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Indescendibility

David Horton*

Supposedly, one of the most important sticks in the bundle of property rights is the power to transfer an asset after death. This Article explores objects and entitlements that defy this norm. Indescendibility—the inability to pass property by will, trust, or intestacy—lurks throughout the legal system, from constitutional provisions barring hereditary privileges, to statutes that prohibit decedents from bequeathing their valuable body parts, to the ancient but misty doctrine that certain claims do not survive the plaintiff, to more prosaic matters such as season tickets, taxi cab medallions, frequent-flier miles, and social media accounts. The Article first identifies the common policy underpinnings of these diverse rules. It compares the related issue of market inalienability—the phenomenon of property that can be given away but not sold—and concludes that indescendibility often serves unique objectives. In particular, forbidding posthumous transfer can avoid administrative costs and signaling problems. The Article then uses these insights to propose reforms to the descendibility of body parts, causes of action, and items made non-inheritable by contract.

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INTRODUCTION

Half a century after her death, Marilyn Monroe earns tens of millions of dollars a year.[1] This river of royalties flows through her probate estate to a company called Marilyn Monroe LLC.[2] Recently, the company sued two photographers, claiming that they had violated Monroe's right of publicity—the property right in one's persona—by selling and licensing her image.[3] But did Marilyn Monroe LLC hold Monroe's publicity rights? On the one hand, the iconic actress had lived, worked, and died in California, which allows publicity rights to pass "by means of any trust or any other testamentary instrument."[4] On the other hand, Monroe also had ties to New York, which does not allow publicity rights to be inherited.[5] In 2012, the Ninth Circuit held that because Monroe's estate had claimed that she was a New York resident in other

1. *See* Dorothy Pomerantz, *The Top-Earning Dead Celebrities*, FORBES (Oct. 25, 2011, 10:43 AM), http://www.forbes.com/sites/dorothypomerantz/2011/10/25/the-top-earning-dead-celebrities (finding that Monroe earned $27 million in 2011).

2. *See* Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 987, 990 (9th Cir. 2012).

3. *See id.* at 990 n.7; *see also* Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., No. CV 05-02200, 2008 WL 655604, at *2 (C.D. Cal. Jan. 7, 2008), *on reconsideration*, 568 F. Supp. 2d 1152 (C.D. Cal. 2008), *aff'd sub nom.* Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983 (9th Cir. 2012).

4. CAL. CIV. CODE § 3344.1(3)(b) (West Supp. 2011).

5. *See* Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007).

litigation, it was estopped from claiming that California law governed.[6] As a result, Monroe's publicity rights died along with her.[7]

Yet property is not supposed to behave that way. We define ownership as a rainbow of rights that includes not only the privilege of using and consuming something during life, but also of transferring it after death.[8] The U.S. Supreme Court has called the power of posthumous conveyance "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[9] Likewise, commentators routinely contend that disposing of one's estate is "part and parcel of ownership"[10] and tied "to the very notion of private property."[11] However, as Monroe's lapsed publicity rights reveal, not all items and entitlements conform to this understanding. Some things are indescendible: impossible to transfer by will, trust, or intestacy.

Indescendibility pops up throughout the legal universe. For instance, the U.S. Constitution and several of its state counterparts abolish the British custom of allowing noble titles and governmental positions to be inherited.[12] Likewise, the Uniform Anatomical Gift Act (UAGA) prohibits decedents from transferring their body parts,[13] which can be worth thousands of dollars, to their loved ones.[14] Similarly, under the ancient but troublesome doctrine of abatement, an array of legal claims do not survive a plaintiff, including allegations of defamation, personal injury, and violations of a plaintiff's constitutional rights under 42 U.S.C. § 1983 and *Bivens*.[15] Finally, an expanding web of fine print prohibits the posthumous transfer of season tickets,[16] frequent-flier miles,[17] and digital assets like email, virtual property, and social media accounts.[18]

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6. *See Milton H. Greene Archives*, 692 F.3d at 1000.

7. *See id.*

8. *See, e.g.*, BLACK'S LAW DICTIONARY 955–56 (9th ed. 2009) (defining "ownership" as including "the right to convey . . . to others" and as "heritable").

9. Hodel v. Irving, 481 U.S. 704, 716 (1987).

10. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1667 (2003).

11. RAY D. MADOFF, IMMORTALITY AND THE LAW 57–58 (2010).

12. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. I, § 10, cl. 1; *see also infra* text accompanying notes 41–44.

13. UNIF. ANATOMICAL GIFT ACT § 11, 8A U.L.A. 19 (2001).

14. *See infra* text accompanying note 58.

15. *See infra* Part I.C.; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971) (authorizing suits against federal officials for damages arising from violations of constitutional rights).

16. *See infra* Part I.D.

17. *See, e.g.*, A. Pawlowski, *Delta Skymiles Now Die When You Do*, NBC NEWS (Mar. 27, 2013, 9:31 AM), http://sys02-public.nbcnews.com/travel/delta-skymiles-now-die-when-you-do-1C908 5955.

18. *See, e.g.*, Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1647–49 (2011).

This Article explores this neglected room in the cathedral of private ordering. It begins by presenting several examples of indescendibility: noble titles and hereditary privileges, body parts, causes of action, and various things that have been made indescendible by contract. It then gathers and critiques the leading justifications for why we sometimes deny owners the ability to transfer assets after death. For starters, some courts, lawmakers, and commentators have assumed that indescendibility is simply a posthumous version of market inalienability (a characteristic of property that can be given away but not sold).[19] Conversely, I argue that the policy foundations of market inalienability often do not apply to indescendibility. Consider human tissue, which is both market inalienable and indescendible.[20] Policymakers exempt organs and similar biological resources from bargained-for exchanges to spare low-income individuals from pressure to enter into transactions they may later regret.[21] Yet not only is such paternalism out of place in wills and trusts law—the dead do not experience regret—but the indescendibility of body parts disproportionately impacts poor families.[22] Likewise, non-commodification rhetoric also drives the market inalienability of the human anatomy: perhaps allowing people to treat their bodies like the junk in their attic would coarsen our sense of what it means to be human.[23] But again, this argument is much weaker when applied to the newly deceased, who are on the verge of being buried or cremated. Thus, indescendibility can be more difficult to justify than market inalienability.

Another common rationale for indescendibility is that a decedent cannot transfer certain things because they are "not property."[24] Again, body parts are the prime example, although the same rationale is proffered to explain why certain legal claims do not survive the plaintiff, and why a growing number of companies inform consumers that everything from points in loyalty programs to personal seat licenses to virtual currency is "not your property."[25] But because "property" is merely a label for a bundle of rights—including the power to transmit an item after death—the "not property" rationale is unsatisfying. To say that something cannot be passed after death because it is

19. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 n.18 (1987).

20. *See infra* Part I.B.

21. *See infra* text accompanying note 65.

22. *See infra* text accompanying notes 245–50.

23. *See infra* notes 68–69.

24. *See* Albrecht v. Treon, 889 N.E.2d 120, 133 (Ohio 2008); *see also* Reeves v. United Artists, 572 F. Supp. 1231, 1234–35 (N.D. Ohio 1983) (holding that the right of publicity is not descendible because it is not a "property right"), *aff'd sub nom.* Reeves v. United Artists Corp., 765 F.2d 79 (6th Cir. 1985), *superseded by* OHIO REV. CODE ANN. § 2741.02 (West 2006); Sullivan v. Catholic Cemeteries, Inc., 317 A.2d 430, 432 (R.I. 1974) ("[A] dead body is not classified as 'property' in the true legal sense of that term . . . .").

25. *See, e.g.*, *USAA Rewards Program Terms and Conditions*, U.S. AUTO. ASS'N, https://www.usaa.com/inet/pages/credit_card_total_rewards_terms?akredirect=true (last visited Mar. 3, 2014).

not property does not address *why* the thing should not be descendible; instead, it cycles straight from the fact that the thing is not property to the conclusion that only property is descendible.

Indescendibility also stems from the intuition that particular rights are too "personal" to pass to a decedent's heirs and beneficiaries.[26] For centuries, the abatement doctrine required judges to dismiss tort claims when the plaintiff died.[27] The idea was that lawsuits for physical injuries were intimately tied to the plaintiff and thus should not enrich her loved ones. Today, almost every state has modified the abatement rule by passing a survival statute.[28] But rather than clarifying matters, these wildly divergent laws have only codified the confusion that existed at common law. In fact, some survival statutes have been struck down for lacking a rational basis under the Equal Protection Clause[29]—a testament to the bankruptcy of the "personal" theory. The fixation on the plaintiff's stake in the lawsuit was never a deliberate policy choice; instead, it reflected seventeenth-century judges' conflation of tort and criminal proceedings.[30]

After challenging these oft-cited justifications for indescendibility, I offer a qualified defense of the phenomenon. I contend that barring posthumous transfer can prevent what I call "administrability" problems. Allowing certain objects or entitlements to be inherited would create substantial management costs. For instance, because a decedent's body parts would have to be harvested mere hours after her death to be useful, deeming them to be her property would require expensive medical procedures followed by a mad scramble to find transplant recipients. Likewise, descendible future causes of action, such as the right to sue for defamation of the dead, would saddle personal representatives with a duty of eternal vigilance: failing to pursue valid claims would expose them to liability for breach of fiduciary obligation, and distributing damage awards would grow harder as time passes and lines of consanguinity splinter. Some of these costs, such as the burden on the legal system of perpetual rights, are garden-variety negative externalities, and tip the scales toward stripping decedents of the power to transfer. At the same time, though, the majority of these expenses, such as organ harvesting and higher fiduciary fees, would be paid out of a decedent's funds. Arguably, then, decedents should be free to incur the costs associated with inheritability in return for its benefits. But here a unique facet of wills and trusts law enters the equation. Although this issue is fuzzy and under-theorized, we generally think of succession as mandatory: once something is descendible, it *must* be passed on.[31] As a result, even

26. *See infra* Part I.C.
27. *See, e.g.*, Meese v. City of Fond du Lac, 4 N.W. 406, 408 (Wis. 1880).
28. *See infra* text accompanying notes 108–19.
29. *See, e.g.*, Thompson v. Estate of Petroff, 319 N.W.2d 400, 405 (Minn. 1982).
30. *See infra* Part II.C.
31. *See infra* note 342.

decedents who would prefer not to transfer a descendible item—for example, people who object to organ harvesting on spiritual grounds, or whose bodies are worth less than the harvesting fees—would not be able to escape inheritance's gravitational pull. Partial indescendibility can therefore be appropriate for assets that some decedents would strongly object to conveying.

Finally, I bring these insights to bear on three examples of contemporary indescendibility. First, I argue that although body parts should not be indescendible for the same reasons they are market inalienable, administration costs counsel against making human tissue fully descendible. Thus, I propose that states be allowed to experiment with clear statement regimes that allow decedents to signal their wish to have their organic matter sold for the benefit of their loved ones. Second, I urge lawmakers to abolish the abatement doctrine—a relic that serves no purpose—and deem all existing causes of action to be assets of a decedent's estate. Third, I explain how defining the contours of "pure" indescendibility can be helpful for the nascent problem of indescendibility by private agreement.[32] Although virtually every issue in this area is unsettled, the unconscionability doctrine is likely to emerge as the primary check on non-inheritability clauses. This rule considers the reasonableness of consumers' expectations and drafters' motivations for deleting rights. By exploring these issues in the context of "pure" indescendibility, I hope to begin the conversation about limits on indescendibility by contract.

The Article contains three Parts. Part I introduces indescendibility, focusing on constitutional provisions that prohibit hereditary privileges, statutes that bar decedents from conveying their body parts, legal claims that expire when the plaintiff dies, and the emerging area of contractually mandated non-inheritability. Part II collects and criticizes the justifications that policymakers, courts, and scholars have offered for eliminating a decedent's power to transmit property. Part III contends that indescendibility can be best understood as an attempt to limit administrability problems. It then uses this analysis to suggest reforms to the inheritability of body parts, causes of action, and rights made indescendible by fine print.

I.
INDESCENDIBILITY EXAMPLES

Two propositions are so central to U.S. wills and trusts law that they are virtually never questioned. The first is that owning an item confers the power to transfer it when one dies. The twin institutions of testation and intestacy are so

32. By "pure" indescendibility, I mean the phenomenon of courts or policymakers forbidding decedents from conveying certain things. Conversely, contractual indescendibility arises when a decedent has formed an agreement that relinquishes the power to transmit an otherwise-descendible right or object.

entrenched that "[i]t is hard for most Americans to imagine a system of private property that doesn't include a right to control what happens to their property after death."[33] Second, succession is comprehensive. Well-drafted wills and trusts contain a residuary clause—a catch-all that gives every item not specifically mentioned to particular beneficiaries. And if anything falls through this safety net, the intestacy statute will shepherd it to the decedent's family. Thus, as Adam Hirsch explains, "[o]ne way or another, everything previously owned by a deceased person is going to pass into someone else's hands."[34] Lawrence Friedman elaborates: "When people die, everything they think they own, everything struggled, scrimped, and saved for, every jewel and bauble, every bank account, all stocks and bonds, the cars and houses, corn futures or gold bullion, all books, CDs, pictures, and carpets—everything will pass on to somebody or something else."[35]

Indescendible objects and rights do not obey these principles. This Section offers a guided tour of property that cannot be transferred after death. It addresses the indescendibility of noble titles and hereditary privileges, body parts, causes of action, and rights and items governed by contract. It shows that courts, lawmakers, and scholars have justified indescendibility of these things on three grounds: (1) property that cannot be sold during life should not be transferable at death, (2) some things are not "property" at all, and (3) some rights are too personal to bequeath or pass by intestacy. The goal here is to lay the groundwork for Part II, which holds these rationales to the fire.

A. Noble Titles and Hereditary Privileges

To find the first examples of American indescendibility, one need look no further than the highest laws of the land. The U.S. Constitution outlaws the grant of noble titles, and many state constitutions forbid hereditary privileges with respect to state institutions. This Section describes these early examples of indescendibility.

For centuries, England recognized an array of incorporeal hereditaments—intangible property rights rooted in ancestry.[36] For instance, the "dignity"—a designation like duke, earl, or baron—was a prerequisite to membership in Parliament's House of Lords.[37] Once the King had conferred such a title, it became a kind of covenant that ran with the generations, forever attached to the family name. Likewise, franchises (businesses that collected tolls or taxes) and low-level government positions (such as magistrate, bailiff,

33. MADOFF, *supra* note 11, at 57–58.

34. Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1424 (2013).

35. LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 3 (2009).

36. *See* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 6 (2011).

37. *See* JEFFREY FORGENG, DAILY LIFE IN STUART ENGLAND 20 (2007).

or receiver) were seen as property.[38] They entitled their holder to a regular income stream (called "emoluments") and were traded and inherited.[39]

When tensions with Britain flared, the fledgling American political elite began to see inherited status as embodying all that was inegalitarian about the monarchy. First in the Articles of Confederation, and then twelve years later in the U.S. Constitution, the Founders abolished dignities by prohibiting the federal and state governments from "grant[ing] any Title of Nobility."[40]

Several state constitutions went further. For instance, the Virginia Declaration of Rights eliminated inheritable governmental positions, stating that "no man . . . is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary."[41] Likewise, the New Hampshire Constitution declared that "[n]o office or place, whatsoever, in government, shall be hereditary—the abilities and integrity requisite in all, not being transmissible to posterity or relations."[42] The Massachusetts Constitution similarly described public offices as "neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural."[43] And the North Carolina Declaration of Rights provided that "no hereditary emoluments, privileges or honors ought to be granted or conferred in this State."[44]

In fact, these lofty statements had little practical effect. Colonial society was much less patrician: although the Crown had granted a handful of franchises, dignities had all but disappeared, and public service was rarely treated as a commodity.[45] But the hereditary privilege clauses were part of a larger movement in which succession reform "carried a symbolic importance disproportionate to the significance of its substantive implications."[46] Previously, states had made an elaborate show of abolishing the entail and primogeniture—two staples of British inheritance law designed to keep land within families.[47] Likewise, this very public stand against inherited advantage

38. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *36.

39. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *28; WILLIAM CRUISE, A TREATISE ON THE ORIGIN AND NATURE OF DIGNITIES, OR TITLES OF HONOR 3 (London, A. Strahan, 2d ed. 1823); FORGENG, *supra* note 37, at 20.

40. ARTICLES OF CONFEDERATION of 1778, art. VI, para. 1; U.S. CONST. art. I, § 10, cl. 1; *see also* U.S. CONST. art. I, § 9, cl. 8.

41. VA. CONST. of 1776, DECLARATION OF RIGHTS, art. IV.

42. N.H. CONST. art. IX.

43. MASS. CONST. pt. 1, art. VI.

44. N.C. CONST. of 1776, DECLARATION OF RIGHTS, art. XXII.

45. *See, e.g.*, ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC 79 (2011).

46. Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 28 (1977).

47. *See id.* at 12–13.

may not have affected daily life, but it eliminated traditions that "symbolize[d] the aristocratic aspects of English government against which the Revolution increasingly directed itself."[48]

In addition, this dusty chapter in American constitutionalism highlights several issues that continue to swirl around modern indescendibility.[49] For one, it reveals that making an item or right indescendible can lead down two very different paths. First, indescendibility can return something to a common stockpile to be redistributed. That was the fate of public offices, which are now filled by appointment or election when the incumbent dies. Today, lawmakers still sometimes use non-inheritability as a way of hitting the "reset" button on the ownership of scarce resources. For instance, in the 1970s, the market for taxi cab medallions in San Francisco was dominated by entrepreneurs who would lease them for profit.[50] To cut out these middlemen, voters passed Proposition K, which made permits both inalienable and indescendible in an effort to keep them in the hands of "working cab drivers, who are actually driving their own taxis."[51] But second, as with dignities, indescendibility can have a more dramatic effect. Prohibiting the posthumous conveyance of an object or entitlement can phase it out of existence: when its owner dies, it vanishes, never to be owned again. As I will discuss, this property-eviscerating strand of indescendibility is at the heart of several polarizing debates, including the legal status of body parts and the survivability of pending causes of action.[52]

The abolition of inheritable public offices also underscores how tightly descendibility is bound with the definition of "property." In the wake of the revolution, courts and scholars disagreed over whether incumbents enjoyed a property right in their jobs. No less of an authority than Alexander Hamilton claimed that they did, reasoning that these posts combine a "trust for public

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48. *Id.* at 11. After the 1917 revolution, the new Soviet government passed a law that mandated universal indescendibility: "Inheritance, testate and intestate is abolished. Upon the death of the owner his property (movable and immovable) becomes the property of the [state]." JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 225–28 (8th ed. 2009). Like the colonial insurgents before them, the Marxists were primarily interested in indescendibility as a symbol. Indeed, the anti-inheritance statute was riddled with exceptions that soon swallowed the rule. *See, e.g.*, Frances Foster-Simons, *The Development of Inheritance Law in the Soviet Union and the People's Republic of China*, 33 AM. J. COMP. L. 33, 34–37 (1985).

49. Likewise, in a thoughtful article Carlton Larson has argued that the Nobility Clauses prohibit legacy preferences in public school admissions. *See* Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1379 (2006).

50. *See* Heidi Machen & Jordanna Thigpen, *Overview of the San Francisco Taxi Industry and Proposition K*, at *4, http://www.taxi-library.org/overview-of-prop-k.pdf (last visited Mar. 3, 2014); Tim Redmond, *Big Changes for Cab Industry*, S.F. BAY GUARDIAN ONLINE (Dec. 23, 2009, 3:48 PM), http://www.sfbg.com/politics/2009/12/23/big-changes-cab-industry.

