memory of the deceased, infringe on the individual dignity of the deceased person in a manner akin to virtual bodily interference. For comparative purposes, consider how dignitary harms also arise in the distinct context of nonconsensual deepfake pornography, which has been described as objectifying, reductive, dehumanizing, degrading, and violative of the targeted individual.⁸¹ The common denominator for both types of deepfakes is the nonconsensual use of an integral part of an individual's identity, namely their name and likeness, which compromises the

⁸⁰ See *supra* Part I.A.

⁸¹ Emily Pascale, *Deeply Dehumanizing, Degrading, and Violating: Deepfake Pornography and the Path to Legal Recourse*, 73 SYRACUSE L. REV. 335, 340 (2023).

dignitary interests associated with their liberty and autonomy.⁸² Posthumous deepfakes of a non-pornographic nature do not necessarily produce the exact same outcomes as the targeted individual is not alive to experience the effects, but the unique dignities and sensitivities associated with the deceased provide a different canvas on which other types of dignitary harms can be perpetrated against surviving kin and society.

By interfering with the individual dignity of the deceased, posthumous deepfakes similarly intrude upon the shared interests that surviving kin and society have in preserving it for honorific purposes. While posthumous deepfakes do not physically deprive surviving kin of their possessory interest in the deceased, they indirectly subvert this interest. In effect, they virtually resurrect the deceased, unwinding the finality of their disposition and rendering surviving loved ones vulnerable to emotional and mental distress. This act of virtual resurrection likewise enables the unwarranted public exploitation warned against by the Supreme Court in *Flavish*, by threatening the privacy rights held by surviving kin to honor the deceased in their character and memory. Subjecting a deceased person's image and likeness to technologically augmented manipulation not only gratuitously interferes with these interests; it can also potentially inflict comparable dignitary harms on the surviving kin without the practical burden of directly interfering with a funeral or the custody of death images. By opening the gateway to these degradations, posthumous deepfakes carve out a sizeable gap in the existing landscape of legal protections for the social customs and dignity interests governing the deceased.

In the case of property interests and related harms arising from posthumous deepfakes, these issues are reflected in the efforts to virtually recreate deceased celebrities such as Tupac Shakur and Amy Winehouse for entertainment purposes.⁸³ Such schemes raise a number of questions, namely whether these commercial resurrections are done with the consent of the deceased, who is pulling the strings, and who is entitled to claim the property interests at stake. In the case of both performers, their surviving kin gave their consent to these digital facsimiles being puppeteered by third parties.⁸⁴ But it bears asking whether these familial wishes should

⁸² See Abraham & White, *supra* note 33, at 355 (“[T]he interest in controlling use of one's name or likeness has an affinity with the interests in controlling one's body and intimate space. One's name and how one looks are an essential part of an individual's identity. Using part of that identity without consent infringes on the individual's liberty and autonomy.”).

⁸³ See *supra* Introduction; Part I.A.

⁸⁴ See Dodson, *supra* note 4; Pometsey, *supra* note 31.

supersede the absence of consent from the deceased. That issue is also potent in a scenario where the next of kin are not unified in their interests and dispute the ownership of commercial exploitation rights for the deceased.⁸⁵

Given the dignitary boundaries of the possessory interest in deceased bodies bestowed on surviving kin, which precludes non-honorific purposes such as mistreatment of the body,⁸⁶ it is not at all apparent that there should be a presumptive familial entitlement to commercially exploit the deceased's image and likeness by deepfake means. Whereas traditional forms of commercial exploitation of this property interest are to be expected and arise from the very nature of celebrity commodification and productization, deepfake exploitation represents an altogether different dimension of identity appropriation based on its manipulative character. The issue of who should be able to subject a deceased person to posthumous deepfake exploitation for commercial reasons raises concerns implicating surviving kin and other third parties alike.

II. POTENTIAL PRIVATE REMEDIES FOR POSTHUMOUS DEEPFAKES

Existing legal measures do not adequately supply appropriate remedies for the dignitary and property harms of posthumous deepfakes. This Part reviews relevant mechanisms for relief and uncover shortcomings in their applicability and efficacy for posthumous deepfakes. However, the tort of appropriation of name or likeness and the right of publicity are the most suitable measures for reform to remedy the negative impacts of posthumous deepfakes. Modernizing these private remedies would also provide a more tailored and constitutionally defensible approach over categorical regulatory prohibitions that may be doomed to First Amendment failure by impinging on free expression.⁸⁷

A. Dignitary Torts

⁸⁵ By way of example, the death of rock-and-roll artist Jimi Hendrix in 1970 famously set off a decades-long legal battle between multiple relatives and other claimants vying for the rights to his estate and the commercial exploitation of his legacy. Rick Anderson, *Litigious Experience*, SEATTLE WEEKLY (Oct. 9, 2006, 12:00 AM), <https://www.seattleweekly.com/news/litigious-experience/> [<https://perma.cc/A3XA-TNHR>].