51. Slone v. Taxi Comm'n, No. C 07-03335, 2008 WL 2632101, at *5 (N.D. Cal. June 30, 2008).

52. *See infra* Part I.B–C.

benefit" and a "vested interest in the individual."[53] Likewise, the North Carolina Supreme Court reasoned that the position of clerk of the county court was like anything else from which a person "can earn a livelihood and make gain," such as "the land which he tills, or the horse he rides or the debt which is owing to him."[54] But soon the contrary position gathered momentum. Among other factors, judges cited the missing stick of posthumous transfer—the fact that "[a] public office cannot be acquired by . . . inheritance or devise"—to conclude that this particular bundle was not property.[55] Even today, the question of whether one can have property without inheritability (or vice versa) continues to baffle courts and commentators.[56]

Thus, indescendibility traces back to the dawn of the nation. By refusing to allow ancient forms of property to pass down family lines, the revolutionary generation unfurled a banner of defiance at the monarchy. And as I discuss next, indescendibility has also sparked more recent controversies.

B. Body Parts

As strange as it may sound, burial and cremation destroy one of the most valuable things we will ever own. In this age of advanced biotechnology, the human body is worth an average of $220,000,[57] including $350–$850 per elbow, $1,800–$2,800 for corneas, $10,000 for heart valves, $14,000 for knee cartilage, and $1,000 per square foot for skin.[58] In fact, as Lior Jacob Strahilevitz notes, "a young accident victim's organs may well exceed the market value of all her real and personal assets."[59] However, as I explain in this Section, body parts are indescendible for two independent reasons. First, federal and state statutes make the vast majority of the anatomy market inalienable during life, and lawmakers have assumed that the same policy considerations also require outlawing posthumous transfers. Second, a decedent can convey only her property, and we are queasy about recognizing ownership interests in the body.

The market for the human anatomy is heavily regulated. In 1984, Congress passed the National Organ Transplantation Act (NOTA), which

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53. 8 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 318 (Henry Cabot Lodge ed., 1904).

54. Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 18–19 (1833).

55. *Ex parte* Norris, 8 S.C. 408, 444 (1876).

56. *See infra* Part II.B.

57. *See* MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 178 (2006).

58. *See* J. Randall Boyer, Comment, *Gifts of the Heart . . . and Other Tissues: Legalizing the Sale of Human Organs and Tissues*, 2012 BYU L. REV. 313, 333 n.141 (citing ANNIE CHENEY, BODY BROKERS: INSIDE AMERICA'S UNDERGROUND TRADE IN HUMAN REMAINS 8 (2006)); Dan Majors, *You Can't Have Too Many Eyes*, PITTSBURGH POST-GAZETTE, Feb. 10, 2005, at A13; Jeffrey Kluger, *The Body Snatchers*, TIME, Mar. 22, 2004, at 41.

59. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 823 (2005).

prohibits the acquisition or transfer of "any human organ for valuable consideration for use in human transplantation."[60] The NOTA defines "organ" expansively, as "kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof."[61] Likewise, every state and the District of Columbia has passed some version of the Uniform Anatomical Gift Act (UAGA), which criminalizes the sale of human eyes, organs, and tissue, and establishes an elaborate regime designed to facilitate organ donation.[62] But both the NOTA and the UAGA allow hospitals to charge downstream patients for "removal, transportation, implantation, processing, preservation, quality control, and storage."[63] Thus, these statutes deny compensation only to the individual who has chosen to relinquish the body part. After the extraction, "money changes hands at numerous points in the chain of distribution."[64]

The initial market inalienability of these body parts reflects several potent concerns. For one, allowing major components of the anatomy to be sold might create perverse incentives for low-income individuals. As the Ninth Circuit recently explained, alienability could encourage "poor people to sell their organs, even when the transplant would create excessive medical risk, pain, or disability for the donor."[65] In addition, the NOTA and the UAGA serve as bulwarks against commodification. Many doctors and medical ethicists support the statutes because they believe that human tissue should be provided gratuitously in order to foster a culture of generosity and reinforce our common bonds.[66] Introducing money up front might transform "a system based on generosity and civic spirit into one of antiseptic, bargained-for exchanges."[67] Moreover, it also might diminish our respect for bodily integrity and the sanctity of human life. As Margaret Jane Radin has famously argued, even speaking about certain things in market rhetoric can be damaging: it casts what

60. 42 U.S.C. § 274e(a) (2012).

61. *Id.* at § 274e(c)(1). Regulations promulgated by the Secretary of Health and Human Services have added the esophagus, stomach, and intestines to the list. *See* 42 C.F.R. § 121.13 (2007).

62. *See* UNIF. ANATOMICAL GIFT ACT § 16, 8A U.L.A. 19 (2001). Thirty-nine states and the District of Columbia have adopted the Revised Uniform Anatomical Gift Act, which made several changes to the Uniform Anatomical Gift Act in an effort to better facilitate organ donation. *See* REVISED UNIF. ANATOMICAL GIFT ACT (amended 2006), 8A U.L.A. (Supp. 2013) [hereinafter RUAGA]; *Anatomical Gift Act (2006) Summary*, UNIF. LAW COMM'N, http://uniformlaws.org/Act Summary.aspx?title=Anatomical%20Gift%20Act%20(2006) (last visited Mar. 3, 2014).

63. 42 U.S.C. § 274e(c)(2) (2012); *accord* RUAGA § 16(b).

64. Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 165 (2000).

65. Flynn v. Holder, 684 F.3d 852, 860 (9th Cir. 2012).

66. *See, e.g.*, DAVID L. WEIMER, MEDICAL GOVERNANCE: VALUES, EXPERTISE, AND INTERESTS IN ORGAN TRANSPLANTATION 59 (2010); Gil Siegal & Richard J. Bonnie, *Closing the Organ Gap: A Reciprocity-Based Social Contract Approach*, 34 J.L. MED. & ETHICS 415, 415–16 (2006) (noting that "incentive-based approaches have been strongly resisted by many transplantation specialists and bioethicists because they would displace altruism with self-interest as the driving force in the system").

67. Julia D. Mahoney, *Altruism, Markets, and Organ Procurement*, 72 LAW & CONTEMP. PROBS. 17, 17–18 (2009) (articulating but challenging this viewpoint).

should be cherished and inviolate as something that can be invaded if the benefits outweigh the burdens.[68] Indeed, the NOTA's congressional record is shot through with the sentiment that "[h]uman organs should not be treated like fenders in an auto junkyard."[69]

Despite these laudable goals, the bar on anatomical sales has sparked intense debate, especially because there has long been a well-documented organ shortage. The statistics relating to kidneys alone are sobering: with a waitlist of nearly one hundred thousand patients in the United States,[70] someone dies for lack of a transplant every four hours.[71] Likewise, about two thousand people pass away each year due to the scarcity of usable livers.[72] Not only have the NOTA and the UAGA failed to solve these urgent needs, but they perversely deny compensation to the human source while allowing biotechnology companies and hospitals to profit handsomely.[73] Thus, a rising chorus of voices has argued that permitting organs to be freely traded would increase supply, save lives, and be more equitable.[74]

Nevertheless, the market inalienability of body parts is only half the story. A little-noticed provision in the UAGA makes these items indescendible by allowing only particular entities and individuals to receive anatomical gifts—hospitals, medical schools, research institutions, and patients.[75] Thus, a decedent cannot execute a testamentary instrument that leaves her kidney to a beneficiary unless the beneficiary actually plans to have that particular kidney implanted into herself.[76] The UAGA also severely limits a personal representative's authority over a decedent's body. Aside from controlling the disposition of the corpse, the estate has no power to transfer it—or any part of

68. *See* Radin, *supra* note 19, at 1879–81.

69. *National Organ Transplant Act: Hearing on H.R. 4080 Before the Subcomm. on Health of the H. Comm. on Ways & Means*, 98th Cong. 26 (1984) (statement of Rep. Henry A. Waxman).

70. *See Organ Procurement and Transplantation Network Data*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, http://optn.transplant.hrsa.gov/data (last visited Mar. 3, 2014).

71. Michele Goodwin, *Private Ordering and Intimate Spaces: Why the Ability to Negotiate is Non-Negotiable*, 105 MICH. L. REV. 1367, 1370 (2007).

72. MEHMET C. DEMIRCI, DESIGNING THE LIVER ALLOCATION HIERARCHY: INCORPORATING EQUITY AND UNCERTAINTY 2 (2008).

73. *See, e.g.*, GOODWIN, *supra* note 57, at 178; Mahoney, *supra* note 64, at 193–94. Indeed, as Julia Mahoney points out, despite the NOTA and the UAGA's restriction on people selling their own body parts, "[t]ransplant patients pay to receive organs, fertility patients purchase ova and sperm, and biotechnology firms sell products derived from human cells." *Id.* at 165.

74. *See, e.g.*, Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 132 (2004); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 2 (1989); Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 405–06 (2004); Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 66–67 (2007); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1841–45 (2007).

75. RUAGA § 11(a)(1)–(2) (amended 2006), 8A U.L.A. 109 (Supp. 2013).

76. *Id.* at § 11(a)(2).

it—to others.[77] Thus, unlike other income-generating items such as real estate or securities, a decedent cannot leave her cadaver to her estate to be managed for the benefit of her loved ones.

Of course, the fact that most body parts are market inalienable makes it less important that they are indescendible. Even if a decedent could convey these items, the NOTA and the UAGA preclude her personal representative or loved ones from turning around and selling them.[78] Nevertheless, as I will discuss, the laser-like focus on alienability—which relegates descendibility to an afterthought—misses the mark. Rather than deeming body parts to be fully alienable during life, lawmakers could chart a modest course by making these objects transferable for consideration only *after* the decedent has passed.[79] I will argue that such a regime could increase supply without exploiting the poor or corroding our view of bodily integrity.[80]

But even if I am correct that the rationales for market inalienability do not apply to indescendibility, body parts cannot be inherited for a second reason: we do not think of the human body as property. For instance, in the well-known case of *Moore v. Regents of the University of California*,[81] the California Supreme Court rejected a conversion claim brought by a man whose spleen had been surgically removed and then used to produce a lucrative cell line.[82] The plaintiff, John Moore, argued that the defendants had appropriated his "property"—a required element of conversion—because he continued to own his spleen after it had been extracted.[83] The court disagreed, reasoning that "human biological materials [are] . . . sui generis" and thus not governed by the "law of personal property."[84] Concurring Justice Arabian put the point more emphatically: by trying to ground a claim on a property interest in the body—"the single most venerated and protected subject in any civilized society"—Moore had asked the court to "commingle the sacred with the profane."[85]

77. *See, e.g.*, *id.* at § 9; Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 386 (Tex. 2012) (noting that "[t]he Anatomical Gift Act does not give the estate the right to designate a recipient once the individual dies").

78. *See supra* text accompanying notes 60–63.

79. *See infra* Part III.A.

80. *Compare id.*, *with* Cohen, *supra* note 74, at 32–36 (proposing an organ "futures market" in which living persons enter into contracts for the sale of their tissue upon death).

81. 793 P.2d 479 (Cal. 1990).

82. *See id.* at 488–93.

83. *See id.* at 487.

84. *Id.* at 489; *see also id.* at 490 ("Only property can be converted."). The court also expressed concern that imposing liability would chill scientific research. *See id.* at 487–88.

85. *Id.* at 497 (Arabian, J., concurring). *Moore* has been widely followed. *See, e.g.*, Washington Univ. v. Catalona, 437 F. Supp. 2d 985, 995–97 (E.D. Mo. 2006) (rejecting conversion claim on the grounds that there is no "property interest" in donated body tissue), *aff'd* 490 F.3d 667 (8th Cir. 2007); Greenberg v. Miami Children's Hosp. Research Inst., Inc., 264 F. Supp. 2d 1064, 1074–76 (S.D. Fla. 2003) (same); Boorman v. Nevada Mem'l Cremation Soc'y, 236 P.3d 4, 9–10 (Nev. 2010) (same).

This thick resistance to treating a living person's anatomy as her property also extends to cadavers. Indeed, we have little power over our own corpses, even though the law has slowly expanded the dominion one may exercise over another's corpse. Judges were once prone to sweeping declarations that "a dead body is not the subject of property."[86] Gradually, however, they began to soften these statements and describe a decedent's family as having a "quasi-property right in his or her corpse to ensure its proper handling and burial."[87] And although there is a paucity of case law on this issue, there is consensus that unrelated third parties, such as biotechnology companies, may enjoy the entire spectrum of property rights in excised human biological material.[88] Thus, ownership of cadavers is an inverted pyramid in which those with the strongest link to the body during life enjoy the least control after death.

A recent Texas Supreme Court decision vividly illustrates these tiers. In *Evanston Insurance Co. v. Legacy of Life, Inc.*,[89] Debra Alvarez alleged that a charity had harvested and sold her deceased mother's tissue after falsely promising that it would not be used for profit.[90] The charity asked its insurance carrier to defend the action under a policy that covered lawsuits arising out of "property damage."[91] As the court examined whether Alvarez or her mother's estate stated a claim for "property damage," a paradox emerged. Seen from the perspective of the charity, the tissue was almost certainly property: it could be used and sold.[92] Yet for Alvarez and her mother's estate—the relevant parties for determining whether the insurer had a duty to defend the lawsuit—the tissue was not property.[93] Indeed, Alvarez had no right to possess the body other than to direct its final disposition, and could only transfer it as set forth in the UAGA.[94] And oddly, the party with the weakest claim to ownership was the body's former inhabitant: Alvarez's mother. She lived only through her estate, and her personal representative had no authority to designate a recipient for her tissue.[95]

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86. Regina v. Price, [1884] 12 Q.B. 247 at 252 (Eng).

87. Bauer v. N. Fulton Med. Ctr., Inc., 527 S.E.2d 240, 243 (Ga. Ct. App. 1999); *cf.* Newman v. Sathyavaglswaran, 287 F.3d 786, 795–98 (9th Cir. 2002) (holding that parents stated a claim under 42 U.S.C. § 1983 for violation of their due process rights against state officials who removed the corneas of their dead children without notice or consent).

88. *See, e.g.*, Robin Feldman, *Whose Body Is It Anyway? Human Cells and the Strange Effects of Property and Intellectual Property Law*, 63 STAN. L. REV. 1377, 1378 (2011).

89. 370 S.W.3d 377 (Tex. 2012).

90. *Id.* at 379.

91. *See id.* at 382.

92. Admittedly, the court did not need to consider this issue. *See id.* at 385 ("[W]hether the tissues were property to an unrelated third party like [the charity]—a party whose interest is commercial, not personal—is not a question we must answer here."). Nevertheless, other cases have recognized that third parties enjoy broad rights over human remains. *See, e.g.*, Regents of the Univ. of California v. Superior Court, 107 Cal. Rptr. 3d 637, 647 (Ct. App. 2010).

93. Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377, 385 (Tex. 2012).

94. *See id.*

95. *See id.* at 386–87.

Because a decedent lacks a property interest in her corpse, there is a virtually unchallenged norm of excluding even *alienable* body parts from estates. The NOTA and the UAGA do not govern the entire human anatomy: they exclude renewable material, such as hair, blood, and gametes.[96] Thus, living vendors are able to sell rare plasma and eggs for thousands of dollars per unit.[97] But this brisk business ends upon death. Although succession sweeps everything else of value from the dead to the living, we destroy these biological assets rather than allow them to pass to a decedent's loved ones.[98] The rationale behind this practice seems to be that they are not a decedent's property. Indeed, in disputes over burial instructions in wills, several courts have opined that "the body of a deceased . . . forms no part of the 'property' of one's estate in the usual sense."[99] This makes the human corpse indescendible—after all, no matter how broad a residuary clause or an intestacy statute, a decedent cannot convey what she does not own.

Lawmakers have thus made most body parts market inalienable and indescendible. In addition, the prevailing wisdom is that no aspect of a decedent's human anatomy is her "property." But biological material is not the only controversial manifestation of indescendibility. As I discuss next, courts and scholars have long struggled with the intersection of legal claims and death.

C. Causes of Action

Many causes of action are indescendible. At common law, the maxim *actio personalis moritur cum persona*—"a personal action dies with the person"[100]—cast a long shadow over the civil justice system. Under the doctrine of abatement, claims for physical injury evaporated if a plaintiff died before the verdict.[101] Conversely, most suits for breach of contract or recovery of property continued, with a decedent's personal representative taking the

96. *See* 42 U.S.C. § 274e(c)(1) (2012); RUAGA §§ 2(18), 16 (amended 2006), 8A ULA 71, 129 (Supp. 2013); *see also* Flynn v. Holder, 684 F.3d 852, 862–65 (9th Cir. 2012) (enlarging this exception by holding that the NOTA does not apply to hematopoietic stem cells, which are used in bone marrow transplants).

97. *See, e.g.*, Elizabeth E. Appel Blue, *Redefining Stewardship Over Body Parts*, 21 J.L. & HEALTH 75, 79 (2008).

98. The sole exception of which I am aware is *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993), which implied (but did not hold) that a testator could bequeath vials of sperm to his girlfriend. I discuss *Hecht* in the text accompanying notes 288–97.

99. *In re* Estate of Moyer, 577 P.2d 108, 110 (Utah 1978); *accord* Estate of Jimenez, 65 Cal. Rptr. 2d 710, 714 (Ct. App. 1997); *In re* Estate of Medlen, 677 N.E.2d 33, 35–37 (Ill. App. Ct. 1997).

100. *See, e.g.*, Shafer v. Grimes, 23 Iowa 550, 553 (1867).

101. *See, e.g.*, Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 756–57 (1877) ("The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question.").

reins and seeking redress on the estate's behalf.[102] This dichotomy was perverse. If a plaintiff passed away after enduring the disappointment of a broken promise or the inconvenience of lost goods, the defendant was still on the hook. But if a negligence plaintiff succumbed to her injuries, the case came to a screeching halt.[103]

Making matters worse, it was unclear why the law drew this bright line. Judges repeated the mantra that claims for "personal wrongs" died with the plaintiff.[104] However, they did not explain why causes of action for physical injury were more "personal" than other claims, or even why "personal" claims were indescendible.[105] These purported distinctions puzzled Lord Mansfield, who complained that the loose term "personal" "leaves the law undefined."[106] Sir Frederick Pollock likewise noted that because "[c]auses of action on a contract are quite . . . 'personal,'" the non-inheritability of claims for physical injuries was "one of the least rational parts of our law."[107]

Today, almost every state has adopted a survival statute to override the merciless common law rule.[108] However, because the abatement doctrine has never had an acknowledged animating principle, these laws diverge wildly, projecting a patchwork of indescendibility across the country. Some survival statutes are so narrow that they essentially leave the abatement rule intact.[109] At the opposite pole, other survival statutes flatly declare that the plaintiff's death does not affect the viability of an existing lawsuit.[110] Even here, though,

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102. *See, e.g.*, Webber v. St. Paul City Ry. Co., 97 F. 140, 145 (8th Cir. 1899). The precise scope of this rule remains slightly unclear. For instance, although contract claims generally survived, lawsuits for breach of a promise to marry did not. *See* T.A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 607 (1960).

103. Similarly, a defendant's estate was not accountable for torts resulting in physical injury—a kind of reverse indescendibility where a liability, rather than an asset, vanishes upon death. *See* Percy H. Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 249 (1929).

104. Smith v. Baker, 22 F. Cas. 450, 450 (E.D. Pa. 1874); Francis v. Burnett, 84 Ky. 23 (Ky. 1886); Davis v. Justice, 31 Ohio St. 359, 362 (Ohio 1877).

105. *See, e.g.*, Smedley, *supra* note 102.

106. Nelson v. Gass, 21 Pa. D. 777, 778 (Pa. Ct. Com. Pl. 1912).

107. SIR FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 40 (New York and Albany, Banks & Bros. 1895).

108. Most jurisdictions have also supplemented survival statutes with wrongful death statutes, which allow a decedent's close family members to sue for their own losses stemming from her death. *See, e.g.*, Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 62–63 (1990) (tracing the evolution of these laws).

109. *See, e.g.*, ALA. CODE § 6-5-462 (West 1975) (providing that unfiled tort claims abate); N.M. STAT. ANN. § 37-2-1 (West 1978) (abolishing only the abatement rule with respect to predeceasing defendants); *see also* Nordwall v. PHC-Las Cruces, Inc., No. CIV 12-0429 JB/WPL, 2013 WL 4400382, at *33–34 (D.N.M. July 31, 2013) (holding that intentional tort claims abate upon the plaintiff's death); Evans v. Twin Falls Cnty., 796 P.2d 87, 92 (Idaho 1990) (noting that although the Idaho legislature has passed a wrongful death statute, it has not "abrogat[ed] the common law rule of non-survival of causes of action").

110. *See, e.g.*, CAL. CIV. PROC. CODE § 377.20(a) (West Supp. 2011); D.C. CODE § 12-101 (2005); FLA. STAT. ANN. § 46.021 (West 2010); IOWA CODE ANN. § 611.20 (West 2010); MICH.

flickers of the common law remain: some jurisdictions forbid punitive damage awards or compensation for pain and suffering in survival actions.[111] Likewise, several states shield only personal injury claims from the abatement doctrine.[112] And still others retain the abatement rule for allegations of nuisance,[113] fraud,[114] conversion,[115] false imprisonment,[116] invasion of privacy,[117] malicious prosecution,[118] and breach of a promise to marry.[119] To call these variations "haphazard" would be an understatement. They are so random that courts in Minnesota and Pennsylvania have struck down survival statutes under the Equal Protection Clause for distinguishing between types of claims "for no apparent reason."[120]

COMP. LAWS ANN. § 600.2921 (West 2008); MISS. CODE ANN. § 91-7-237 (West 2009); MONT. CODE ANN. § 27-1-501(1) (West 2010); NEV. REV. STAT. ANN. § 41.100(1) (Lexis-Nexis 2007); N.Y. EST. POWERS & TRUSTS LAW § 11-3.2 (McKinney 2000); OR. REV. STAT. ANN. § 115.305 (West 2011); 42 PA. CONS. STAT. ANN. § 8302 (West 2000); S.D. CODIFIED LAWS § 15-4-1 (2011); UTAH CODE ANN. § 78B-3-107 (West 2012). In every state but Alabama, there is no requirement that the plaintiff have actually filed a complaint before death. *See* Estate of Gilliam *ex rel.* Waldroup v. City of Prattville, 639 F.3d 1041, 1052–53 (11th Cir. 2011) (Martin, J., dissenting).

111. *See, e.g.*, CAL. CIV. PROC. CODE § 377.34 (West Supp. 2011) (excluding "damages for pain, suffering, or disfigurement"); FLA. STAT. ANN. § 768.21 (West 2010) (allowing a decedent's family to recover for their own pain and suffering but denying the estate the power to recover for the decedent's pain and suffering); IDAHO CODE ANN. § 5-327(2) (West 1979) (disallowing recovery for both pain and suffering and punitive damages); N.Y. EST. POWERS & TRUSTS LAW § 11-3.2(a) (McKinney 2000) ("[P]unitive damages shall not be awarded . . . ."); *cf.* UTAH CODE ANN. § 78B-3-107 (West 2012) (limiting the damages available depending on the cause and timing of death).

112. *See, e.g.*, DEL. CODE ANN. tit. 10, § 3704(a) (West 2007); MO. ANN. STAT. § 537.020(1) (West 2010); N.J. STAT. ANN. § 2A:15-3 (West 2001); N.Y. EST. POWERS & TRUSTS LAW § 11-3.2(b) (McKinney 1998); W. VA. CODE ANN. § 55-7-8a(a) (West 2005); WYO. STAT. ANN. § 1-4-101 (West 2012). Conversely, some survival statutes expressly retain the abatement rule for personal injury claims. *See, e.g.*, IND. CODE ANN. § 34-9-3-1 (West 2008).

113. *See, e.g.*, OHIO REV. CODE ANN. § 2311.21 (West 2006).

114. *See, e.g.*, Kraft Power Corp. v. Merrill, 981 N.E.2d 671, 686 (Mass. 2013) (noting that the Massachusetts survival statute "does not include fraud among the torts that survive death, unless the fraud results in 'damage to real or personal property'") (citing MASS. GEN. LAWS ANN. ch. 228, § 1 (West 2005)).

115. *See, e.g.*, KY. REV. STAT. ANN. § 411.140 (LexisNexis 2012) (exempting "actions for . . . criminal conversation").

116. *See, e.g.*, IND. CODE ANN. § 34-9-3-1 (West 2008); MASS. GEN. LAWS ANN. ch. 228, § 1 (West 2005); MO. ANN. STAT. §§ 537.010, 537.030 (West 2010); N.C. GEN. STAT. ANN. § 28A-18-1(b) (West 2007).

117. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-3110 (1995); IND. CODE ANN. § 34-9-3-1 (West 2008); *see also* Nicholas v. Nicholas, 83 P.3d 214, 229 (Kan. 2004) ("[W]e hold an invasion of privacy action as stated in this case for intrusion upon seclusion does not survive the death of the alleged victim.").

118. *See, e.g.*, HAW. REV. STAT. ANN. § 663-7 (LexisNexis 1995); IND. CODE ANN. § 34-9-3-1 (West 2008); KY. REV. STAT. ANN. § 411.140 (LexisNexis 2012) (exempting "so much of the action for malicious prosecution as is intended to recover for the personal injury" from the survival statute); OHIO REV. CODE ANN. § 2311.21 (West 2006).

119. ARIZ. REV. STAT. ANN. § 14-3110 (1995).

120. Thompson v. Estate of Petroff, 319 N.W.2d 400, 405 (Minn. 1982); *see also* Moyer v. Phillips, 341 A.2d 441, 445 (Pa. 1975). Even decisions upholding similar laws do so grudgingly. For instance, the Sixth Circuit rejected a rational basis challenge to the Kentucky survival statute's

One major source of disagreement among jurisdictions is the effect of the plaintiff's death on a pending defamation lawsuit. Many survival statutes do not authorize causes of action for slander or libel, in keeping with those claims' traditional status as indescendible.[121] Yet others allow complaints for these claims—dubbed "the most personal of torts"—to withstand the plaintiff's death.[122] Courts in jurisdictions without legislation on point have sharply disagreed. The majority approach holds that defamation claims abate for two reasons. First, the plaintiff's death makes it less important to achieve the core purpose of the cause of action, which is "to restore [the plaintiff's] reputation."[123] Second, an award of damages would arguably confer a windfall on heirs and beneficiaries, whose names have not been tarnished.[124] Then again, several outspoken judges have challenged both prongs of this reasoning, explaining that death does not diminish anyone's desire to see their legacy rehabilitated, and that a defamation victim's family often suffers anguish and even pecuniary loss.[125]

In fact, some commentators and policymakers have proposed going further than the minority approach and creating a cause of action for slander or libel that occurs *after* the victim's death.[126] This cohort cites heart-wrenching stories of spouses, siblings, and parents who are "crushed by false reports about their deceased loved ones."[127] Rhode Island took a modest step in this direction by enacting a law that allows defamation claims stemming from "an obituary or

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exception for slander and libel claims, calling the legislation "anachronistic and based on scant logic." Innes v. Howell Corp., 76 F.3d 702, 710 (6th Cir. 1996).

121. *See, e.g.*, ALA. CODE § 6-5-462 (West 2003); ALASKA STAT. ANN. § 09.55.570 (West 1996); ARIZ. REV. STAT. ANN. § 14-3110 (1995); ARK. CODE ANN. § 16-62-101(a) (West 2010); COLO. REV. STAT. ANN. § 13-20-101 (West 1997); IDAHO CODE ANN. § 5-327 (West 1988); 755 ILL. COMP. STAT. ANN. 5/27-6 (West 2009); IND. CODE ANN. § 34-9-3-1 (West 2012); KY. REV. STAT. ANN. § 411.140 (LexisNexis 2012); MD. CODE ANN., CTS. & JUD. PROC. § 6-401(b) (West 2005); N.C. GEN. STAT. ANN. § 28A-18-1(b) (West 2007); N.D. CENT. CODE ANN. § 28-01-26.1 (West 1991); OHIO REV. CODE ANN. § 2311.21 (West 2006); TENN. CODE ANN. § 20-5-102 (West 1994). Other survival statutes reach the same result by negative implication: they only abolish the abatement rule for particular causes of action, and they do not mention defamation. *See supra* statutes cited in note 112.

122. Florence Frances Cameron, Note, *Defamation Survivability and the Demise of the Antiquated "Actio Personalis" Doctrine*, 85 COLUM. L. REV. 1833, 1834 (1985). The survival statutes of these states do not mention slander or libel specifically; rather, they "allow the survival of all causes of action." *Id.* at 1836; *see also supra* text accompanying note 110.

123. Menefee v. Columbia Broad. Sys., Inc., 329 A.2d 216, 219 (Pa. 1974); *see also* Valadez v. Emmis Commc'ns, 229 P.3d 389, 397 (Kan. 2010); Malson v. Palmer Broad. Grp., 963 P.2d 13, 15 (Okla. Civ. App. 1998).

124. *Menefee*, 329 A.2d at 219.

125. *See* MacDonald v. Time, Inc., 554 F. Supp. 1053, 1054 (D.N.J. 1983) ("Why should a claim for a damaged leg survive one's death, where a claim for a damaged name does not[?] After death, the leg cannot be healed, but the reputation can."); *accord* Canino v. New York News, Inc., 475 A.2d 528, 530–33 (N.J. 1984).

126. *See, e.g.*, Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1526–27, 1567 (1989).

127. *Id.* at 1526.

similar account" that appears shortly after the plaintiff's demise.[128] Likewise, the New York Senate once passed a bill that would have allowed plaintiffs to obtain a declaratory judgment that a recently deceased family member had been defamed, but it failed in the Assembly.[129] Courts, however, have uniformly rejected defamation claims based on statements occurring after an individual's death.[130] Although they have often expressed sympathy for decedents who have been smeared, courts have noted that unlike the abatement of an existing cause of action—where a plaintiff suffers harm and then dies—deceased defamation "victims" never experience indignity firsthand.[131]

Despite this trepidation about posthumous rights, there is one context in which heirs and beneficiaries can inherit the ability to sue for future violations of a decedent's interests. Nineteen jurisdictions recognize a descendible right of publicity.[132] Born in the 1950s, publicity rights protect individuals from the non-consensual use of their name, voice, or likeness.[133] Publicity rights were first seen as an outgrowth of privacy rights, which usually abate upon death.[134] However, a rash of law review articles soon contended that publicity rights were better understood as a form of property.[135] These scholars noted that unlike privacy rights, which entitle people to be left alone and thus safeguard emotional well-being, publicity rights are pecuniary: like a person-specific

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128. R.I. GEN. LAWS ANN. § 10-7.1-1 (West 2011).

129. *See* Brown, *supra* note 126, at 1526–27.

130. *See, e.g.*, Gugliuzza v. K.C.M.C., Inc., 606 So.2d 790, 793 (La. 1992) ("[W]e do not condone the anti-social and valueless conduct of defaming the dead . . . ."); Coulon v. Gaylord Broad., 433 So.2d 429, 430 (La. Ct. App. 1983); *see also* Saari v. Gillett Commc'ns of Atlanta, Inc., 393 S.E.2d 736, 737 (Ga. Ct. App. 1990); Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 940 n.1 (Tex. 1988). No case of which I am aware has considered the Rhode Island statute mentioned *supra* note 128.

131. *See, e.g.*, Skrocki v. Stahl, 110 P. 957, 959 (Cal. Ct. App. 1910); Eagles v. Liberty Weekly, Inc., 244 N.Y.S. 430, 431 (Sup. Ct. 1930).

132. The vast majority of jurisdictions have done so by statute. *See* CAL. CIV. CODE § 3344.1 (West Supp. 2011); FLA. STAT. ANN. § 540.08 (West 2010); 765 ILL. COMP. STAT. ANN. § 1075/30 (West 2009); IND. CODE ANN. § 32-36-1-8 (West 2008); KY. REV. STAT. ANN. § 391.170 (LexisNexis 2012); NEV. REV. STAT. § 597.790 (LexisNexis 2007); OHIO REV. CODE ANN. § 2741.02 (West 2006); OKLA. STAT. ANN. tit. 12, § 1448 (West 2008); 42 PA. CONS. STAT. ANN. § 8316 (West 2010); TENN. CODE ANN. §§ 47-25-1102 (West 2012); TEX. PROP. CODE ANN. § 26.012 (West 2011); VA. CODE ANN. § 8.01-40 (West 2012); WASH. REV. CODE ANN. § 63.60.010 (West 2011). Others have done so through judicial decision. *See* Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 325 (6th Cir. 2001) (applying Michigan law); Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc., 867 F. Supp. 175, 188 (S.D.N.Y. 1994) (applying Connecticut law); Nature's Way Prods., Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245, 252 (D. Utah 1990); Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981); Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E.2d 756, 760 (S.C. 2009); Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982).

133. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

134. *See*, *e.g.*, Maritote v. Desilu Prods., Inc., 345 F.2d 418, 420 (7th Cir. 1965) ("It is anomalous to speak of the privacy of a deceased person."); Lugosi v. Universal Pictures, 603 P.2d 425, 430 (Cal. 1979) ("[T]he right of privacy is purely a personal one . . . .").

135. *See, e.g.*, Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401–07 (1960).

patent or trademark, they safeguard a celebrity's monopoly over her fame.[136] The Restatement (Second) of Torts endorsed this view, calling publicity rights "property right[s]."[137] This change had an important corollary: unlike "personal" causes of action, claims for infringement of property rights are generally inheritable.[138]

Courts were soon flooded with cases brought by heirs of dead celebrities. A few courts held that publicity rights were indescendible, voicing concerns similar to those underpinning their reluctance to accept postmortem defamation claims.[139] For instance, in litigation involving the alleged misappropriation of Elvis Presley's image, the Sixth Circuit cited pragmatic considerations to conclude that publicity rights terminated upon death:

> [T]here are strong reasons for declining to recognize the inheritability of the right. A whole set of practical problems of judicial line-drawing would arise should the courts recognize such an inheritable right. How long would the "property" interest last? In perpetuity? For a term of years? Is the right of publicity taxable? At what point does the right collide with the right of free expression guaranteed by the first amendment? . . . Titles, offices and reputation are not inheritable. Neither are trust or distrust and friendship or enmity descendible.[140]

Nevertheless, most judges came out the other way. The vast majority supported their holdings with little more than a short paragraph reciting that publicity rights are "property right[s]"[141]—as though this was a mathematical equation that proved descendibility. For example, the Second Circuit opined that the publicity right's status as a "property right compels the conclusion that the right survives."[142] Likewise, a Tennessee appellate court reasoned that publicity rights were inheritable simply because a "property right in life . . . is no less a property right at death."[143] This "property syllogism" spread among jurisdictions, as court after court—and then legislature after legislature—fell in

136. *See* Prosser, *supra* note 135 at 406.

137. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977).

138. *See, e.g.*, Armstrong v. Emerson Radio & Phonograph Corp., 132 F. Supp. 176, 178 (S.D.N.Y. 1955); *see also supra* text accompanying notes 101–02.

139. *See, e.g.*, Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317 (2d Cir. 1982); Reeves v. United Artists, 572 F. Supp. 1231 (N.D. Ohio 1983), *aff'd sub nom.* Reeves v. United Artists Corp., 765 F.2d 79 (6th Cir. 1985); Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977); Lugosi v. Universal Pictures, 603 P.2d 425, 430 (Cal. 1979).

140. Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980).

141. Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975).

142. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978), *abrogated by* Pirone v. MacMillan, Inc., 894 F.2d 579 (2d Cir. 1990).

143. State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 97–98 (Tenn. Ct. App. 1987).

line.[144] Currently, of the twenty-one states that recognize the right of publicity, only New York and Wisconsin continue to make them indescendible.[145]

Finally, the descendibility of claims under federal law is deeply unsettled. Federal statutes rarely contain survivorship clauses,[146] and the U.S. Supreme Court has not provided clear guidance on how to treat congressional silence on the matter. In the nineteenth century, the Court held in *Ex parte Schreiber* that civil actions to impose "penalties and forfeitures" cannot proceed after the defendant dies.[147] However, in 1913, when the Court first considered the effect of the *plaintiff*'s demise, it framed the issue differently. In *Michigan Central Railroad Co. v. Vreeland*, the Court held that a lawsuit under the Federal Employers' Liability Act (FELA) abated, noting that the statute did not clearly "provide[] that the right of action shall survive the [plaintiff's] death."[148] Although the Court noted that many states had recently adopted survival statutes, it opined that this sea change did not affect the significance of Congress's failure to expressly grant survivorship rights.[149] Then, in 1955, in *Cox v. Roth*, the Court found that a defendant's death does not terminate a claim under the Jones Act, a statute that was modeled on the FELA.[150] Despite dealing with essentially the same legislation as *Michigan Central*, the Court found far more significance in the rise of survival statutes. Reasoning that forty-three states now "include[d] in their general law the principle of the survival of causes of action against deceased tortfeasors," the Court opined that congressional silence must be interpreted against a backdrop where "recovery, rather than being exceptional, has now become the rule."[151]

Most circuits have attempted to square these mixed signals by ignoring *Michigan Central* and citing *Ex parte Schreiber* and *Cox* for the proposition that "penal" claims terminate with either party's death, while "remedial" claims do not.[152] In turn, a cause of action is "penal" if it centers on a "wrong to the

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144. David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 84–89 (2005).

145. *See* James v. Delilah Films, Inc., 544 N.Y.S.2d 447, 451 (Sup. Ct. 1989); Hagen v. Dahmer, No. CIV. A. 94-C-0485, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995).

146. The few exceptions generally limit the class of heirs and beneficiaries. *See, e.g.*, 42 U.S.C. § 1986 (2012) (providing that a small amount in damages for claims for conspiracy to violate constitutional rights descend to a decedent's widow or next of kin).

147. 110 U.S. 76, 80 (1884).

148. 227 U.S. 59, 67 (1913).

149. *See id.* at 67–68.

150. 348 U.S. 207, 210 (1955).

151. *Id.*

152. Smith v. Dep't of Human Servs., 876 F.2d 832, 834–35 (10th Cir. 1989); *see also* Figueroa v. Sec'y of Health & Human Servs., 715 F.3d 1314, 1318–20, 1328–30 (Fed. Cir. 2013); United States v. Land, Winston Cnty., 221 F.3d 1194, 1197 (11th Cir. 2000). Statutes such as Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) present an additional wrinkle: courts disagree over whether survival is governed by state or federal law. Some judges have read 42 U.S.C. § 1988(a)—which requires the use of state law in certain civil rights disputes when federal law is silent or deficient—to mandate the use of survival

public" and "remedial" if it reimburses a plaintiff "for a specific harm suffered."[153] This rubric is relatively generous to plaintiffs: because most federal statutes have compensatory objectives, few claims abate in their entirety.[154] But it can slice a lawsuit in half by barring recovery for liquidated or punitive damages.[155]

Moreover, the rule that "penal" causes of action do not survive the plaintiff's death is a jarring non sequitur. As noted, this standard has been distilled from U.S. Supreme Court cases involving predeceasing *defendants*.[156] As Judge Prost on the Federal Circuit recently pointed out, only *Michigan Central* featured a dead plaintiff, and it "has never been overruled."[157] Abating "penal" claims when a defendant dies makes sense: quasi-criminal components of civil statutes, such as exemplary damages, seek "to punish reprehensible conduct."[158] Arguably, society cannot admonish a wrongdoer in the same way after she has ceased to exist. But the *plaintiff*'s death does not diminish the law's power to censure a defendant. In fact, in that context, erasing the claim confers a windfall upon someone who has egregiously violated the law. Thus, it is not clear why "penal" status is relevant in plaintiff abatement cases.