⁸⁶ See *supra* Part I.B.1.

⁸⁷ See Nina I. Brown, *Deepfakes and the Weaponization of Disinformation*, 23 VA. J.L. & TECH. 1, 34–36 (2020); *infra* Part III.

In the world of private remedies that may be brought by harmed plaintiffs, the dignitary torts are perhaps the most straightforward means of obtaining redress for harms wrought by posthumous deepfakes. This class of torts includes defamation, intentional infliction of emotional distress, and the invasion of privacy torts.⁸⁸ While each of these focuses on preserving dignity, they approach this mission in different ways that affect their fitness for remedying the issue at focus.

1. *Defamation and Intentional Infliction of Emotional Distress*

Defamation is a staple in the diet of torts that have been deployed against harmful expression. The qualifying threshold is the publication of a false and defamatory statement that is harmful to an individual's reputation by lowering it from the community's perspective or by deterring third parties from engaging with the individual.⁸⁹ If the targeted individual is not a public person, the statement must have been made with at least negligence as to its false and defamatory nature.⁹⁰ In the case of public figures, actual knowledge or reckless disregard of these elements is required.⁹¹ A common shortcoming for defamation (and the other dignitary torts) is their inapplicability where the defamed individual is deceased, a limitation fastened by the logic that dignitary interests are inherently personal and must terminate upon death.⁹² Even putting aside this scoping issue, however, defamation remains ill-suited for general applicability to posthumous deepfakes due to the restrictions of its minimum requirements. For one, the threshold requirement for reputational harm may not be satisfied in every case involving other

⁸⁸ Abraham & White, *supra* note 34, at 322.

⁸⁹ RESTATEMENT (SECOND) OF TORTS § 558–59 (AM. L. INST. 1977).

⁹⁰ *Id.* § 580A–80B.

⁹¹ *Id.*

⁹² MCCARTHY & SCHECHTER, *supra* note 77, § 9:1; *see also* Skrocki v. Stahl, 110 P. 957, 959 (Cal. Ct. App. 1910) (“As a matter of sound public policy, the malicious defamation of the memory of the dead is condemned as an affront to the general sentiments of morality and decency, and the interests of society demand its punishment through the criminal courts, but the law does not contemplate the offense as causing any special damage to another individual, though related to the deceased, and therefore it cannot be made the basis for recovery in a civil action.”); *Hendrickson v. Cal. Newspapers, Inc.*, 121 Cal. Rptr. 429, 431 (Cal. 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).

dignitary harms. For another, although a plaintiff representing the deceased may be able to establish falsity through technical means, their claim would otherwise readily fail if the publisher does not claim the content is real, including by providing a disclaimer or describing it as parody.⁹³

A possible alternative is the tort of intentional infliction of emotional distress, which requires extreme or outrageous conduct that intentionally or recklessly causes severe emotional distress.⁹⁴ This lessens the plaintiff's burden by not requiring a showing of falsity but is supplanted with other substantial requirements. First, the requirement for the conduct to be extreme or outrageous is generally construed narrowly by courts, and is applied to acts that "go beyond the bounds of human decency" and "would not be tolerated in a civilized community."⁹⁵ Certain contributing factors to this factual assessment include the vulnerability of the plaintiff and whether the defendant was aware of this, the defendant's motivation, and the relationship between the parties.⁹⁶ Second, the plaintiff must show they suffered severe emotional distress that "no reasonable [person] could be expected to endure," and that the defendant acted with the purpose of causing this or with the knowledge that it was substantially certain to occur as a result.⁹⁷

There is some merit to considering this tort for posthumous deepfakes given the seriousness of the dignitary harms such content may pose for surviving kin. The use of this tort in cases involving mishandling of the deceased's remains, and courts' recognition of the harmful impact on surviving kin, is certainly an encouraging precedent for the tort's potential application to posthumous deepfakes.⁹⁸ However, the rigorous thresholds demanded by the tort also introduce uncertainty as to how well it will fare against posthumous deepfakes and how practical it will be for plaintiffs seeking remedy. Much would depend on the exact nature of the impugned content, which will require litigating cases of first instance to address these uncertainties. The tort of intentional infliction of emotional distress may have a place in the arsenal of remedies for surviving kin, but its application may also be limited by its own elevated standards.