The indescendibility of asserted violations of a plaintiff's constitutional rights by government officers under 42 U.S.C. § 1983 and *Bivens* brings us full circle. Because there is no federal survival statute, 42 U.S.C. § 1988 instructs courts to employ principles from the forum state unless doing so would be "inconsistent with the Constitution and laws of the United States."[159] This reliance on state survival statutes dooms many claims of serious governmental misconduct: as noted, many states have not strayed far from the unrelenting common law abatement doctrine.[160] Thus, in *Robertson v. Wegmann*,[161] the

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statutes. *See, e.g.*, Estate of Slade v. U.S. Postal Serv., 952 F.2d 357, 360 (10th Cir. 1991). Because some survival statutes essentially restate the common law abatement doctrine, this approach can lead to the dismissal of an entire lawsuit. *See* Allred v. Solaray, Inc., 971 F. Supp. 1394, 1396 (D. Utah 1997) (holding that ADA claim abates under Utah's survival statute). However, these cases appear to be wrongly decided: they overlook the fact that § 1988(a) expressly applies only to civil rights statutes from the Reconstruction era, such as 42 U.S.C. § 1983. *See* Fleming v. U.S. Postal Serv. AMF O'Hare, 27 F.3d 259, 262 (7th Cir. 1994).

153. United States v. NEC Corp., 11 F.3d 136, 137 (11th Cir. 1993); *In re* Wood, 643 F.2d 188, 190–91 (5th Cir. 1980); Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir. 1977).

154. *See, e.g.*, Figueroa, 715 F.3d at 1324–25 (holding a claim for personal injuries under the National Childhood Vaccine Injury Act does not abate when plaintiff dies of causes unrelated to the injury).

155. *See, e.g.*, Smith v. Dep't of Human Servs., 876 F.2d at 832 (holding that ADEA claim for liquidated damages abates); Estwick v. U.S.Air Shuttle, 950 F. Supp. 493, 498 (E.D.N.Y. 1996) (holding that Title VII, ADA, and ADEA claims for punitive damages abate).

156. *See supra* text accompanying notes 147–51.

157. *Figueroa*, 715 F.3d at 1325 (Prost, J., dissenting).

158. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

159. 42 U.S.C. § 1988 (2012).

160. *See supra* text accompanying notes 111–19.

161. 436 U.S. 584 (1978).

Court held that a plaintiff's § 1983 claim for bad faith criminal prosecution abated under a Louisiana law that permits only claims for property damage to pass to an estate.[162] Endorsing the rationale that some claims are too "personal" to descend to heirs and beneficiaries, the Court reasoned that § 1983 does not "requir[e] compensation [for] one who is merely suing as the executor of the deceased's estate."[163] Two years later, in *Carlson v. Green*,[164] the Court backtracked slightly in the context of a *Bivens* action. Holding that federal common law governed, the Court allowed the survival of an alleged constitutional violation that actually led to the plaintiff's death.[165] However, most lower courts continue to use state survival statutes (1) in *Bivens* claims where the purported misconduct is unrelated to the plaintiff's demise and (2) in *all* § 1983 causes of action—even those that accuse state officials of causing the plaintiff's death.[166] The primacy of survival statutes can thwart the rights of a deceased plaintiff because tort-like constitutional claims are "personal cause[s] of action."[167]

Accordingly, as at common law, the inheritability of legal claims is characterized by sharp distinctions. Claims that are anchored in property rights are not only descendible, but also entitle heirs and beneficiaries to sue for violations that have not yet occurred. Yet the abatement doctrine continues to eliminate "personal" claims—even those that challenge egregious conduct by public officials—upon the plaintiff's death.

D. Contract

In March 2013, Delta Airlines quietly deleted a right held by thousands of its customers. Although the company boasts that its SkyMiles never expire,[168] it added the following clause to its list of events that will deactivate a frequent-flier account: "A member is deceased."[169]

Delta's maneuver placed it in the burgeoning ranks of companies that are mandating indescendibility by fine print. Many airlines, credit card issuers, and hotels prohibit the posthumous conveyance of points earned in loyalty

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162. *See id.* at 592.

163. *Id.*

164. 446 U.S. 14 (1980).

165. *See id.* at 24–25.

166. *See, e.g.*, Grandbouche v. Clancy, 825 F.2d 1463, 1465 (10th Cir. 1987) ("[Q]uestions of survivorship in *Bivens* suits are decided by looking to state law."); *see also* Estate of Gilliam *ex rel.* Waldroup v. City of Prattville, 639 F.3d 1041, 1046 (11th Cir. 2011) (holding that § 1983 abated even though defendants allegedly caused death); Hoagland v. Ada Cnty., 303 P.3d 587, 595 (Idaho 2013) (same); *cf.* Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 585 (Ct. App. 1996) (holding that § 1983 claim for pain and suffering abates).

167. *Hoagland*, 303 P.3d at 595.

168. *About SkyMiles*, DELTA AIRLINES, http://www.delta.com/content/www/en_US/skymiles/about-skymiles.html (last visited Mar. 3, 2014).

169. *Program Rules & Conditions*, DELTA AIRLINES, http://www.delta.com/content/www/en_US/skymiles/about-skymiles/program-rules-conditions.html (last visited Mar. 3, 2014).

programs, including United,[170] Southwest,[171] JetBlue,[172] Alaska,[173] U.S. Bank,[174] Chase,[175] American Express,[176] Hilton,[177] Hyatt,[178] and Holiday Inn.[179] Sports franchises have likewise made season tickets non-inheritable, from the Kansas City Royals,[180] to the Dallas Cowboys,[181] to the Duke Blue Devils.[182] And with rising interest in the brave new world of digital estate planning—including a study that found that Americans own an average of $50,000 in electronic assets[183]—internet portal Yahoo!,[184] media titans Apple[185] and Amazon.com,[186] and online community Second Life[187] have

170. *MileagePlus Rules*, UNITED AIRLINES, http://www.united.com/web/en-US/content/mileageplus/rules/default.aspx (last visited Mar. 3, 2014).

171. *Rapid Rewards Program Terms and Conditions*, SOUTHWEST AIRLINES, http://www.southwest.com/html/customer-service/faqs.html?topic=rapid_rewards_program_terms_and_conditions (last visited Mar. 3, 2014).

172. *TrueBlue Terms and Conditions*, JETBLUE, https://trueblue.jetblue.com/web/trueblue/terms-and-conditions (last visited Mar. 3, 2014).

173. *Conditions of Membership*, ALASKA AIRLINES, http://www.alaskaair.com/content/mileage-plan/benefits/conditions-of-membership.aspx#transfers (last visited Mar. 3, 2014).

174. *1-2-3 Rewards Visa Card*, U.S. BANK, https://applications.usbank.com/oad/apply/begin?locationCode=9930&productId=20&sourceCode=93965 (last visited Mar. 3, 2014).

175. *Chase Ultimate Rewards Program Rules and Regulations*, CHASE BANK, https://chaseonline.chase.com/resources/ChaseDebitCardUF_TandC.pdf (last visited Mar. 3, 2014).

176. *Membership Rewards Terms and Conditions*, AM. EXPRESS, https://www.americanexpress.com/sg/personal/cards/rewards/terms.shtml (last visited Mar. 3, 2014).

177. *Honors Terms and Conditions*, HILTON, http://hhonors3.hilton.com/en/terms/index.html (last visited Mar. 3, 2013).

178. *Hyatt Gold Passport Terms and Conditions*, HYATT, http://www.hyatt.com/hyatt/customer-service/gp-terms-conditions.jsp (last visited Mar. 3, 2014).

179. *IHG Rewards Club Global Membership Terms and Conditions*, INTERCONTINENTAL HOTELS GRP., http://www.ihg.com/hotels/us/en/global/customer_care/member-tc (last visited Mar. 3, 2014).

180. *Season Ticket Account Policies*, KAN. CITY ROYALS, http://kansascity.royals.mlb.com/kc/ticketing/sth/sth_policies.jsp (last visited Mar. 3, 2014). To be fair, the Royals have not made season tickets completely indescendible. A decedent's surviving spouse (and in some instances, other named beneficiaries) retains the option to take over the account. *See id.* At the same time, however, the tickets "are not the property of the Season Ticket Holder of Record [and] cannot be treated as such in a will, trust or other property transfer method." *Id.*

181. *See* Rachael Rustmann, *It's a Brand New Ballgame: How to Bequest Season Tickets for your Favorite Sports Team's Games*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 369, 382 (2012).

182. *See* Aaron Beard, *Duke Basketball Tickets Lawsuit*, HUFFINGTON POST (July 15, 2011, 3:04 PM), http://www.huffingtonpost.com/2011/07/15/duke-basketball-tickets-lawsuit-katina-dorton_n_900091.html. Supposedly, Duke does allow ticketholders to transfer their rights in return for hefty donations. *See id.*

183. *See, e.g.*, Arden Dale, *More Estate Plans Account for 'Digital Assets,'* WALL ST. J. (June 13, 2013, 9:19 AM), http://online.wsj.com/article/SB10001424127887323734304578543151391292038.html; *see also* Anne Eisenberg, *Bequeathing the Keys to Your Digital Afterlife*, N.Y. TIMES, May 25, 2013, at BU3.

184. *See Yahoo Terms of Service*, YAHOO!, http:// info.yahoo.com/legal/us/yahoo/utos/terms (last visited Mar. 3, 2014).

185. *See Terms and Conditions*, APPLE, http://www.apple.com/legal/internet-services/itunes/us/terms.html#GIFTS (last visited Mar. 3, 2014).

186. *See Amazon MP3 Store: Terms of Use*, AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html?nodeId=200154280 (last visited Mar. 3, 2014).

imposed similar restrictions on data, apps, emails, music, photographs, and even virtual "land" and "currency."

Almost every legal issue relating to indescendibility by contract is unclear. For starters, the degree to which decedents "own" these things remains hazy. When companies create rewards programs, season ticket renewal options, and digital resources, they take pains to grant consumers only the smallest raft of rights. The vast majority expressly state that any entitlement they bestow is merely a revocable, non-transferable license, and therefore "not . . . property."[188] But this boilerplate is not necessarily controlling. As an initial matter, we tend to think of ownership as being the fruit of labor or ingenuity.[189] Individuals often feel that the effort they have sunk into these things entitles them to the full panoply of property-style privileges.[190] As one consumer advocate puts it, "Earning frequent flier miles in the minds of most people is akin to earning money and the idea that your miles . . . would simply disappear when you die strikes a profoundly disturbing note."[191]

Moreover, there is precedent that the self-affixed "not property" sticker is not dispositive. In Chapter 11 proceedings, at least two bankruptcy judges have decided that some of these assets "are indeed property."[192] For instance, in *In re I.D. Craig Service Corp.*, the court held that renewal rights to Pittsburgh Steeler season tickets fell within the Bankruptcy Code's definition of "property."[193] Likewise, in *In re Platt*,[194] the court authorized a bankruptcy trustee to sell a debtor's Boston Red Sox seats, reasoning that the team's slipshod enforcement of its stated non-transferability policy justified season ticket holders' belief that they held "property right[s]."[195] Anecdotal accounts of firms relaxing their supposedly strict prohibitions on inheritability for certain customers also suggests that analysis need not end with the bare face of the

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187. *See Terms of Service*, LINDEN LAB, http://secondlife.com/corporate/tos.php (last visited Mar. 3, 2014).

188. *See, e.g.*, AM. EXPRESS, *supra* note 176.

189. *Cf.* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (articulating the famous labor-desert theory) ("Whatsoever [a person] removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.").

190. *See, e.g.*, F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 46–48 (2004) (discussing Locke's labor-desert theory in the context of virtual property); *see also* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1053–55 (2005) (arguing that virtual property, like its brick-and-mortar doppelganger, is "rivalrous, persistent, and interconnected").

191. Pawlowski, *supra* note 17 (quoting Tim Winship, the editor and publisher of FrequentFlier.com); *see also* Gary Stoller, *What Happens to Frequent-Flier Miles If You Die?*, USA TODAY (Sept. 1, 2013, 6:03 AM), http://www.usatoday.com/story/travel/flights/2013/09/01/deceased-travelers-frequent-flier-points/2749761 (noting that some frequent-fliers feel that "[m]iles and points are 'like an earned currency' and 'worth real money'").

192. *In re* Platt, 292 B.R. 12, 17 (Bankr. D. Mass. 2003); *In re* I.D. Craig Serv. Corp., 138 B.R. 490, 495 (Bankr. W.D. Pa. 1992).

193. 138 B.R. at 495.

194. 292 B.R. at 17–18.

195. *See id*. at 17.

contract.[196] Accordingly, despite the efforts of drafters to nip descendibility in the bud, consumers may "own" rewards points, season tickets, and digital assets.

If so, then the adhesive clauses stripping decedents of the right to convey must satisfy black-letter contract law. At the outset, drafters must prove that consumers agreed to these provisions. In *Ajemian v. Yahoo!, Inc.*,[197] the only reported case dealing with indescendibility by contract, Yahoo! was unable to meet this threshold requirement.[198] The company refused to disclose the contents of a decedent's emails to the administrators of his estate.[199] A Massachusetts appellate court declined to enforce a forum selection clause in Yahoo!'s "browsewrap" terms of service (TOS), noting that there was no evidence that the decedent had manifested assent to the fine print.[200] As the court explained, customers merely had an opportunity to review the TOS on Yahoo!'s website, but nothing affirmatively called it to their attention.[201] However, even if the court had found assent, that would not be the end of the analysis. Under the unconscionability doctrine, courts can invalidate provisions that are both procedurally unconscionable (hard to read or understand and offered on a take-it-or-leave-it basis) and substantively unconscionable (unduly harsh).[202] Similarly, unilateral amendments to existing contracts like Delta's about-face on inheritability must satisfy the implied covenant of good faith and fair dealing.[203]

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196. *See, e.g.*, Claudia Buck, *Can You Inherit or Transfer Your Airline Frequent-Flier Miles?*, SACBEE.COM (July 23, 2013), http://blogs.sacbee.com/personal-finance-ask-the-experts/2013/07/can-you-inherit-or-transfer-your-airline-frequent-flyer-miles.html; George Hobica, *Can Frequent-Flier Miles Be Inherited?*, USA TODAY (May 14, 2010, 5:13 PM), http://usatoday30.usatoday.com/travel/columnist/hobica/2010-02-03-inheriting-frequent-flier-miles_N.htm; Stoller, *supra* note 191 (noting that some companies have made "case-by-case exceptions"). This is part of a larger phenomenon in which companies relax harsh standard-form provisions in order to earn goodwill from valuable customers. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 865–77 (2006). Of course, consumers must walk a fine line here. If courts cite a company's disregard of its indescendibility provisions to hold that an asset "is indeed property," *Platt*, 292 B.R. at 17, the company may simply begin to enforce its provisions.

197. 987 N.E.2d 604 (Mass. Ct. App. 2013).

198. *See id*. at 612–13.

199. *See id*. at 606–07.

200. *See id.* at 612–13.

201. *Id.* at 613. The court's finding that the decedent did not assent to the forum selection clause strongly implies that he also did not agree to the non-inheritability provision—after all, both were part of the same TOS. *See id.* ("[T]he record does not reflect that the terms of any agreement were reasonably communicated or that they were accepted."). In addition, the court also reasoned that the TOS did not bind third parties such as the decedent's personal representative. *See id.* at 614.

202. *See, e.g.*, *In re* DirecTV Early Cancellation Litig., 738 F. Supp. 2d 1062, 1085 (C.D. Cal. 2010).

203. *See, e.g.*, Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 283–84 (Ct. App. 1998); *cf.* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 666 (2010) (arguing that unilateral changes to existing contracts are hard to square with foundational contract doctrines, such as consideration and the presumption against acceptance by silence).

Federal regulation, however, has muddied the waters. In the frequent-flier context, the Airline Deregulation Act (ADA) bars states from "enact[ing] or enforc[ing]" regulations related to "a price, route, or service."[204] In *American Airlines, Inc. v. Wolens*,[205] a customer brought consumer fraud and breach of contract claims against an airline for retroactively changing its frequent-flier program.[206] The U.S. Supreme Court held that the ADA preempted the consumer protection claim, which impermissibly sought to "enforce" a state law that pertained to the marketing practices of airlines.[207] Conversely, the Court determined that the breach of contract claim survived because it arose from the airline's voluntary, self-imposed legal duties—not from any mandate imposed by the state.[208] *Wolens* created confusion about whether the ADA trumps contract principles such as unconscionability and the implied covenant. These rules can either be seen as benign vehicles for discerning the "true" agreement of the parties or improper attempts to vindicate paternalistic state policies that are "external to the contract itself."[209] On May 20, 2013, the Court granted certiorari in *Northwest, Inc. v. Ginsberg*[210] to consider whether the ADA preempts allegations that an airline breached the implied covenant by revoking the plaintiff's frequent-flier membership. A pro-business ruling in *Ginsberg* could have the unintended consequence of giving airlines carte blanche to make rewards points indescendible.

The survivability of digital assets also depends on a maze of legislation. The Stored Communications Act (SCA) bars the unauthorized access and disclosure of electronic data.[211] Two components of the SCA arguably forbid personal representatives from taking control of a decedent's email, blogging, instant messaging, and social networking accounts—a result that would make all information therein indescendible. First, the SCA criminalizes the "intentional[] access . . . without authorization [of] a facility through which an electronic communication service is provided."[212] Second, the SCA prohibits

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204. 49 U.S.C. § 1305(a)(1) (2012).

205. 513 U.S. 219 (1995).

206. *See id.* at 227–28.

207. *See id.*

208. *Id.* at 228–29.

209. Petition for Writ of Certiorari at 8, Northwest, Inc. v. Ginsberg, 133 S. Ct. 2387 (2013) (No. 12-462), 2012 WL 4883563.

210. 133 S. Ct. 2387 (2013).

211. 18 U.S.C. § 2701 (2012). The SCA is sometimes referred to as the "Electronic Communications Privacy Act" (ECPA) (the larger statutory rubric in which it appears) or "Title II" (because it is the second title in the ECPA). *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 n.1 (2004). Congress intended the statute to provide Fourth Amendment-like protection to computer users and to deter hacking. *See id.* at 1211–13; Molly Wilkens, Note, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1053–54 (2011).