⁹³ See Lindsey Joost, *The Place for Illusions: Deepfake Technology and the Challenges of Regulating Unreality*, 33 U. FLA. J.L. & PUB. POL'Y 309, 321 (2023).

⁹⁴ RESTATEMENT (THIRD) OF TORTS § 46 (AM. L. INST. 2012).

⁹⁵ *Id.* § 46 cmt. a, cmt. d.

⁹⁶ *Id.* § 46 cmt. a.

⁹⁷ *Id.* § 46 cmt. j, 46.

⁹⁸ See *supra* Part I.B.1.

2. False Light

The invasion of privacy torts, namely false light and appropriation, appear more inviting as avenues for relief.⁹⁹ The false light tort consists of publicizing a matter placing another individual in a false light if done 1) in a manner that would be highly offensive to a reasonable person, and 2) with knowledge or reckless disregard as to the matter being false and the false light that would result.¹⁰⁰ Intuitively, this tort is an attractive remedial candidate because its features map well onto the characteristics of posthumous deepfakes, including the underlying falsity and offensiveness of the content.¹⁰¹ Moreover, satisfying the malice standard should be light work at least with respect to the creator of the posthumous deepfake given their presumptive awareness of the falsity of the content.¹⁰²

However, the tort of false light is not without its own procedural and substantive burdens that render its fitness for addressing posthumous deepfakes shaky. The highly offensive standard, which requires that a reasonable person would feel “seriously offended and aggrieved” by the publicization of a “major misrepresentation” of their “character, history, activities or beliefs,”¹⁰³ raises the question of whether falsity itself meets this threshold if the impugned content

⁹⁹ The four invasion of privacy torts, intrusion upon seclusion, public disclosure, false light, and appropriation, were famously distilled by Dean William Prosser in his seminal law review article “Privacy.” William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Intrusion upon seclusion and public disclosure are excluded from consideration here due to their general inapplicability. Intrusion upon seclusion centers on intentional interference with the private affairs or concerns of an individual in a manner that would be highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977). Publicity given to private life centers on publicizing a matter regarding the private life of an individual in a manner that would be highly offensive to a reasonable person and represents no legitimate public concern. *Id.* § 652D. Posthumous deepfakes are inherently false and often rely on publicly available media, which would generally preclude these two invasion of privacy torts.

¹⁰⁰ RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

¹⁰¹ See Olivia Wall, *A Privacy Torts Solution to Postmortem Deepfakes*, 100 WASH. U. L. REV. 885, 900–02 (2023).

¹⁰² See *id.* at 900. However, pursuing other publishers would pose its own challenges.

¹⁰³ RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (AM. L. INST. 1977); see, e.g., *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 246, 252–53 (1974) (holding a newspaper liable for false light for publishing an untruthful article that among other things, portrayed a widow as being observed “wear(ing) the same mask of nonexpression she wore (at her husband’s) funeral.”).

does not necessarily portray offensive words or deeds.¹⁰⁴ This leaves open the possibility of some posthumous deepfakes escaping liability for being “merely” offensive despite causing dignitary harm to the deceased’s surviving kin that warrants remedy. While that may be justified as a guardrail against abuses of this tort that may harm free expression, it is not clear that this would be the most appropriate balancing of interests considering the unique dignitary harms of posthumous deepfakes.

Another constraint is the necessity of establishing falsity of the posthumous deepfake.¹⁰⁵ Although that burden may seem relatively straightforward at first glance, the issue grates against a broader technological battle between deepfake creators and deepfake detectors, with no clear long-term victor in sight.¹⁰⁶ What may be feasible for establishing provably false content in one case may be prohibitive in another depending on the sophistication of the posthumous deepfake and detective capabilities at the time of proceedings. It goes without saying that an evidentiary threshold that shifts with the winds of innovation is inherently unreliable. The tort of false light would undoubtedly have utility in certain cases, but it may not be the most apropos instrument in light of these limitations.