212. 18 U.S.C. § 2701(a) (2012). Likewise, the Computer Fraud and Abuse Act and similar state-level laws prohibit the "intentional[] access [of] a computer without authorization." 18 U.S.C.

service providers from divulging the contents of electronic communications, such as the text and even the subject line of emails.[213] However, these provisions do not apply to individuals who are acting with the consent of the account holder.[214] A handful of states have passed laws that attempt to clarify that personal representatives qualify for this exemption and may handle these items.[215]

In addition, more ambitious reforms are on the distant horizon. In July 2013, the Uniform Law Commission promulgated a draft Fiduciary Access to Digital Assets Act.[216] The proposed statute would give personal representatives nearly the same dominion over virtual assets that they enjoy over chattels and real estate.[217] However, it is torn in two directions on the issue of indescendibility by contract. On the one hand, the drafters sound a skeptical note about provisions that limit posthumous transfer, noting that few consumers read such terms.[218] On the other hand, the suggested code makes a personal representative's authority subject to "any applicable and enforceable terms of service agreement."[219] Thus, what is likely to be the most comprehensive revision to this area would not prevent firms from eliminating descendibility through the simple expedient of text on a page.

It is axiomatic that testation and intestacy achieve "a comprehensive disposition of all of [an] estate."[220] But as I have demonstrated, some items and rights defy this entrenched norm. Lawmakers have made body parts market inalienable and indescendible for the same reasons: to avoid exploitation, encourage altruism, and prevent commodification. The abatement doctrine kills off existing claims that are "personal" to the plaintiff. And companies are increasingly flexing their legal muscle to mandate non-inheritability by

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§ 1030(a) (2012); *see also* MICH. COMP. LAWS ANN. § 752.795 (West 2008); Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 148 (2013).

213. 18 U.S.C. § 2702(a)(1) (2012) ("[A] person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.").

214. *See id.* § 2701(c)(2) (exempting "conduct authorized . . . by a user . . . with respect to a communication of or intended for that user"); *id.* § 2702(b)(1) (exempting "an agent" of an electronic communication's "addressee or intended recipient"); *id.* § 2702(b)(3) (exempting disclosure made with "the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service").

215. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-334a (West 2012); IND. CODE ANN. § 29-1-13-1.1 (West 2008); NEB. REV. STAT. ANN. § 30-2472 (West 2012); OKLA. STAT. ANN. tit. 58, § 269 (West 2012); R.I. GEN. LAWS ANN. § 33-27-1 (West 2012).

216. UNIF. LAW COMM'N, FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, *available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_Draft.pdf (last visited Mar. 3, 2014).

217. *See id.* § 3(b) ("A fiduciary with [legal] authority over digital property of an account holder has the same authority as the account holder.").

218. *See id.* at 1 (Prefatory Note for the Drafting Committee).

219. *Id.* § 3.

220. *In re* Hoffman's Will, 124 N.Y.S. 680, 684 (Sur. Ct. 1910).

adhesion contract. In the next Section, I look more closely at the rationales that policymakers, courts, and scholars have offered for indescendibility.

II.
JUSTIFICATIONS FOR INDESCENDIBILITY

In this Section, I critique the common justifications for indescendibility. First, contrary to the UAGA, I argue that indescendibility should not be seen as a posthumous version of market inalienability. In fact, I claim, the concerns that have prompted lawmakers to forbid the transfer of body parts during life fade away upon death. Second, I challenge the idea that inheritability should hinge on whether something is "property." This formalist, labels-based approach eclipses meaningful consideration of whether certain rights or objects should be descendible. Third, I show that the "personal" rationale for the abatement doctrine is no more than rank historical accident.

A. Posthumous Inalienability

One might think that indescendibility serves the same policy objectives as market inalienability. After all, both deny owners the power to convey, albeit from opposite sides of the grave. Indeed, as noted, the UAGA assumes that body parts should be indescendible precisely because they are market inalienable.[221] However, in this Section, I argue that indescendibility is unique. In fact, I contend that it is often harder to justify than market inalienability.

As a purely descriptive matter, indescendibility and market inalienability do not overlap completely. Consider *Estate of Walker*.[222] Former New York Mayor James Walker owned papers that revealed the names of his adopted children's natural mothers.[223] Walker could have disclosed the names or simply given the documents to his adopted children during his life.[224] Instead, he executed a will that gave "all my personal property" to his adopted children.[225] After he died, a dispute arose about whether his adopted children were entitled to the papers.[226] The New York Court of Appeals agreed that the documents were "personal property" and therefore fell squarely within the language of the will.[227] Nevertheless, the court rejected the children's request to receive the papers, reasoning that it did not matter that Walker could have transferred the

221. *See supra* Part I.B.
222. 476 N.E.2d 298 (N.Y. 1985).
223. *See id.* at 299.
224. *See id.* at 302.
225. *Id.* at 299–300.
226. *Id.*
227. *Id.*

papers or disclosed the names during his life "because neither course was actually pursued."[228]

The court's language is slightly cryptic, but it is worth taking a close look at why something that was alienable during life became indescendible at death. The court seems to view Walker's failure to either surrender the papers to his adopted children or simply tell them the names of their natural mothers—the "course[s]" that he did not "actually pursue[]"[229]—as ambivalence, likely due to his recognition that it would be wrong to invade the privacy of third parties. However, Walker was less concerned about this harm when he wrote his will, implying that he succumbed to the moral hazard of testation.[230] Holding the documents to be indescendible dovetails with other limits on testamentary freedom that stem from the fact that the dead do not experience the consequences of their decisions. For instance, a living person can play darts with her priceless watercolor or set fire to a stack of cash, but a court will not enforce a testator's command that her personal representative do so.[231] This restraint on dead hand control reflects the fear that people act less soberly in making decisions that will take effect only after their demise.[232] The choice to take a potentially disruptive action only after death raises an inference that their testamentary wishes are infected with nihilism. In the rare instances when these concerns are present, indescendibility may attach to something that was fully alienable during life.[233]

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228. *Id.* at 302. The court also cited a New York statute in effect at the time of the dispute that required such information to be sealed. *See id.* at 301–02. However, dissenting Judge Jasen pointed out that the law was not in effect at the time Walker came into possession of the documents. *Id.* at 303 (Jasen, J., dissenting). Moreover, Judge Jasen reasoned that the papers should be descendible because they were alienable: "Mayor Walker . . . could have made an *inter vivos* transfer of the copies of the adoption decrees and the information contained therein to the petitioners." *Id.*

229. *Id.* at 302.

230. Of course, this conclusion about Walker's subjective mental state only follows if one believes—as the court apparently does—that Walker realized that the "all my personal property" clause governed the adoption documents. Given the fact that this language is a form-book residuary clause, I am less confident.

231. *See, e.g.*, Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 211–14 (Mo. Ct. App. 1975) (invalidating a testator's instruction to raze her house); *In re* Scott's Will, 93 N.W. 109, 109–10 (Minn. 1903) (voiding a testator's directive to "destroy all the rest and residue of the money or cash or other evidence of credit that to me or to my estate may belong").

232. *See, e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 14 (1992); *cf.* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1110–11 (2004) (noting also that "[t]he living donor can always change his or her mind, as he or she observes the consequences of an unwise course of conduct").

233. For a recent (albeit less extreme) example, see *Grant v. Bessemer Trust Co. of Fla., Inc. ex rel. Grant*, 117 So. 3d 830 (Fla. Dist. Ct. App. 2013). The testator's codicil requested that a business he had founded provide lifetime employment to his son. *See id.* at 833–34. The court refused to enforce the provision, noting that it would bind the officers and directors to keep the son on the payroll "regardless of circumstances or detriment to the corporation." *Id.* at 837. Of course, the testator could have entered into an ironclad employment contract with his son during life; the fact that he waited until after death undercut the authority of his wishes.

On the other hand, contrary to the UAGA's blithe assumption, just because something should be market inalienable during life does not necessarily mean that it should also be indescendible. Indeed, there are meaningful differences between denying a living person the ability to sell her tissue and extending the same prohibition to the dead. Recall that the market inalienability of body parts stems from paternalism: anxiety that low-income individuals will make choices that are not in their best interests, such as selling a kidney for cash despite future health complications.[234] When applied to the living, the need to prevent informational defects from causing market failure is a well-accepted rationale for market inalienability.[235] But after death, paternalism may not be a useful tool: the dead do not suffer when they make unwise decisions. To be sure, cases like *Estate of Walker* attempt to avoid negative externalities by minimizing the impact of rash testamentary judgments upon *others*. However, paternalism seeks to protect decedents from themselves. Because there is less risk that the posthumous sale of body parts will cause physical harm or regret, this rationale for market inalienability does not justify indescendibility.

Non-commodification arguments are also less persuasive when applied to decedents. As noted above, some scholars have defended the market inalienability of body parts by contending that altruism is superior to paid exchange because it reinforces "the ties that bind our society together"[236] and "strengthen[s] feelings of community and mutual interdependence."[237] However, making body parts inheritable is perfectly consistent with this view. Because testation is a ritualized gift, it also fosters friendship and family ties.[238] Moreover, just like existing law—which only requires that the *initial* decision to surrender human tissue be gratuitous[239]—the conveyance from a decedent to

234. *See, e.g.*, Flynn v. Holder, 684 F.3d 852, 860 (9th Cir. 2012) ("[I]f donors could be paid, rich patients or the medical industry might induce poor people to sell their organs . . . .").

235. *See, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 102–03 (1993) ("[I]f at least one party inaccurately perceives or evaluates the impact of the exchange on her utility, we can no longer be confident that [it] will in fact render both parties better off."); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113–14 (1972) (discussing paternalism as a basis for inalienability).

236. Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, to Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 299 (1995).

237. Peter Singer, *Altruism and Commerce: A Defense of Titmuss Against Arrow*, 2 PHIL. & PUB. AFF. 312, 317 (1973).

238. *See, e.g.*, ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS 30 (1990) ("Bequeathing something to others is an expression of caring about them, and it intensifies those bonds."). Of course, like all gifts, testation also features shrouded elements of exchange. *See* Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2187–88 (2011) (noting that testators often receive services from beneficiaries in return for the implicit promise of a bequest).

239. *See supra* text accompanying notes 64–67.

her estate or loved ones would be uncompensated. Only later, after this gift has been given, would money enter the picture.

Other commentators have insisted that altruism is necessary to prevent a shortfall in supply. According to the "crowding out" theory, allowing payment for body parts would eliminate incentives for donors and thus increase scarcity.[240] Admittedly, making the human anatomy descendible might discourage lifetime philanthropy: presumably, few people would choose the uncompensated aggravation of surgery over a pain-free, estate-enriching option at death. However, even if making human tissue inheritable would diminish living donation, it is unlikely to decrease the stocks of usable body parts. If the snag is that potential donors will wait until they die, the incidence of giving will be no less—it will just occur later.[241] Moreover, there is empirical support for the proposition that some people who would not relinquish organs for free during life would exchange them for consideration upon death. For instance, one group of researchers found that three-quarters of survey participants would accept $1,000 to have their organs harvested at death—an increase of 117 percent over current lifetime donation rates.[242] Thus, if anything, making human biological material inheritable would likely greatly increase its availability.

A second strand of non-commodification theory posits that allowing the living to sell their anatomy will erode our respect for bodily integrity and the singularity of life.[243] But our norms involving corpses radically diverge from those relating to the functional human body. We see nothing debasing about submerging cadavers in the earth or incinerating them and scattering the ashes. In fact, we already honor a decedent's wish to donate her organs, even though this means that her body will be disassembled and then exploited for pecuniary gain by hospitals and biotechnology firms. Indeed, as Julia D. Mahoney has astutely observed, "[T]he debate over the commercialization of the human body is not about commercialization at all, but rather about how the financial

240. *See* RICHARD M. TITMUSS, THE GIFT RELATIONSHIP 76–77 (1971); INST. OF MED., ORGAN DONATION: OPPORTUNITIES FOR ACTION 11 (2006); S.M. Rothman & D.J. Rothman, *The Hidden Cost of Organ Sale*, 6 AM. J. TRANSPLANTATION 1524–26 (2006).

241. Admittedly, this might be its own problem: due to timing and health issues, organs from living donors can be more useful than organs from decedents. *See, e.g.*, Gary S. Becker & Julio Jorge Elías, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, 21 J. ECON. PERSP. 3, 17 (2007).

242. *See* A. Frank Adams III et al., *Markets for Organs: The Question of Supply*, 17 CONTEMP. ECON. POL'Y 147, 153–54 (1999). Despite being much more skeptical about the use of surveys to determine whether individuals would sell their organs, a later study determined that offering decedents $10,000 per kidney would nearly eliminate the transplant waiting list. *See* Alison J. Wellington & Justin B. Whitmire, *Kidney Transplants and the Shortage of Donors: Is a Market the Answer?*, 25 CONTEMP. ECON. POL'Y 131, 143 (2007). Of course, people may be more willing to trade their cadaveric organs for a lifetime payment (which they can actually enjoy) than for an infusion of cash into their estate.

243. *See supra* text accompanying notes 68–69.

benefits available will be apportioned."[244] Given the rampant profiteering that already takes place, it is unclear why decedents cannot use their bodies for the financial aggrandizement of their loved ones.

Moreover, the indescendibility of human tissue disproportionately affects poor decedents. A basic premise of American social policy is that the marginal utility of money declines: each additional dollar received is worth less than the previous one.[245] A corollary of this principle is that no constituency benefits more from a spike in income than those who are worst off financially.[246] Usually, the institution of inheritance inverts this understanding by allowing wealth to feed off itself over the generations.[247] Indeed, even the most conservative estimates peg the total amount of capital that has been inherited (rather than earned) in the United States at a whopping 20 percent.[248] But making body parts descendible could create new opportunities for those on the bottom rungs of the fiscal ladder to "make" wealth that does not stem from existing wealth.

Admittedly, market inalienability also burdens the poor, but that does not stop us from barring the sale of certain things. In her canonical article, Margaret Jane Radin notes that market inalienability puts low-income women in a "double bind."[249] On the one hand, enforcing contracts for sex or surrogacy would diminish people's personhood by monetizing their reproductive systems; on the other hand, it would give them a resource that might improve their economic standing.[250] Perhaps making body parts inheritable would recreate this dilemma. One can easily imagine a world in which open-casket funerals were a status symbol and agreeing to anatomical harvesting was a badge of shame. Likewise, individuals who want to be buried intact for spiritual reasons might feel unfairly treated.

Although I do not want to minimize these objections, I am not persuaded that they justify the indescendibility of body parts. Legalizing prostitution or surrogacy agreements might accentuate unsavory class and gender distinctions. As Radin argues, it could stunt human flourishing by causing poor women to "internalize the notion that their persons and their attributes are separate, thus creating the pain of a divided self."[251] The fact that we generally do not think of our dead bodies as our "selves" suggests that there is less danger in making corpses inheritable. Also, the social gains from allowing the sale of human

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244. Mahoney, *supra* note 64, at 165.

245. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 30 n.22 (2002).

246. *See, e.g.*, A. C. PIGOU, THE ECONOMICS OF WELFARE 89 (4th ed. 1938).

247. *See, e.g.*, James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 826 (2001) (noting the increasing stratification of wealth in the U.S. due to inheritance).

248. *See* JENS BECKERT, INHERITED WEALTH 15 (2008).

249. Radin, *supra* note 19, at 1915–16.

250. *See id.* at 1916.

251. *Id.*

sexuality would be debatable. Conversely, there is little dispute that increasing the stockpile of usable body parts would be tremendously advantageous. Indeed, there has long been a pressing organ shortage, and medical professionals have spent decades trying to increase supply.[252] Thus, the costs of indescendibility in this context dwarf the benefits.

To summarize, indescendibility is not (and should not be) coterminous with market inalienability. Most importantly, the concerns that have prompted the UAGA to make body parts market inalienable are less forceful when applied to the newly deceased. Likewise, as I discuss next, another common rationale for indescendibility—that certain objects or entitlements are not property—is unpersuasive.

B. Not Property

Descendibility also supposedly pivots on whether an object or entitlement is a decedent's property. For instance, publicity rights are inheritable because they are a species of property,[253] but cadaveric tissue is not descendible because it "forms no part of the property of [the] estate."[254] Companies have also attempted to capitalize on the talismanic power of the "property" sobriquet by drafting terms and conditions declaring that loyalty points, season tickets, and digital assets "do not constitute property."[255] However, as I argue in this Section, this obsession with labels is misguided. The glowing question is whether a thing should be descendible, not whether it falls within one of the most malleable categories in all of law.

The most common definition of property—a bundle of rights[256]—is not helpful for mapping the borders of descendibility. The problem is that inheritability and alienability are both sticks in the bundle, and supposedly "go hand in hand."[257] Consider the seminal cases recognizing a posthumous right of publicity.[258] The reasoning in these opinions is a hypnotic spiral: judges note

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252. *See supra* text accompanying notes 70–72.

253. *See supra* text accompanying notes 132–45.

254. Estate of Jimenez, 65 Cal. Rptr. 2d 710, 714 (Ct. App. 1997) (quoting O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899)).

255. *Membership Rewards*, AM. EXPRESS, http://www.americanexpress.com/lacidc/en/mr/tc.shtml (last visited Mar. 3, 2014) (declaring that loyalty points "do not constitute property"); *see also supra* text accompanying notes 170–80.

256. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 83 (7th ed. 2010). Recently, scholars have begun to develop a left-leaning, "progressive" theory of property. *See, e.g.*, Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743–44 (2009). Very roughly, this school recasts property as not only a bundle of rights, but a bundle of duties, including the obligation to make otherwise exclusive resources available for the public good in exigent circumstances. *See id.* at 743. Because this theory of property is still in its formative stages, and because I am interested in how courts and policymakers currently justify indescendibility, I do not engage with it.

257. Micheletti v. Moidel, 32 P.2d 266, 267 (Colo. 1934) (quoting Home Ins. Co. v. Atchison, Topeka & Santa Fe R.R. Co., 34 P. 281, 282 (Colo. 1893)).

258. *See, e.g.*, Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843–44 (S.D.N.Y. 1975); State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 96–97 (Tenn. Ct. App.

that publicity rights are transferable during life, label them as property, and conclude that property is inheritable. For instance, in the influential decision of *Price v. Hal Roach Studios*, *Inc.*,[259] a New York district court held that because the right of publicity is "assignable," it is "a 'property' right," and thus has "no logical reason to terminate . . . upon death."[260] Likewise, in *State v. Crowell*,[261] a Tennessee appellate court opined that because publicity rights are alienable, they are property, and thus descendible:

> [P]roperty . . . has been described as a bundle of rights or legally protected interests. These rights or interests include: (1) the right of possession, enjoyment and use; (2) the unrestricted right of disposition; and (3) the power of testimonial disposition . . . . Unquestionably, a celebrity's right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible personal property.[262]

This alienable-thus-property-therefore-descendible chain is deeply flawed. For one, not all alienable things are (or should be) descendible. In fact, many items and rights are alienable but indescendible: human blood, hair, sperm, and eggs, and unique examples like Mayor Walker's adoption papers.[263] Indeed, as I have argued, the reasons for barring transfer in one sphere cannot be grafted wholesale into the other. Consider the alienability of legal claims. One might argue that we should allow lawsuits to be sold on the theory that "plaintiffs [would] obtain judgments more quickly."[264] But this benefit is beside the point when it comes to the inheritability of causes of action, where the focus is on whether the estate may assert a claim *at all*. Alternatively, one could oppose claim sales on the grounds that "[t]he practice of lawyers engaging in self-dealing could hurt the reputation of the profession."[265] Conversely, permitting an attorney to vindicate the rights of someone who happened to die before judgment involves no such unseemliness. Thus, these issues at the center of the alienability debate have little bearing on the distinct matter of whether claims should be inheritable.

Likewise, in a provocative recent article Jennifer Rothman challenges the proposition that publicity rights should be alienable.[266] Rothman notes that the

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1987); *see also* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 220–21 (2d Cir. 1978), *abrogated by* Pirone v. MacMillan, Inc., 894 F.2d 579 (2d Cir. 1990); Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981).

259. 400 F. Supp. 836.

260. *Id.* at 844.

261. 733 S.W.2d 89.

262. *Id.* at 96–97.

263. *See supra* text accompanying notes 96–99, 222–30.

264. Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 702 (2005).

265. *See id.* at 719.

266. *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012).

sale of publicity rights divides "publicity-holders" (the owner of the publicity right) from "identity-holders" (the person whose likeness is protected).[267] Because rights-holders enjoy vast dominion over identity-holders—including the power to stop them from appearing in certain places or saying specific things—a person who has sold her publicity rights has also forfeited her "liberty, free speech, and associational rights."[268] This is a serious problem when the identity-holder is alive, but not after she dies. Allowing the lifetime transfer of publicity rights may thus be more problematic than permitting publicity rights to be inherited.[269] Nevertheless, despite these key differences between alienability and descendibility, the alienable-thus-property-therefore-descendible syllogism insists that both sticks must either be present or absent at the same time.[270]

Upon close inspection, even cadaveric body parts—the prototypical things that are supposedly indescendible because they do not belong to decedents—could easily be recast as property. Over time, the property concept has swollen to include anything from government entitlements to ethereal *in personam* rights.[271] This expansion has collapsed the border between property rights and other rights. For instance, because some courts and scholars see no difference between the core property right of exclusion and the *in personam* right to sue for breach of contract, "property rights are simply rights, to which the term 'property' adds nothing at all."[272] However, as Thomas Merrill and Henry Smith have argued, property is best understood as rights grounded in *objects*:

> Because core property rights attach to persons only through the intermediary of some thing, they have an impersonality and generality that is absent from rights and privileges that attach to persons directly. When we encounter a thing that is marked in the conventional manner as being owned, we know that we are subject to certain negative duties of abstention with respect to that thing—not to enter upon it, not to use

267. *See id.* at 187.

268. *Id.* at 210. In fact, Rothman acknowledges that "courts and commentators have frequently compared nonconsensual uses of an individual's identity to involuntary servitude and slavery." *Id.* at 212.

269. Rothman notes that her analysis suggests limiting (although not necessarily precluding) the inheritability of publicity rights. *See id.* at 237–40.

270. Similarly, not everything that we describe as property is descendible. Recall that after the American Revolution, low-level governmental positions were regarded as property even though they were not transmissible after death. *See supra* text accompanying notes 53–56.

271. *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (noting that "[t]he valuables dispensed by government . . . are steadily taking the place of traditional forms of wealth").

272. Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1078 (1997).

> it, not to take it, etc. And we know all this without having any idea who the owner of the thing actually is.[273]

According to Merrill and Smith, this information-conveying function—a kind of "keep out" sign that radiates from tangible items—separates property rights from other rights.[274]

Although the human anatomy possesses this hallmark of property—put crudely, it is a *thing*—there are compelling reasons not to grant it full-fledged property status during life. For one, recognizing property rights in the living body would treat what should be a subject (a person) as a mere object (a collection of skin, organs, and blood).[275] Also, although property is generally detachable and transferable, during our lives we cannot be fully separated from our bodies. As Meredith Render notes, "no one else can use a human body in a manner that is in any way commensurate to the manner that the original owner uses it."[276] And finally, recognizing a property right in the living human body would lead to dystopian scenarios involving bankruptcy and divorce, with creditors and jilted couples claiming ownership interests in functional organs or limbs.[277]

But the fact that we are not prepared to elevate something to the level of property during life does not mean that it must be denied this status after death. For the body, dying is the ultimate transformation into "thing-ness." It may be awkward to talk about a cadaver as an item, but it is not an autonomous entity. Also, unlike a living human, a corpse can be subject to the same divisions of ownership, use, and control as any other asset. Indeed, the law has slowly come to grips with these qualities of the dead body by acknowledging that a decedent's next-of-kin have a quasi-property right in her anatomy.[278] And in the hands of third parties such as biotechnology companies, excised human biological material almost certainly *is* property.[279] Thus, acknowledging that decedents own the resource of their own bodies would hardly extend our existing conception of property rights.

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273. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357, 359 (2001); *see also* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

274. Merrill and Smith note that this aspect of property rights "imposes an informational burden on large numbers of people." Merrill & Smith, *What Happened to Property in Law and Economics?*, *supra* note 273. Thus, they claim that it explains the *numerus clausus* principle, which limits property bundles to several well-known forms, such as fee simple or life estate, "that the layperson can understand at low cost." *Id*.

275. *See, e.g.*, Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549, 582–86 (2013).

276. *Id.* at 579.

277. *See, e.g.*, Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 455–56 (2000) (noting that recognizing property interests in living bodies could "afford[] one individual pervasive power over the body of another"); *cf.* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (reasoning that a divorced couple had "an interest in the nature of ownership" over frozen pre-embryos they had created through in vitro fertilization).

278. *See supra* text accompanying note 87.

279. *See supra* text accompanying note 88.

Likewise, existing case law contains the seeds of classifying a decedent's tissue as enough like property to be descendible. Consider again the paradigmatic case of *Moore v. Regents of the University of California*.[280] As mentioned above, the California Supreme Court rejected a conversion claim brought by a man whose spleen had been surgically removed and then used to secure a valuable patent.[281] Central to the court's conclusion that Moore had no property interest in his detached spleen were the facts that he had consented to having the organ extracted from his body and "clearly did not expect to retain possession of his cells."[282] *Moore* is, at bottom, a decision about abandonment. As a general principle, an owner can return an item to the commons by "intentionally and voluntarily relinquish[ing] all right, title, and interest in it."[283] *Moore* thus does not preclude a living individual from *directing* an otherwise-lawful transfer of her anatomy. Indeed, the common practice of selling blood, hair, sperm, and eggs suggests that people do in fact enjoy this power—whether we are willing to call their biological material their property or not.[284]

Similarly, *Hecht v. Superior Court*[285] suggests that this ownership interest—whatever it is called—does not diminish at death. William E. Kane deposited fifteen vials of sperm with a cryogenics facility.[286] Before he committed suicide, Kane executed a will that bequeathed the specimens to his girlfriend, Deborah Allen Hecht.[287] A California probate court ordered the sperm destroyed, but the court of appeals reversed.[288] First, the appellate court considered an existential challenge to the proceedings below: because the probate system governs a decedent's "property," the lower court had jurisdiction only if the sperm belonged to Kane.[289] Kane's children pressed this point, citing *Moore* for the proposition that the sperm was not Kane's.[290] The appellate court disagreed. It distinguished *Moore* on the grounds that Kane's agreement with the sperm bank showcased his "intent and expectation that he would in fact retain control over the sperm following its deposit."[291] Thus, the

280. 793 P.2d 479 (Cal. 1990).
281. *See id.* at 489.
282. *Id.* at 488–89.
283. Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010) (quoting JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW §4.03 (2000)); *see also* Rao, *supra* note 277, at 374–75; Render, *supra* note 275, at 572.
284. *Cf.* United States v. Garber, 607 F.2d 92, 97 (5th Cir. 1979) (en banc) ("[B]lood plasma, like a chicken's eggs, a sheep's wool, or like any salable part of the human body, is tangible property . . . .").
285. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).
286. *See id.* at 276.
287. *See id.* at 276–77.
288. *See id.* at 279, 291.
289. *Id.* at 280–81.
290. *Id.*
291. *Id.* at 280 n.4.

court held that Kane "had an interest, in the nature of ownership" that made the sperm his property within the meaning of the probate system.[292] In addition, by noting that Kane retained "decision making authority as to the sperm,"[293] the court strongly implied that, as with any other asset of Kane's estate, his "intent controls [its] disposition."[294]

In conclusion, the "not property" rationale for indescendibility adds little to the debate. It offers no extrinsic reason why body parts or causes of action are not inheritable; rather, it pedals backward from the reflexive conclusion that they are not property to find that they are not inheritable. And as I discuss next, the deeply embedded notion that "personal" causes of action abate upon the plaintiff's death is equally unconvincing.

C. Personal Causes of Action

Many legal claims are indescendible because they seek redress for "personal wrongs."[295] It would be difficult to exaggerate the resiliency of this idea. It was the crux of the seminal abatement case *Higgins v. Butcher*, decided in 1607, in which the King's Bench held that a husband could not recover for injuries that were "personal" to his deceased wife.[296] After four hundred years and several waves of reform, the proposition that personal claims do not survive the plaintiff remains the touchstone. For instance, in May 2013, the Idaho Supreme Court held that a mother could not assert constitutional claims on behalf of her son's estate against the very jail guards who allegedly caused his death "because § 1983 is a personal cause of action."[297]

However, this focus on "personal wrongs" was never a considered policy choice. Instead, it stems from the way Anglo-Saxon law handled torts. Instead of treating torts as a sovereign field, courts resolved matters involving negligent or intentional injury through a mechanism called the "appeal of felony"—a proceeding that was more like a criminal prosecution than a civil lawsuit.[298] The appeal of felony entitled the victim to challenge the perpetrator to battle. It

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292. *Id.* at 281.

293. *Id.*

294. *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 315 (Ct. App. 2008) (reading *Hecht* for this proposition and honoring a decedent's wish that his frozen sperm be destroyed after his death). Admittedly, *Hecht* relied heavily on the unique nature of sperm, which makes its holding difficult to generalize to other body parts. *See* 20 Cal. Rptr. 2d at 281. ("[D]ecedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies 'an interim category that entitles them to special respect because of their potential for human life.'") (quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

295. Nat'l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 258 n.13 (D.D.C. 2012).

296. (1607) 80 Eng. Rep. 61 (K.B.); *see also* Winfield, *supra* note 103, at 252 (explaining that "the sole reason why [the husband in *Higgins*] lost his case was because he was suing for a tort entirely personal to his wife").

297. Hoagland v. Ada Cnty., 303 P.3d 587, 595 (Idaho 2013).

298. *See* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 465–66 (Cambridge, 2d ed. 1898).

was seen as a "substitute for a private war"[299]—a matter of "personal vengeance . . . between the transgressor and his victim."[300] At the time, however, the primitive law of succession conceptualized executors as stepping into the shoes of "the estate, but not the person, of his testator."[301] Accordingly, when a plaintiff died before a case ran its course, her personal representative had no stake in the matter: there was no possibility of one-on-one "combat" between the original disputants, and no money on the table. Thus, as Blackstone explained, tort-like claims abated because the personal representative of a deceased plaintiff had not received "in [her] own personal capacity, any manner of wrong or injury."[302]

Even in the seventeenth century, when tort law began to crystallize as a sovereign discipline, it continued to overlap with criminal law. The appeal of felony evolved into the writ of trespass, which allowed plaintiffs to sue for bodily harm.[303] But even when a plaintiff won, she did not recover damages in an amount that was designed to remediate the wrong.[304] Instead, defendants paid a "bot"—a tariff in a fixed amount that was keyed to the kind of grievance.[305] Bots preserved the peace by buying off the victim's right to retaliate.[306] Thus, as before, the plaintiff's death made revenge impossible and obviated the need for any payment. Moreover, given the bot's non-compensatory purpose, it did not seem anomalous to deny personal representatives the right to recover for a decedent's physical injuries. If the law did not make a living person whole, why should it extend that courtesy to a decedent?

However, for reasons that have never been clear, the indescendibility of "personal" claims endured into the nineteenth century. During this time, tort law became increasingly slanted toward the objective of compensation.[307] Scholars have wondered about the abatement doctrine's persistence: a rare instance of "the common law, with its characteristic capacity for growth, retain[ing] . . . historical limitations intact."[308] But even more bizarrely, this

299. POLLOCK, *supra* note 107, at 64.

300. Smedley, *supra* note 102, at 608.

301. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1045 (1965).

302. 3 WILLIAM BLACKSTONE, COMMENTARIES *302.

303. *See* 2 POLLOCK & MAITLAND, *supra* note 298, at 510–12.

304. *See id.* at 521–23.

305. *See id.*

306. *See, e.g.*, Harry Zavos, *Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages*, 43 LOY. L.A. L. REV. 193, 232 (2009) (distinguishing between the *bot* and damages on the grounds that the former "provid[ed] an amount appropriate to offset against retaliation" while the latter "provid[ed] an amount appropriate to offset the plaintiff's loss").

307. *See, e.g.*, Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1577 n.45 (1997).

308. Malone, *supra* note 301, at 1051; *see also* Smedley, *supra* note 102, at 609 (noting that "when the function of damages awards came to be recognized as compensatory rather than punitive, the reason for the rule ceased to exist").

formulation of the abatement doctrine still exists in many jurisdictions. Although it has been over a hundred years since the widespread adoption of survival statutes—a revolution designed "[t]o alleviate the [abatement] rule's often harsh results"[309]—the view that a "personal" claim "dies with the plaintiff"[310] has proven unshakable. And yet this approach owes its genesis to nothing more than "early confusion of the role of civil damages actions with the punitive aspects of criminal proceedings."[311]

Because "personal" is a word balloon, courts and commentators have sometimes tried to fill it with substance. The most compelling such attempt cites the fact that certain kinds of harm are subjective and ephemeral—that is, felt only by the plaintiff—and thus not worth remedying after the plaintiff's death. For instance, in the nineteenth century, some courts refused to apply the rule that contract claims survived the plaintiff to lawsuits alleging breach of a promise to marry. An 1825 Pennsylvania Supreme Court decision explains why: such an agreement "affected the hopes, the feelings, the imagination, the mind[] of the [plaintiff], without touching [her] property."[312] This sense that pecuniary loss stands on different footing than emotional harm also explains why the right of publicity is descendible but privacy and defamation claims are not,[313] and why some jurisdictions do not allow estates to recover for a plaintiff's pain and suffering.[314] After all, a decedent's financial loss—a smashed vase or failure to honor a profitable deal—affects more than just her interests. Because estates are a way station between property owners, a decedent's heirs or beneficiaries suffer, too. Compared to the concrete, demonstrable injury of property loss, "compensating" the dead for the shame of a ruined reputation or even the private agony of physical wounds seems hazy and metaphysical. Indeed, as one federal district court observed, if a plaintiff "is deceased, any damage award would not compensate *him* for his injuries, because the cruel fact is that he is no longer present to benefit from any damages awarded."[315]

But this attempt to reverse engineer an explanation for why "personal" claims abate is not persuasive. For one, even assuming that the law should

309. Thompson v. Estate of Petroff, 319 N.W.2d 400, 403 (Minn. 1982).

310. Butts v. Evangelical Lutheran Good Samaritan Soc'y, 852 F. Supp. 2d 1139, 1151 (D.S.D. 2012).

311. Smedley, *supra* note 102, at 607.

312. Lattimore v. Simmons, 13 Serg. & Rawle 183, 185 (Pa. 1825).

313. *See supra* text accompanying notes 132–45.

314. *See supra* text accompanying note 111.

315. Brown v. Morgan Cnty., 518 F. Supp. 661, 664 (N.D. Ala. 1981); *cf.* Sullivan v. Delta Air Lines, Inc., 52 Cal. Rptr. 2d 662, 664 n.3 (Ct. App. 1996) ("It does not seem reasonable that an estate should be enhanced by the value placed by a jury upon the pain and suffering experienced by a dead man. The deceased bore the pain and suffering and he is the only one who should be compensated. He can't take it with him.") (quoting Lawrence Livingston, *Survival of Tort Actions: A Proposal for California Legislation*, 37 CALIF. L. REV. 63, 73–74 (1949)), *rev'd*, 935 P.2d 781 (Cal. 1997).

privilege financial loss over emotional harm, there is no neat divide between the two. For instance, defaming someone can affect the pecuniary interests of her loved ones just as much as destroying her property. In *Moyer v. Phillips*,[316] a doctor falsely reported that a longtime truck driver was an alcoholic.[317] The driver sued for defamation but died shortly thereafter.[318] By the time of his death, the driver had been "placed on state welfare by his loss of employment and ha[d] been placed in arrears with his creditors."[319] Likewise, plaintiffs with valid claims for negligent or intentional infliction of emotional distress often must pay medical expenses and suffer lost income.[320] These claims may be "personal," but they seek damages suffered by *the estate* as a result of the defendant's conduct.

More broadly, philosophical handwringing over whether it is possible to "compensate" decedents overlooks tort law's second great pillar, deterrence.[321] The abatement doctrine turns this second goal on its head. If a police officer uses excessive force, § 1983 entitles the plaintiff to all damages that would be available under common law tort principles.[322] Paradoxically, though, a police officer whose conduct is so brutal that it kills the plaintiff will often be better off under the statute. Even in states with generous survival statutes, the plaintiff's estate may not be able to recover for the decedent's pain and suffering or emotional distress.[323] And more perversely, in jurisdictions that have not strayed too far from the abatement doctrine, the plaintiff's lawsuit can vaporize completely. For instance, Eugene Gilliam died seven hours after being shot by a Taser multiple times during a routine traffic stop.[324] In *Waldroup v. City of Prattville*, the Eleventh Circuit held that his personal representative's § 1983 claim abated under Alabama's survival statute.[325] Absolving a

316. 341 A.2d 441 (Pa. 1975).

317. *See id.* at 442.

318. *See id.* at 441.

319. *Id.* at 444.

320. *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 503 (1998).

321. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 901 (1979).

322. *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986).

323. *See, e.g.*, Schwartz v. Lassen Cnty. *ex rel*. Lassen Cnty. Jail (Det. Facility), 838 F. Supp. 2d 1045, 1059 (E.D. Cal. 2012); Venerable v. City of Sacramento, 185 F. Supp. 2d 1128, 1133 (E.D. Cal. 2002); Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 585 (Ct. App. 1996). *But see* Cotton *ex rel.* McClure v. City of Eureka, 860 F. Supp. 2d 999, 1014 (N.D. Cal. 2012); Gotbaum v. City of Phoenix, 617 F. Supp. 2d 878, 884 (D. Ariz. 2008).

324. Estate of Gilliam *ex rel.* Waldroup v. City of Prattville, 639 F.3d 1041, 1043 (11th Cir. 2011).

325. *Id.* The facts of *Waldroup* are slightly unusual in that the estate failed to prove that the tasering caused Gilliam's death at trial. *See id.* at 1044. But as dissenting Judge Martin pointed out, the district court did find that the tasering, although not a proximate cause of Gilliam's death, was a "contributing factor." *Id.* at 1050 (Martin, J., dissenting).

tortfeasor for wanton conduct because his victim did not survive is exactly backwards.[326]

Finally, the failure of the "personal" rationale for indescendibility comes into sharp relief when one compares the survivability of federal statutory claims. As noted, lawsuits for violation of federal statutes abate if they are "penal" rather than "remedial."[327] I have previously argued that this rule is as off-kilter as the abatement doctrine—indeed, it has been distilled from the distinguishable context of U.S. Supreme Court cases involving deceased *defendants*.[328] But what is more important is how the two doctrines look side by side. Federal statutory claims survive if they seek "to redress individual wrongs" and any recovery will "run[] to the harmed individual."[329] As a result, under federal common law, the *more* "personal" a claim, the *less likely* it is to abate. For instance, the False Claims Act allows private individuals to bring *qui tam* actions against defendants who have defrauded the United States.[330] The statute straddles the penal/remedial distinction: it empowers whistleblowers to sue in the name of the federal government in order to add an extra dose of deterrence. Nevertheless, *qui tam* actions are "remedial"—and thus survive the plaintiff's death—because they compensate an informant for "emotional strain" and permit her to restore her reputation "by distancing [herself] from the fraud."[331] These precise factors—the intangible and individualistic nature of the plaintiff's injuries—would cause a similar claim to abate under many survival statutes. The problem is not that federal and state law answer the same question in different ways. It is that they are nearly polar opposites. When two doctrinal approaches are at war with each other, it is a safe bet that neither is compelling.