3. *Appropriation of Name or Likeness*

The tort of appropriation of name or likeness appears more readily adaptable to the threat of posthumous deepfakes based on its elements and, to some degree, its history. A person is liable for this tort when they use the name or likeness of another person for their

¹⁰⁴ See Wall, *supra* note 101, at 901.

¹⁰⁵ See *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983) (“In a false light privacy action whether a statement is true or false is a question of fact.”).

¹⁰⁶ Bernaciak & Ross, *supra* note 17 (“Regardless of the accuracy of current detectors, [deepfake video detection (DVD)] is a game of cat and mouse. Advances in detection methods alternate with advances in deepfake-generation methods. Successful defense will require repeatedly improving on DVD methods by anticipating the next generation of deepfaked content.”); see also Cade Metz, *Spot the Deepfake. (It's Getting Harder.)*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/24/technology/tech-companies-deepfakes.html> [<https://perma.cc/86Z2-RDX4>] (quoting Arizona State University computer science professor Subbarao Kambhampati on the challenge of keeping up with deepfake sophistication: “In the short term, detection will be reasonably effective...In the longer term, I think it will be impossible to distinguish between the real pictures and the fake pictures.”).

own use or benefit.¹⁰⁷ The tort protects the exclusive use of an individual's identity as represented by their name or likeness and to the extent that use benefits someone.¹⁰⁸ In contrast to the right of publicity, which addresses harm to commercial interests, the tort of appropriation remedies the harm of mental distress.¹⁰⁹ This tort is further distinguished by two key features. First, it applies to appropriation for both commercial purposes and other non-pecuniary purposes at common law, although some state laws have statutorily varied it to only apply to commercial appropriation.¹¹⁰ Second, although its posthumous application has been subject to legislative modification that limit its coverage to commercial appropriation, it is not necessarily limited to living individuals.¹¹¹

The relatively broad scope of the tort of appropriation is an important characteristic that speaks to its dignitary history and evolution. It originated in the first U.S. court case to establish a right

¹⁰⁷ RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977). This interest is also analogous to the interest in bodily autonomy. *See also* Abraham & White, *supra* note 33, at 355 (“[T]he interest in controlling use of one's name or likeness has an affinity with the interests in controlling one's body and intimate space. One's name and how one looks are an essential part of an individual's identity. Using part of that identity without consent infringes on the individual's liberty and autonomy.”).

¹⁰⁸ *Id.* § 652C cmt. a.

¹⁰⁹ MCCARTHY & SCHECHTER, *supra* note 77, § 5:63; *see* *Cartoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996) (“Publicity rights, however, are meant to protect against the loss of financial gain, not mental anguish.”).

¹¹⁰ RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. L. INST. 1977); *see, e.g.*, *Jalin Realty Cap. Advisors, LLC v. A Better Wireless, NISP, LLC*, 917 F. Supp. 2d 927, 941 (D. Minn. 2013) (“The appropriation tort protects the ‘privacy and solitude of private personae from the mental distress that accompanies undesired publicity.’”); *Thornton v. W. & S. Fin. Grp. Beneflex Plan*, 797 F. Supp. 2d 796, 815 (W.D. Ky. 2011) (recognizing that nominal damages may be awarded for non-pecuniary appropriation in a case where a terminated employee's name and likeness was appropriated for goodwill purposes in marketing materials); *Int'l Bhd. of Teamsters Loc. 651 v. Philbeck*, 464 F. Supp. 3d 863, 873 (E.D. Ky. 2020) (holding that a former union representative appropriated the union's name and likeness for goodwill purposes by misappropriating control of their social media accounts).

¹¹¹ MCCARTHY & SCHECHTER, *supra* note 77, § 9:1 (“It seems that under the common law rule that the right to recover only for mental suffering or emotional upset caused by invasion of ‘appropriation privacy’ by commercialization of a person's identity after death would not continue after death of the person. Some states have changed this common law rule by statute. But while several states have statutes specifically granting postmortem rights, they are all restricted to the commercial ‘appropriation’ type of invasion of privacy, not to the other three types of privacy.”).

to privacy, *Pavesich v. New England Life Insurance Co.*¹¹² The plaintiff, Paolo Pavesich, sued an insurance company for using an image of him without his consent for an advertisement falsely portraying him as having a policy with them.¹¹³ The Supreme Court of Georgia affirmed that his right to privacy had been invaded and went so far as to describe the impugned conduct as a deprivation of liberty,¹¹⁴ a characterization with dignitary connotations that laid the groundwork for the invasion of privacy torts.¹¹⁵ In subsequent decisions over the century, however, the tort of appropriation strayed from its dignitary roots towards a more property-based approach that emphasized the proprietary over the privacy aspect of identity.¹¹⁶

In part, this conceptual shift has been driven by much of the jurisprudence arising from celebrity identity appropriation. A representative case is *Onassis v. Christian Dior-New York, Inc.*, in which former First Lady Jacqueline Kennedy Onassis (then remarried to Aristotle Onassis) successfully sued to enjoin Christian Dior from using her likeness in an advertising campaign pursuant to a statutory right in New York against commercial appropriation.¹¹⁷ Commenting generally on preceding case law, the court observed that this right served to protect individuals, both celebrities and non-celebrities alike, from “rapacious commercial exploitation” of their identities.¹¹⁸ Despite the commercial undertones of the dispute and the tort itself, this judicial observation reaffirmed the essential nature

¹¹² *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 69–73 (Ga. 1905); see Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 216 (1999).

¹¹³ *Pavesich*, 50 S.E. at 68–69.

¹¹⁴ See *id.* at 79–81 (“The knowledge that one’s features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts. or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.”).

¹¹⁵ Prosser, *supra* note 99, at 386.

¹¹⁶ Kahn, *supra* note 112, at 223–24.

¹¹⁷ *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 256 (N.Y. Sup. Ct. 1984), *aff’d* 488 N.Y.S.2d 943 (1985). For other prominent cases in this category, see, e.g., *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136 (N.J. Ch. 1907); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

¹¹⁸ *Onassis*, 472 N.Y.S.2d at 260.

of tortious appropriation: unauthorized appropriation of an individual's identity inevitably implicates their right to privacy based on the non-commercial aspects of their identity related to the "integrity of their persona."¹¹⁹

This dignitary aspect of the tort of appropriation renders it a particularly attractive vehicle for pursuing redress for harms arising from posthumous deepfakes. Fundamentally, it protects individuals from the nonconsensual exploitation of their identities for both commercial and non-pecuniary purposes, a remedial flexibility that would enable it to cover a broad range of nonconsensual posthumous deepfakes.¹²⁰ Plaintiffs would also not be subject to the technologically cumbersome burden of establishing the falsity of the deepfake or litigating the social nuances of an offensiveness threshold, although the former would be relevant to establishing the requisite mental distress to ground a claim.¹²¹ Its chief caveat arises from its fragmentation at the state level, where legislative alterations and carve-outs have left behind a nationally inconsistent tort of appropriation that varies in its application to non-pecuniary appropriation and deceased individuals.¹²² That said, in its current

¹¹⁹ Kahn, *supra* note 112, at 264 ("The unauthorized use of a person's identity may implicate the right of publicity to the extent that such identity has commercial value, but it will also implicate the right of privacy to the extent that such identity has non-commercial value relevant to maintaining the integrity of the subject's persona.").

¹²⁰ *See, e.g.*, Binion v. O'Neal, No. 15-60869, 2016 WL 111344 (S.D. Fla. Jan. 11, 2016) (rejecting a motion to dismiss a lawsuit against Shaquille O'Neal for appropriating the plaintiff's image by posting a picture on social media appearing to mock the plaintiff's "disfigured appearance" caused by his ectodermal dysplasia, allegedly done in part for social clout); Faegre & Benson, LLP v. Purdy, 447 F. Supp. 2d 1008, 1017–18 (D. Minn. 2006) (granting motion for summary judgment based on anti-abortion activist defendant misappropriating identities associated with plaintiff law firm by registering domain names to appropriate goodwill, generate publicity, reroute traffic to the defendant's own websites, and deceptively portray the plaintiff's views as supporting the defendant).

¹²¹ *See* MCCARTHY AND SCHECHTER, *supra* note 77, § 5:62; Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 542 (1993) ("The other [type of appropriation] is the appropriation of the name and likeness that brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective."). The burden of establishing mental distress is also not prohibitively high. *See* MCCARTHY & SCHECHTER, *supra* note 77, § 11:29 ("To recover mental suffering damages, it is not necessary that plaintiff see a doctor, miss work or alter normal daily activities. Plaintiff need not be incapacitated by a mental breakdown to prove the existence of real indignity and offense.").