Policymakers, judges, and commentators have justified indescendibility as a posthumous extension of market inalienability, as reflecting the fact that certain things are not property, and as hinging on the "personal" quality of certain legal claims. I have challenged each of these rationales. Now, in the next Section, I offer a new understanding of indescendibility.

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326. Admittedly, the availability of a claim for wrongful death can ameliorate the harshness of the abatement doctrine. But it is no panacea. For one, as noted, only a decedent's spouse and family have the ability to bring such a cause of action; thus, when a decedent has no such relatives, her claim abates entirely. *See* Robertson v. Wegmann, 436 U.S. 584, 591–92 (1978). In addition, damages for wrongful death can be quite limited. *See, e.g.*, Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 586 (1985) (noting that "in some cases virtually no wrongful death damages will be available under state law").

327. *See supra* text accompanying notes 152–53.

328. *See supra* text accompanying notes 166–68.

329. United States v. NEC Corp., 11 F.3d 136, 137 (11th Cir. 1993).

330. *See* 31 U.S.C. §§ 3729–3731 (2012).

331. *NEC Corp.*, 11 F.3d at 138.

III.
RECALIBRATING INDESCENDIBILITY

In this Section, I contend that the best justifications for non-inheritability are prudential—a cluster of management, signaling, and line-drawing issues that I call "administrability." These pragmatic concerns rarely surface in cases and commentary,[332] but the idea is simple. Death thrusts property into limbo—a no man's land between owners—until distribution to a decedent's heirs and beneficiaries. Some assets make this transition less gracefully than others: they impose costs or provoke strong feelings. Some decedents would prefer not to convey these things. However, we generally think of succession as mandatory: once an object or entitlement *can* be passed on, it *must* be passed on. The difficulty of opting out makes some form of indescendibility an appropriately cautious choice when decedents likely have deep-seated but heterogeneous preference about inheritability. Similarly, costs such as the burden to the legal system are negative externalities, and can justify prohibiting posthumous transfers. I use this analysis to suggest reforms to the inheritability of body parts, legal claims, and items made indescendible by fine print.

A. Partial Descendibility of Body Parts

As I have argued above, the concerns that prompted the NOTA and the UAGA to bar the lifetime sale of body parts do not also justify a prohibition on posthumous transfer.[333] One response to this insight might be to invert the law and make human tissue fully descendible and alienable after death. However, in this Section, I argue that a more cautious approach is warranted. An unregulated market in corpses—treating cadavers as a resource to be strip-mined—would impose hefty management costs and inspire strong opposition.[334] Given the difficulty of harmonizing these concerns, I propose amending the NOTA and the UAGA to allow states to experiment with various forms of compensated anatomical harvesting.

Body parts are a striking illustration of assets that would be expensive or difficult to manage if they were inheritable—the first element of the problem that I call "administrability." Consider the logistical challenges that would arise if a decedent's anatomy was her property. When someone passed away, a clock unlike any other would start ticking. To maximize the value of this newly minted asset, doctors would need to inject preservation fluid within thirty

332. For the rare exception, see Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980) (declining to recognize a descendible right of publicity due to practical concerns); *see also supra* text accompanying note 140.

333. *See supra* Part II.A.

334. *See infra* text accompanying notes 335–337 (explaining the steps necessary to harvest cadaveric tissue); *supra* text accompanying notes 66–69 (noting the objections to permitting the sale of human tissue).

minutes of cardiac arrest.[335] They would need to bank kidneys, corneas, tissue, and skin immediately.[336] The heart and lungs would need to be removed and transplanted within four hours; the pancreas and liver would have an eight- to ten-hour fuse.[337] Although there would be no guarantee of finding a suitable transplant recipient or buyer for all of these materials with such a tight turnaround, one thing would be certain: the estate would be stuck with a massive medical bill.

In addition, much could go wrong in the frantic period shortly after death. If what was once a human being morphs into inheritable property, medical professionals and personal representatives might face liability on several fronts. As bailees, hospitals could commit negligence by failing either to preserve the body or to extract all of its usable elements.[338] Personal representatives could owe a fiduciary obligation to find suitable matches for organ transplantation.[339] The specter of liability and the pressure to wring every last dollar out of the body would drive up medical and fiduciary fees. Also, on a more human note, making tissue inheritable would further destabilize an emotionally fraught environment. When a prospective organ donor is seriously ill, doctors and family members sometimes clash over when to declare death. Hospitals are acutely aware that organs are most valuable if reaped after brain death but before cardiac arrest.[340] However, harvesting during this period means dissecting a "cadaver" with a beating heart—a practice that many family members find deeply unsettling.[341] Adding another group of stakeholders—heirs and beneficiaries with a financial stake in organ quality—would pour more powder into the keg.

Admittedly, most of the administrability expenses I have discussed so far would be borne by the estate. For instance, a large harvesting bill and higher fiduciary fees would be paid out of a decedent's funds. In this way, inheritable body parts would be no different from other descendible assets that require

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335. *See* James P. Orlowski, *The Opportunity for Altruism: Preserving Options for Family Members*, *in* PROCURING ORGANS FOR TRANSPLANT 187, 188 (Robert M. Arnold et al. eds., 1995); *cf.* Glen E. Michael & John Jesus, *Treatment of Potential Organ Donors*, *in* ETHICAL PROBLEMS IN EMERGENCY MEDICINE 261, 262–63 (John Jesus & Peter Rosen eds., 2012) (noting that the window is slightly longer following brain death).

336. *See* DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 25 n.13 (2000); *cf.* FREDERICK S. BRIGHTBILL, CORNEAL SURGERY 10–11 (1986) (noting that unbanked corneas are ideally harvested within six hours of death and transplanted within twenty-four hours).

337. *See* PRICE, *supra* note 336, at 25 n.11.

338. *Cf.* Cohen, *supra* note 74, at 2, 34 (noting that one consequence of a futures market in organs would be greater liability exposure for hospitals).

339. *See* RUAGA § 5(b) (amended 2006), 8A U.L.A. 109 (Supp. 2013). In general, personal representatives must "act in good faith, with due diligence, and with at least such care and skill as a person of ordinary prudence would exercise in dealing with his or her own property." Branum v. Akins 978 S.W.2d 554, 557 (Tenn. Ct. App. 1998). Failing to make assets productive can breach this duty. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 181 (1959).

340. *See* ERICH H. LOEWY, TEXTBOOK OF MEDICAL ETHICS 111 (1989).

341. *See* DICK TERESI, THE UNDEAD 104–120 (2012).

active management, such as residential property or stock portfolios. The fact that a decedent would internalize these costs might suggest that she should be free to decide to incur them in return for the benefits of descendibility.

Nevertheless, the compulsory nature of inheritance complicates matters. Testation and intestacy are not discretionary: once something belongs to a decedent, she cannot exclude it from her estate.[342] If she does not mention it in her will or trust, it will pass through her residuary clause; if she excludes it from her residuary clause, it will pass through intestacy.[343] Although she could try to create a kind of property-specific "negative will" that makes her body indescendible, that would arguably constitute testamentary property destruction, which the law does not allow.[344] This all-or-nothing approach makes a policy of unfettered inheritability unwise for lightning-rod assets like human tissue. Many people would gladly participate in a regime that would increase the size of their legacy and save lives. But others would object on moral or spiritual grounds. And for the very ill or elderly, compensated harvesting might simply be a bad business decision: the medical costs could exceed the value of their usable body parts. Making matters worse, the Internal Revenue Service bases a decedent's estate tax liability on the net worth of her property, no matter how much ends up in the hands of her heirs and beneficiaries.[345] Accordingly, if the human anatomy was descendible, and the law permitted decedents to be buried or cremated intact, some individuals would need to pay a tax bill that reflected the fair market value of their human tissue.[346] For these reasons, all-out descendibility would be unfair.

In fact, the law would have little choice but to treat inheritable body parts as sui generis. Given the pressing time constraints after death, decedents who wanted to sell their anatomy would need a vehicle for making their intent

342. *See* Shelly Kreiczer-Levy, *The Mandatory Nature of Inheritance*, 53 AM. J. JURIS. 105, 106 (2008) (noting that "an owner cannot just 'not give' her property to receivers"). For instance, even if no heirs or beneficiaries exist, property will escheat to the state. *See, e.g.*, David C. Auten, Note, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95, 96 (1963).

343. *See supra* text accompanying notes 34–35.

344. *See In re* Pace, 400 N.Y.S.2d 488, 490, 493 (Sur. Ct. 1977) (rejecting testator's demand to have buildings "razed to the ground"); *In re* Meksras Estate, 63 Pa. D. & C.2d 371, 372–73 (Pa. Com. Pl. 1974) (refusing to honor a testator's request to be buried with her jewelry); *see also* cases cited *supra* note 231. *But see In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 315 (Ct. App. 2008) (ordering a decedent's frozen sperm be destroyed after his death in accordance with his wishes); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 69–84 (1999) (challenging the prohibition on testamentary destruction); Strahilevitz, *supra* note 59, at 838–41 (same).

345. *See* I.R.C. § 2033 (2012).

346. Because the estate tax exemption has recently risen to $5 million, this problem would only affect the very rich. *See* Bridget J. Crawford, *Our Bodies, Our (Tax) Selves*, 31 VA. TAX REV. 695, 745–46 (2012) (making this point in the context of human gametes). For a real-life example of the taxation of destroyed property, see Hirsch, *supra* note 344, at 76 n.157 (noting that Jacqueline Susann, author of *Valley of the Dolls*, instructed her executor to burn her diary, which the IRS subsequently valued at $3.8 million).

instantly accessible. Lawmakers have addressed this quandary in the context of organ donation by encouraging the use of cards, driver's license stickers, and Facebook pages.[347] But these casual signaling devices are a departure from the stringent formalities that require most wills to be signed and witnessed.[348] The UAGA attempts to resolve this tension by providing that an anatomical gift in a will is effective "whether or not the will is probated" and even if the bequest is "[i]nvalidat[ed] . . . after the donor's death."[349] This relaxed standard makes sense: heirs and beneficiaries have little at stake with a decedent's choice to give away her organs, minimizing the dangers of fraud or undue influence. However, the same is not true for compensated harvesting. Even if cards or stickers merely evidenced *whether* a decedent wanted to have her body sold—leaving *how* to allocate the proceeds until later—they would cause the value of the estate to swell by thousands of dollars. The ease with which expressions of a decedent's wishes could be manipulated would invite opportunism.[350] Thus, inheritable body parts would force policymakers to walk a tightrope between the exigencies of science and traditional succession principles.

In my view, the best solution would be to amend the NOTA and the UAGA to allow state experimentation with various forms of compensation for willing decedents. The complexity of the variables involved casts doubt on the wisdom of a federally mandated, one-size-fits-all approach. Admittedly, some states might stick to the status quo. However, other jurisdictions could treat corpses like all other belongings and thereby serve as laboratories for the crowding-out hypothesis and the administrability problems I have identified.[351] Still others might pay a preordained amount—say, $10,000—to the estate of decedents who agree to harvesting. These funds could come directly from the sale of the decedent's anatomy or another source, such as a tax on hospitals that perform extraction procedures. A fixed stipend, rather than the vagaries of the open market, would alleviate the pressure on doctors and personal representatives to maximize the value of the reaped biological material. Finally, states that are less sanguine about the commercialization of body parts could try

347. *See, e.g.*, LA. REV. STAT. ANN. § 32:410(B)(1)(a) (2010) (requiring driver's licenses to "contain an indication thereon whether or not the named applicant has elected to make an anatomical gift"); RUAGA § 5(b) (amended 2006), 8A U.L.A. 109 (Supp. 2013) (encouraging the use of "donor card[s] or other record[s]"); Todd Wasserman, *Facebook Adds Donor Option to Timeline*, MASHABLE.COM (May 1, 2012), http://mashable.com/2012/05/01/facebook-organ-donor.

348. *See, e.g.*, DUKEMINIER ET AL., *supra* note 48, at 225–28.

349. RUAGA § 5(d).

350. Admittedly, informal signaling devices like stickers would be less of a departure for *inter vivos* trusts, which neither pass through probate nor always need to be memorialized in a signed writing. *See* DUKEMINIER, *supra* note 348, at 592. In fact, when deciding whether a settlor intended an asset to be included in the trust—which is roughly equivalent to whether a decedent wants her body to be part of her estate—courts are relatively lenient about what kind of evidence is permissible. *See, e.g.*, Estate of Heggstad, 20 Cal. Rptr. 2d 433, 435–36 (Ct. App. 1993) (holding that real estate can be part of a trust even in the absence of a deed transferring it to the trustee).

351. *See supra* text accompanying notes 240–41, 335–41.

tax credits[352] or scholarships for a decedent's loved ones.[353] Notably, after years of opposing remuneration, the American Medical Association has called for the study of financial incentives—albeit set at "the lowest level that can reasonably be expected to encourage cadaveric organ donation."[354] In this spirit, Pennsylvania lawmakers passed a statute that gave the families of deceased organ donors $300 to offset funeral costs, but ultimately decided not to implement it due to concern that it violated the NOTA.[355] My proposal would encourage similarly creative efforts to increase the supply of vital body parts and thereby prevent needless death and suffering.

To conclude, whatever the merits of the debate over the market inalienability of body parts during life, the case for extending the NOTA and the UAGA to decedents is much weaker. The strongest grounds for prohibiting posthumous transfer revolve around administrative costs and signaling problems. Because these arguments are hardly overwhelming, and may be mitigated by creative solutions, state lawmakers should be able to make the human anatomy at least partially descendible.

B. Causes of Action

In this Section, I argue that the abatement doctrine cannot be explained as an effort to limit administrability costs and thus should be abolished. I then consider the more complex matter of the inheritability of future causes of action.

1. Abolishing the Abatement Doctrine for Existing Claims

The abatement of "personal" claims—a historical accident—has been defended on the grounds that certain injuries, such as pain and suffering or emotional distress, are tightly entwined with the plaintiff.[356] Thus, this theory proceeds, there is little harm left to remedy once the plaintiff dies. I have

352. Congress has considered (but never passed) bills that would give the estates of deceased organ donors either a $10,000 tax credit, *see* Gift of Life Tax Credit Act of 2001, H.R. 1872, 107th Cong. (2001), or a $2,500 tax refund, *see* Expand Act of 2001, H.R. 2090, 107th Cong. (2001). Many states provide tax incentives for living organ donors. *See, e.g.*, ARK. CODE ANN. § 26-51-2103 (West 2010); WIS. STAT. ANN. § 71.05(10)(i) (West 2007).

353. *Cf.* Jake Linford, *The Kidney Donor Scholarship Act: How College Scholarships Can Provide Financial Incentives for Kidney Donations While Preserving Altruistic Meaning*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 265 (2009) (proposing that lawmakers give scholarships to living organ donors).

354. AM. MED. ASS'N, REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS: CADAVERIC ORGAN DONATION 3 (2002), *available at* http://www.ama-assn.org/resources/doc/code-medical-ethics/2151a.pdf.

355. *See* 20 PA. CONS. STAT. ANN. § 8622 (West 2011); PA. GEN. ASSEMBLY, LEGISLATIVE BUDGET & FIN. COMM., A PERFORMANCE EVALUATION OF PENNSYLVANIA'S ORGAN AND TISSUE DONOR AWARENESS PROGRAM (2007), *available at* http://lbfc.legis.state.pa.us/reports/2007/291.pdf.

356. *See supra* text accompanying notes 312–15.

challenged this account above.[357] But even if it were correct, it would need to identify some cost that overshadows the virtues of holding defendants fully accountable for their wrongdoing. One candidate for such an expense is the burden on the legal system.[358] Another is the use of a decedent's assets to prosecute the lawsuit—a drain on the estate much like the medical fees generated by organ harvesting. Yet neither of these administrability concerns justifies the abatement rule. Bringing the doctrine's complete logic into the light reveals why lawmakers should eliminate it.[359]

For starters, the judicial-economy rationale for abatement is unpersuasive. Compare the analogous doctrine of mootness. An action becomes moot when "the parties lack a legally cognizable interest in the outcome."[360] Like the purported justification for abatement, mootness serves the salutary purpose of preserving "the court's scarce resources for the resolution of real disputes."[361] Yet here the similarities end. The abatement doctrine is an axe that falls from the sky any time the plaintiff dies before the verdict. Conversely, a defendant seeking dismissal on mootness grounds bears the onerous burden of proving that it is "impossible for a court to grant any effectual relief whatever."[362] Indeed, courts reserve mootness for disputes that have been extinguished by settlement[363] or by the defendant's permanent cessation of illegal conduct,[364] and challenges to statutes that have been repealed[365] or never were implemented.[366] Moreover, when the asserted trigger for the mootness doctrine is the plaintiff's loss of a "personal stake" in the outcome, the rule is riddled

357. *See supra* text accompanying notes 316–29.

358. *See, e.g.*, Brown, *supra* note 126, at 1535 (noting that the abatement doctrine "is not so much a statement that no injury has occurred as it is a judgment that the injury *is not worth redressing*") (emphasis added). A slightly different spin on this concern is the idea that "difficulties of proof may arise from the fact that one of the interested parties is not available to testify." Smedley, *supra* note 102, at 608. For instance, it might be hard for a jury to quantify damages for pain and suffering if the plaintiff never takes the witness stand. Yet although evidentiary insufficiency might justify a motion for summary judgment in a specific case, it hardly seems to warrant a categorical bar on particular causes of action. Indeed, we give plaintiffs tremendous leeway to offer expert testimony on "deeply complex matters, including technology, science, economics, medicine, and finance." Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 548 (2013).

359. For reasons I have already discussed, the federal common law rule that only allows survival of federal statutory claims that are "remedial" should also be abolished. *See supra* text accompanying notes 156–58, 327–29.

360. Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013) (internal quotation marks omitted).

361. Pamela R. *ex rel.* Thomas R.W. v. Mass. Dep't of Educ., 130 F.3d 477, 479 (1st Cir. 1997).

362. Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks omitted).

363. *See, e.g.*, Smith v. T-Mobile USA Inc., 570 F.3d 1119, 1122 (9th Cir. 2009).

364. *See, e.g.*, WildEarth Guardians v. Pub. Serv. Co. of Colo., 690 F.3d 1174, 1186 (10th Cir. 2012).

365. *See, e.g.*, Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1256–57 (10th Cir. 2004).

366. *See, e.g.*, Lillbask *ex rel*. Mauclaire v. Conn. Dep't of Educ., 397 F.3d 77, 91 (2d Cir. 2005).

with prudential exceptions that allow courts to hear the matter.[367] Federal law exempts issues that are "capable of repetition yet evading review" from the mootness bar;[368] most states go further and empower judges to entertain otherwise moot disputes that are of "substantial public interest."[369] These carve-outs recognize what the abatement doctrine ignores: even claims that are "personal" can serve social interests that transcend any particular individual.