¹²² *See* MCCARTHY & SCHECHTER, *supra* note 77, § 9:1.

form, the tort of appropriation largely offers a compelling framework as a private remedy for posthumous deepfake harms.

B. Right of Publicity

As far as private remedies for property-based harms are concerned, the affected interests in the deceased are rooted in a dense history of identity commercialization that has been legally mechanized through the right of publicity. While the right of publicity offers a robust tool to protect the commercial interests of the deceased from posthumous deepfake exploitation, this established legal framework is hampered by its inconsistency. The coverage and contents of these laws vary widely: only thirty-three states recognize this right by statute or common law, and only twenty-seven states recognize its application to the deceased.¹²³ Across this patchwork, states diverge from each other in their provision of a posthumous right of publicity, including its statutory duration and which attributes of identity are covered.¹²⁴ These variances have contributed to a landscape of unequal protection whose application largely depends on where the deceased was domiciled.

The right of publicity developed through the efforts by celebrities to protect the commercial interests in their identity. It was first judicially recognized in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a dispute between two chewing gum companies over the commercial right to use the photograph of a professional baseball player.¹²⁵ From these humble beginnings, the right of publicity has gained considerable credence as a protective force for identity commercialization as distinct from privacy interests. The Supreme Court clarified this property-based distinction in *Zacchini v. Scripps-Howard Broad. Co.*¹²⁶ The case centered on a dispute over whether a television broadcaster was entitled on First and Fourteenth Amendment grounds to broadcast the entire recorded performance of a human cannonball show without the performer's consent.¹²⁷ In no uncertain terms, the court ruled that the right of publicity protected the "proprietary interest" in the performance as a means of incentivization, among other

¹²³ *Id.* §§ 6:2, 9:17.

¹²⁴ Christian B. Ronald, *Burdens of the Dead: Postmortem Right of Publicity Statutes and the Dormant Commerce Clause*, 42 COLUM. J.L. & ARTS 123, 131 (2018).

¹²⁵ *Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953); MCCARTHY & SCHECHTER, *supra* note 77, § 1:26.

¹²⁶ 433 U.S. 562 (1977).

¹²⁷ *Id.* at 563–64.

purposes, and that its goals were comparable to those of copyright and patent law.¹²⁸ Such property-based interests, including compensation rights, could therefore be protected by limiting third-party dissemination without running afoul of the expressive rights under the Constitution.¹²⁹

Following the grain of the jurisprudence, the posthumous version of this right later developed in the early 1980s in response to the burgeoning market for celebrity commercialization.¹³⁰ As the Supreme Court of Georgia reasoned in a 1982 dispute over the production and marketing of a plastic bust of Dr. Martin Luther King, Jr., the assignability of the right of publicity that rendered its “full commercial exploitation” possible would logically support its inheritability to preserve its continuing value for the benefit of the estate.¹³¹ But as with many other features of the right of publicity at the state level, this approach did not find common consensus across the board.¹³²

¹²⁸ *Id.* at 573; see also *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1206 (11th Cir. 2009) (“Since the right of publicity is a ‘proprietary’ right, ‘the measure of damages is the value of the use of the appropriated publicity.’”) (quoting *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prod., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982)).

¹²⁹ See *Zacchini*, 433 U.S. at 578.

¹³⁰ Ronald, *supra* note 124, at 127.

¹³¹ *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prod., Inc.*, 296 S.E.2d 697, 704–05 (Ga. 1982).

¹³² The inheritors of Elvis Presley’s business empire discovered this divergence in an early series of litigation battles over the right to commercially exploit the image and likeness of the “King of Rock and Roll.” During his lifetime, Elvis conveyed exclusive rights for commercial exploitation of his name and likeness to a company mostly owned by his manager, and following Elvis’s death in 1977, these rights were licensed to another company, Factors Etc. Another company attempted to market an Elvis commemoration poster, triggering proceedings in New York by Factors to stop them. The Second Circuit held that under New York state law, the licensed right was an “intangible property right” that survived the King’s death like any other would and should be inheritable to protect the rightsholders from competitors who would otherwise exploit at will. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 216–18, 221–22 (2d Cir. 1978). These holdings did not survive for long, however, as the court subsequently abrogated them in *Pirone v. MacMillan, Inc.* based on the New York Court of Appeals separately concluding that such rights were strictly statutory with no legislative basis for inheritability. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585–86 (2d Cir. 1990). Conversely, in the 1980 case *Memphis Development Foundation v. Factors Etc., Inc.*, the Sixth Circuit determined that Elvis’s assignment of rights to his image during his life did not convert them to inheritable property under Tennessee law and that these effectively entered the public domain upon his death. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 960

The unstandardized framework of the right of publicity means a challenging terrain to address posthumous deepfake harms, with protections largely dependent on the applicable state. From a reform perspective, one of the issues most urgently requiring harmonized regulation is the inheritability of the right of publicity. Then, there is the question of whether that inheritability right should extend to posthumous deepfakes if this category of exploitation has not been addressed by the deceased in their lifetime. That forfeiture of autonomy is not necessarily concerning in the posthumous commercial use of the deceased's images generally, but it raises distinct risks in the context of posthumous deepfakes. In states where inheritability is codified and no testamentary direction has been given, estates and other rightsholders may essentially have free reign to commercially and non-consensually exploit a deceased's image and likeness using posthumous deepfakes in ways that implicate dignitary harms. That outcome may be protective of commercial interests for the deceased but may simultaneously be detrimental to their dignitary interests.

III. REFORMING RIGHTS AND TORTS FOR POSTHUMOUS DEEPFAKES

The unique harms of posthumous deepfakes that arise from dignitary and property interests in the deceased warrant the adaptation of existing private remedies. The tort of appropriation is ideally suited for addressing dignitary harms and should be statutorily extended to surviving kin. To address the commercial exploitation of the deceased's identity, the right of publicity is a suitable framework and should be harmonized through a national right of publicity that requires express written consent for deepfake exploitation rights to be inherited.

A. Reforming the Tort of Appropriation

Given the state-level variation that has splintered the tort of appropriation across the U.S., the tort should be harmonized through federal legislation. This standardization should not only incorporate the key common law elements, including application to both

(6th Cir. 1980). The Tennessee government eventually responded by statutorily enshrining the inheritability of the right of publicity. Peter Colin, Jr., *Elvis and Prince: Personality Rights Guidance for Dead Celebrities and the Lawyers and Legislatures Who Protect Them*, NAT'L L. REV. (Oct. 10, 2016), <https://www.natlawreview.com/article/elvis-and-prince-personality-rights-guidance-dead-celebrities-and-lawyers-and> [<https://perma.cc/45JP-F95Z>].

commercial and non-pecuniary purposes, but also impose targeted reforms to address posthumous deepfake harms. The first of these reforms should be recognition of standing for surviving kin to bring suit for a deceased loved one's identity being appropriated. Second, there should be affirmation of nominal damages to standardize monetary repercussions for tortfeasors who engage in non-pecuniary appropriation along with traditional compensatory damages for commercial appropriation.¹³³

Third, to address the prospective scenario in which the creator or publishers cannot be identified or located, or otherwise reside beyond the jurisdiction of the U.S. legal system, there should be a limited right to bring an *in rem* action against the posthumous deepfake itself as property to secure its removal from online media platforms. This could be modeled after the *in rem* cause of action enshrined under the Anti-Cybersquatting Consumer Protection Act, which enables trademark owners to secure domain names from cyber-squatters by obtaining court orders for domain name authorities to transfer the subject domain name.¹³⁴ To prevent potential abuse of this procedure in the posthumous deepfake context, the cause of action could require proving the falsity of the content in addition to establishing the other prerequisites of tortious appropriation before a court will order the takedown of the content.¹³⁵

Fourth, to better insulate the statutory tort from First Amendment challenges, existing exemptions for protected speech categories can be adopted based on common law standards.¹³⁶ There is of course a First Amendment concern given the impact these reforms may perpetrate against free expression concerning deepfake creation and distribution. As a plurality of the Supreme Court determined in the 2012 decision *United States v. Alvarez*, false speech is not automatically excluded from First Amendment protection and requires a legally cognizable harm to be constitutionally subject to content-based restrictions.¹³⁷ A reformed tort of appropriation would need to conform to the restraints on constitutionally accepted

¹³³ See, e.g., *Thornton v. W. & S. Fin. Grp. Beneflex Plan*, 797 F. Supp. 2d 796, 815 (W.D. Ky. 2011) (recognizing that nominal damages may be awarded for non-pecuniary appropriation).

¹³⁴ 15 U.S.C. § 1125(d)(2)(A).

¹³⁵ Although the proposed requirements for pursuing this cause of action may not be practical in many cases given the “whack-a-mole” nature of Internet content proliferation in addition to the technical challenges related to establishing the falsity of a deepfake, it would at least provide an alternative remedy where traditional actions are insufficient.

¹³⁶ See *Snyder v. Phelps*, 562 U.S. 443, 451–53 (2011) (affirming that the Free Speech Clause of the First Amendment can serve as a defense against state dignitary tort claims).

¹³⁷ *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

categories of tortious expression, such as defamation and other invasion of privacy torts.¹³⁸ However, considering the unique dignitary harms of posthumous deepfakes that courts have implicitly recognized in other contexts related to the deceased,¹³⁹ as well as the historical foundations and well-established jurisprudence of the tort of appropriation,¹⁴⁰ there is ample basis for characterizing the effects of posthumous deepfakes as a legally cognizable harm that may be subject to tort liability.

B. Reforming the Right of Publicity

The proposal to establish a federal right of publicity is certainly not novel and has been a rallying cry for many scholars over the years.¹⁴¹ To echo some of those pleas, it has long been the case that various state rights of publicity should be harmonized through a federal law that would, among other things, streamline the jurisdiction of claims, enshrine a posthumous right of publicity, and establish a fixed duration to reasonably preserve its benefits without stifling longer-term expression.¹⁴² Beyond those recommendations, the right of publicity should also be reformed by requiring that deepfake exploitation rights be assigned in writing, among other procedural requirements for both premortem and posthumous purposes. In other words, this narrow category of commercial exploitation rights should not be automatically inherited or enter the public domain, except with the formal consent of the individual concerned to protect their implicated property interests and the dignitary interests therein.

Inheritability and public domain status for the mere use of the image and likeness of an individual has a certain logic where the commercialization prospects are foreseeable in one's lifetime. However, posthumous deepfakes open a Pandora's box of possibilities where the potential exploitation and manipulation of an individual is only cabined by the imagination. Prohibiting this nonconsensual virtual exploitation for commercial purposes would be a simple guardrail that ensures that the deceased are not subject to dignitary harms by their estate or others. Further, it would minimally

¹³⁸ *See id.*

¹³⁹ *See supra* Part I.B.

¹⁴⁰ *See supra* Part II.A.3.

¹⁴¹ *See, e.g.,* Ronald, *supra* note 124, at 153–55; Eric J. Goodman, A *National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227 (1999); Brittany Adkins, *Crying Out for Uniformity. Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499 (2009).

¹⁴² *See* Ronald, *supra* note 124, at 154.

infringe expressive rights, particularly as the First Amendment does not protect misleading commercial speech¹⁴³ as inherently represented by posthumous deepfakes.

Even with these reforms, a critical gap may remain in the protective ambit of the right of publicity. In a situation where a deceased individual has chosen not to authorize their posthumous deepfake exploitation, enforcement would depend on an entitled rightsholder being adequately resourced and motivated to bring suit against unauthorized posthumous deepfake purveyors. That duty may naturally fall to surviving kin in most cases, but a conflict of interest may arise if those same individuals are also responsible for the posthumous deepfakes. Protecting against such a risk requires savvy estate planning to ensure enforcement rights are entrusted to a party who can prevent other rightsholders from going against the wishes of the deceased when it comes to posthumous deepfake exploitation. The potential complications of this additional step may not be necessary for every deceased individual with valued commercial interests in their image and likeness, but apprehensive individuals with dignitary interests at stake may need to be prepared for advanced estate planning to close off potential enforcement gaps with respect to their inheritors.

CONCLUSION

Posthumous deepfakes offer great promise and peril. Surviving family members may deploy it to be virtually reconnected with loved ones. Celebrities may license their image and likeness for deepfake generation to entertain fans in perpetuity. Conversely, online trolls and other malefactors may weaponize posthumous deepfakes to harass chosen victims. Corporate-minded estates may virtually resurrect beloved performers to keep the show going without the performer's blessing or any principled endpoint. In addition to the property interests at stake, these scenarios implicate unique dignitary interests that arise from the tripartite relationship between the deceased, surviving kin, and society. These engaged interests enable significant harms that require tailored remedies in the form of a reformed and federalized tort of appropriation and right of publicity. For the sake of both the living and the dead, the law must evolve with technology to ensure that surviving kin are not left without adequate recourse nor unduly empowered to exploit the deceased.

¹⁴³ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . .”).