A recent case brings this point into focus. In *Maghee v. State*,[370] Valentino Maghee challenged the revocation of his work release from prison.[371] The law was unclear about the proper procedural vehicle to seek such relief, and the trial court dismissed Maghee's claim on the grounds that he had filed a motion in court rather than an administrative action.[372] Maghee died while his appeal was pending, and the department of corrections argued that Maghee's claim both abated and had become moot.[373] The Iowa Supreme Court disagreed. The state high court first held that the case did not abate under Iowa's broad survival statute, which applies to "all causes of action without limitation."[374] It then acknowledged that Maghee's case was moot, but nevertheless applied the substantial public interest exception:

> [T]he present appeal presents an issue of general applicability that is likely to reoccur. Prisoners are transferred in and out of work release every day, and challenges to such transfers inevitably arise. Certainly, it is desirable to have an authoritative adjudication as to [the plaintiff's] challenge[ ] . . . . Public officials as well as prisoners would benefit from such guidance.[375]

After resuscitating the lawsuit, the court clarified the correct path for inmates to contest the revocation of their work release.[376]

Maghee showcases the abatement doctrine's shortcomings. Although Maghee's claim survived in Iowa, it would have abated in many states.[377] In fact, is hard to imagine a more "personal" cause of action than one brought by a prisoner seeking an injunction against his return to confinement. A lawsuit for

367. *See, e.g.*, U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980); *see also* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 600 (2009) ("[A] long line of cases suggests that the mootness doctrine is far more flexible with regard to personal stake mootness.").

368. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 317–18 (1988).

369. City of Yakima v. Mollett, 63 P.3d 177, 179 (Wash. Ct. App. 2003). State mootness doctrine is generally more lenient because it does not derive from Article III of the U.S. Constitution, which limits the federal judicial power to "[c]ases" and "[c]ontroversies." U.S. CONST. art. III, § 2, cl. 1.

370. 773 N.W.2d 228 (Iowa 2009).

371. *See id.* at 230.

372. *See id.*

373. *See id.* at 231.

374. *Id.* (citing IOWA CODE ANN. § 611.20 (West 2010)).

375. *Id.* at 235.

376. *Id.* at 235–42.

377. *See supra* text accompanying notes 112–19.

pain and suffering may be "personal" in the sense that it raises chin-stroking questions about whether awarding damages to a decedent's estate "compensates" anyone,[378] but Maghee's cause of action was "personal" in a more concrete way: once he died, granting relief became impossible. Thus, if we were serious about abating "personal" claims, Maghee's lawsuit would have terminated regardless of its significance under the mootness rule exception. Abatement's potential to insulate weighty issues from judicial review is a major downside. And at the same time, abatement adds nothing to mootness. The only upside to abatement—limiting the strain on the court system—is already well-served by mootness. For instance, if Maghee's claim had not been important, the state high court would have dismissed it as moot. And indeed, judges frequently invoke mootness when the plaintiff's death has made a dispute frivolous or trivial.[379] There is simply no need for abatement to police the same terrain.

One might use *Maghee* to defend the abatement rule on different grounds: that it facilitates a decedent's likely intent by avoiding the costs of prosecuting a pointless lawsuit. The case is the poster child for such a position. Although Maghee would have benefited from overturning the revocation of his work release when he was alive, his death made that objective irrelevant. Arguably, he would have preferred that his estate not spend money on attorneys' fees, but Iowa's lenient survival statute permitted the state supreme court to hijack the matter to serve its own ends.

Close inspection, however, reveals two reasons why the abatement rule does not further decedents' preferences. First, there is no *requirement* that a personal representative litigate on behalf of a decedent. Indeed, if a plaintiff's death obviates the purposes of a lawsuit, the estate can simply stop pursuing it. The very point of selecting a personal representative is to give someone whom the decedent trusts wide discretion to manage her property. Handpicked individuals will generally do a better job of facilitating a decedent's intent than an immutable rule that exterminates claims.

Second, as I have discussed, abatement often takes money out of the pockets of a decedent's loved ones while permitting a defendant who has seriously hurt or even killed the decedent to escape liability.[380] Indeed, claims for personal injuries or death often dissolve in the acid bath of abatement. For every Valentino Maghee, there are dozens of decedents like Jeremy Blouins, who was shot when a police officer's gun discharged and yet whose personal representative could not bring claims under § 1983 or common law tort

378. *See supra* text accompanying notes 314–15.

379. Many such cases hold that a plaintiff's death moots a claim for injunctive or declaratory relief. *See, e.g.*, Rhodes v. Stewart, 488 U.S. 1, 4 (1988); Kennerly v. United States, 721 F.2d 1252, 1260 (9th Cir. 1983). Others involve "personal" obligations like request for a divorce. *See, e.g.*, Barney v. Barney, 14 Iowa 189, 191–93 (1862).

380. *See supra* text accompanying notes 110–21.

principles.[381] Of course, in these contexts, the doctrine does violence to what most decedents would want.

In sum, there is no persuasive justification for the indescendibility of existing claims. Abolishing the anachronistic abatement rule would allow the more flexible mootness doctrine to conserve judicial resources while better facilitating decedents' wishes.

2. Limited Descendibility for Future Claims

If the abatement doctrine falls, what should happen to the right to sue for an injury that a decedent sustains *after* her death? As noted above, heirs and beneficiaries generally inherit future property and contract claims.[382] This makes sense, because the damaged assets and expectations of the estate will belong to them as soon as probate concludes. But what about the contested fringes of this issue? Recall that many jurisdictions have granted inheritable publicity rights, and others have toyed with recognizing a posthumous claim for defamation.[383] In this Section, I argue that these claims should only be allowed to descend in limited form, if at all.

The non-inheritability of future claims is easier to defend than the abatement doctrine. For one, the social value of remedying harm to decedents is questionable. Consider prospective defamation lawsuits. It is true that an individual has an interest in having her name cleared even after she passes away. But a plaintiff who is defamed and then dies suffers a qualitatively different injury than a plaintiff who dies and then is defamed. In the first scenario, the plaintiff actually experiences the falsehood's effect on her standing in the community. In the second situation, the plaintiff is blissfully unaware of these consequences. Thus, a deceased defamation "victim" suffers a more attenuated kind of damage than a living person who has been slandered or libeled and then dies before the verdict.

Further, permitting future claims to survive would create administrability problems. Posthumous defamation rights would be relatively easy to implement for the recently deceased. But if the entitlement ran in perpetuity, difficult factual questions would arise. For instance, potentially libelous theories abound that William Shakespeare did not actually write his plays.[384] However, five centuries later, it seems exceedingly unlikely that a trial, with its dueling experts, could unearth the truth any better than the veritable mountain of

381. *See* Oliveros v. Mitchell, 449 F.3d 1091, 1095 (10th Cir. 2006).

382. *See supra* text accompanying note 102.

383. *See supra* text accompanying notes 121–45.

384. *See, e.g.*, Paul Hechinger, *Did Shakespeare Really Write His Plays? A Few Theories Examined*, BBC AMERICA (Oct. 24, 2011), http://www.bbcamerica.com/anglophenia/2011/10/did-shakespeare-really-write-his-plays-a-few-theories-examined.

scholarship that has already addressed the issue.[385] And suppose that Shakespeare prevailed, thus entitling his estate to damages. If Shakespeare's freedom from defamation was like other property, it would have passed through five centuries of devise and descent, tumbling through the residuary clauses and intestacy schemes of generations upon generations. Distributing the award would require its own class-action-like proceeding.[386]

Lawmakers could minimize these concerns by capping the posthumous duration of rights. However, as inheritable publicity rights have proven, that approach has its own downsides. For example, in 2009, General Motors ran an advertisement that featured Albert Einstein's face photoshopped onto a muscular physique, accompanied by the slogan "Ideas are sexy too."[387] The residuary beneficiary of Einstein's 1955 will sued, and GM countered by arguing that Einstein's publicity rights had expired.[388] A federal district court noted that it faced two unpalatable options: either treating publicity rights as a "heredity right" and thus allowing "descendants or heirs unto the nth generation [to] reap[] the commercial rewards of a distant and famous ancestor," or limiting the right's temporal scope in a way that was "by nature almost arbitrary."[389] Ultimately, the court chose the latter path, analogizing to copyright law to limit the right to a half-century.[390] Yet it noted discomfort with having to create this number out of whole cloth.[391]

Inheritable future claims also raise opt-out problems. For one, not every decedent would choose to transmit their prospective rights to loved ones. Doing so would impose additional burdens on personal representatives, who would have to monitor the legal landscape for violations or face fiduciary liability.[392] In addition, descendible publicity rights are problematic because some people avoid capitalizing on their fame during life. From author J.D. Salinger to *Calvin and Hobbes* creator Bill Watterson to comedian Dave Chappelle, a cadre of celebrities reject lucrative offers to cash in on their personas.[393] These reclusive stars still own valuable (albeit untapped) publicity rights that must be

385. *See, e.g.*, SHAKESPEARE AUTHORSHIP COAL., SHAKESPEARE BEYOND DOUBT? (John M. Shahan & Alexander Waugh eds. 2013).

386. In addition, descendible entitlements encroach upon other values. For instance, robust publicity and defamation rights chill freedom of expression, and thus are in tension with the First Amendment. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

387. Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 903 F. Supp. 2d 932, 932 (C.D. Cal. 2012).

388. *See id*. at 933.

389. *Id.* at 934, 942 (quotation omitted).

390. *See id.*

391. *See id.* at 934 ("An 'almost arbitrary' ruling is unacceptable . . . .").

392. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 282 (1959) (imposing fiduciary liability on trustees for failing to pursue valid legal claims).

393. *See, e.g.*, *Top 10 Most Reclusive Celebrities*, TIME, http://www.time.com/time/specials/packages/article/0,28804,1902376_1902378_1902428,00.html (last visited Mar. 3, 2014).

taxed upon their deaths.[394] In fact, their estate tax liability may be so large that their personal representative will need to sell their publicity rights to pay it—resulting in the very exploitation of their image that they assiduously avoided while alive.[395] Thus, as with body parts, some decedents would actually *prefer* indescendibility.

Accordingly, at most, future claims should be partially descendible—not transmissible as the same industrial-strength entitlement that exists during life, but filtered by death. For instance, if lawmakers are going to create a cause of action for posthumous defamation, they should limit the remedy to declaratory relief. This would give heirs and beneficiaries "an opportunity to set the record straight about a deceased relative."[396] At the same time, removing money from the equation would liberate fiduciaries from having to detect and prosecute claims and ensure that judges never need to allocate damages among far-flung relatives.

Likewise, courts and lawmakers could tailor publicity rights to address administrability costs and opt out problems. For instance, they could adjust the contours of the right to accommodate intensely private celebrities. Several jurisdictions once conditioned the inheritability of publicity rights on the decedent having "actively exploited his name and likeness."[397] This lifetime exploitation requirement has since fallen from grace. No recent judge or legislature has embraced it,[398] and Thomas McCarthy, the leading authority on publicity rights, has criticized it as "appear[ing] out of nowhere" and "without explanation or rationale."[399] Indeed, making lifetime exploitation a prerequisite for inheritable publicity rights creates a perverse result: the death of a celebrity who kept a low profile triggers a commercial free-for-all in which her loved ones cannot prevent third parties from using her likeness.[400] Nevertheless, a

394. *See* Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 780–82 (1998).

395. *See, e.g.*, Mitchell M. Gans, Bridget J. Crawford & Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203, 207 (2008), *available at* http://yalelawjournal.org/images/pdfs/658.pdf (proposing that states pass statutes that automatically vest publicity rights in designated heirs to avoid "estate tax liquidity problem[s]"). *But see* Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1, 10–11 (2009) (arguing that a forced-share statute is unnecessary in light of the overall purposes of the estate tax).

396. Brown, *supra* note 126, at 1566.

397. Gleason v. Hustler Magazine, Inc., 7 Media L. Rep. 2183, 2185 (D.N.J. July 6, 1981)); *see also* Nature's Way Prods., Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245, 252 (D. Utah 1990); Sinkler v. Goldsmith, 623 F. Supp. 727, 733–34 (D. Ariz. 1985).

398. *See, e.g.*, Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 878 F. Supp. 2d 1021, 1030–31 (C.D. Cal. 2012).

399. 2 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 9:14 (2012).

400. *See, e.g.*, Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 694 F.2d 674, 683 (11th Cir. 1983) ("Without doubt, Dr. King could have exploited his name and likeness during his lifetime. That this opportunity was not appealing to him does not mean that others have the right to use his name and likeness in ways he himself chose not to do.").

celebrity's choice not to trade on her fame can be a valuable proxy. Arguably, most such individuals would prefer to continue the same legacy after death. Thus, rather than a binary approach where lack of commercialization makes publicity rights non-inheritable, proof that a decedent rejected endorsement deals could raise a presumption that she only intended to transmit "negative" publicity rights. This fractional entitlement would empower her loved ones to enjoin others from using her image, but not bestow upon anyone the ability to sell or license it. In addition, like any default rule, a celebrity could expressly override it in her will or trust. This more fine-grained approach to descendibility would be superior to its current indiscriminate form.

C. Contract and the Unconscionability of Indescendibility Terms

At first blush, the trend of indescendibility by fine print might seem only tangentially related to things that are "purely" indescendible, like body parts. After all, non-inheritability provisions fall under the aegis of contract law, not decedents' estates. However, in this Section, I argue that these two forms of indescendibility are more tightly bound than they initially seem. Although drafters have offered several reasons for barring consumers from transferring items after death, the strongest such rationale is to avoid administrability problems.

The degree to which courts should honor adhesive terms is one of the most fraught issues in modern contract law.[401] The problem is the yawning gulf between contract theory and contract reality: although binding agreements supposedly arise from mutual assent, we are only dimly aware of the fine print spawned by most commercial transactions.[402] Thus, once in a great while, a judge will find that a purported form contract is not a contract at all. *Ajemian v. Yahoo!*,[403] which refused to enforce a forum selection clause in a dispute over the contractual non-inheritability of email, is an example.[404] However, *Ajemian* involved "browsewrap" terms, which simply appear on a website.[405] Courts have been less receptive to browsewrap than they have been to other sketchy formation practices, such as "shrinkwrap" (licenses that take effect when a

401. *See, e.g.*, MARGARET JANE RADIN, BOILERPLATE (2012); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174–76 (1983).

402. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 533 (1971).

403. 987 N.E. 2d 604 (Mass. Ct. App. 2013).

404. *See supra* text accompanying notes 197–203.

405. *See* Ajemian, 987 N.E.2d at 605, 613; *see also* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 32, 35 (2d Cir. 2002) (refusing to enforce arbitration provision that was merely mentioned on a "submerged screen" that was not readily visible to website users); Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) ("Very little is required to form a contract nowadays—but this alone does not suffice.").

purchaser breaks the seal on software),[406] "clickwrap" (pop-up boxes that prompt computer users to click "I agree"),[407] and "rolling" contracts (provisions that arrive in the same box as the goods).[408] In addition, opinions like *Ajemian* seize upon flaws that drafters can easily cure, such as the inconspicuousness of the posted language.[409] For these reasons, it seems unlikely that lack of assent will be fatal to most non-inheritability clauses.

Instead, courts will probably treat boilerplate indescendibility provisions the same way they treat boilerplate generally: as presumptively binding but subject to further review.[410] This approach reflects the influence of Karl Llewellyn, whose opus *The Common Law Tradition* contains a two-step attempt to square adhesive terms and contractual consent:

> Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent term the seller may have on his form . . . .[411]

The unconscionability doctrine very roughly tracks Llewellyn's analysis. It begins by isolating terms that are procedurally unconscionable—those that are non-negotiable and hard to read, and therefore only capable of generating blanket assent.[412] It then empowers courts to strike down clauses that are also substantively unconscionable, which are so harsh that they fall outside the contours of the imputed agreement.[413]

My earlier analysis provides preliminary guidance for courts applying these principles to adhesive non-inheritability clauses. Recall that pure non-inheritability comes in two basic varieties. First, in its mildest and most

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406. *See, e.g.*, Blizzard Entm't Inc. v. Ceiling Fan Software LLC, 941 F. Supp.2d 1227, 1236 n.7 (C.D. Cal. 2013) ("[I]t appears that the weight of authority is such that shrinkwrap licenses are enforceable.").

407. *See, e.g.*, Ajemian, 987 N.E.2d at 613 (collecting cases).

408. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997); *see also* Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 686 n.26 (2004) (discussing "pay now, terms later" agreements).

409. *See* Ajemian, 987 N.E.2d at 612 ("We do not know, and cannot infer, that the provisions of the 2002 [terms-of-service] were displayed on the user's computer screen (in whole or in part).").

410. Consumer protection laws might also preclude drafters from enforcing adhesive non-inheritability clauses. *See, e.g.*, David P. Sheldon, Comment, *Claiming Ownership, But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 782–85 (2007) (discussing the application of California's Unfair Competition Law to virtual-world end-user license agreements).

411. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

412. *See, e.g.*, David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 393 (2012).

413. A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 122 (Ct. App. 1982); *see also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965) ("[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.").

defensible manifestation, it untangles the knot of ownership after death and allows someone else to acquire an asset. This is the role that indescendibility plays for public offices and taxi medallions.[414] One strand of contractual non-inheritability likewise prevents decedents and their families from monopolizing an object or right. For instance, teams like the Boston Red Sox have made season tickets indescendible to minimize a 7,500-fan waiting list.[415] However, in its second form, indescendibility eviscerates an object or right, as it does with dignities, body parts, and legal claims.[416] This is often the goal that companies seek to accomplish with contractual non-inheritability. One example is the text that accompanies frequent-flier miles and digital assets, which is designed to prevent anyone from enjoying an entitlement after its owner dies. As noted, in some contexts, these provisions contradict customers' reasonable expectations by divesting their estate of an asset into which they have poured time, effort, or money.[417] Yet unlike season tickets, public offices, or taxi medallions, this species of indescendibility does not facilitate equality of opportunity. Without any benefits on the other side of the ledger, these terms seem like a raw exercise of drafting power. Because they are more extreme, courts should be more willing to strike them down.

An important factor for gauging whether a term is substantively unconscionable is whether it has a valid "business justification."[418] Some firms have attempted to defend contractual non-inheritability on administrability grounds, arguing that processing ownership changes is cost prohibitive.[419] But the companies that do allow rewards points, season tickets, and digital assets to be inherited only insist on obtaining a photocopy of the death certificate and speaking to the decedent's personal representative.[420] The expense and hassle involved is akin to opening or closing an account or updating an address. The fact that these explanations do not withstand scrutiny reveals indescendibility by contract for what it usually is: a bald attempt to delete an important right.

However, other administrability concerns are weightier. Consider the inheritability of email. As noted, the Stored Communications Act (SCA) may

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414. *See supra* text accompanying notes 50–51.

415. *See* Amalie Benjamin, *Many Red Sox Season-Ticket Holders Fleeing Now*, BOSTON GLOBE (Feb. 27, 2013), http://www.bostonglobe.com/sports/2013/02/27/many-red-sox-ticket-holders-fleeing-now/S2HwrcNSX6D4Iuqa4G8PLN/story.html.

416. *See supra* text accompanying note 52.

417. *See supra* text accompanying notes 192–94.

418. *In re* DirecTV Early Cancellation Litig., 738 F. Supp. 2d 1062, 1085 (C.D. Cal. 2010). Likewise, when drafters attempt to unilaterally change existing contracts—as Delta did with the inheritability of SkyMiles—the implied covenant of good faith and fair dealing requires new terms to be "commercially reasonable." *In re* Kaplan, 143 F.3d 807, 818 (3d Cir. 1998).

419. *See* Pawlowski, *supra* note 17 (noting that airlines have made frequent-flier miles indescendible, in part, so they "no longer ha[ve] to devote resources to the transfer process").

420. *See* Chelsea Emery, *Don't Let Frequent Flier Miles Die With You*, REUTERS (Mar. 1, 2013, 7:39 AM), http://www.reuters.com/article/2013/03/01/us-inheritance-airmiles-idUSBRE9200I420130301.

prohibit companies from disclosing the contents of a customer's online communications.[421] If so, then firms could not allow a personal representative to access a decedent's account without facing a whopper of an administrability cost: civil liability.[422] In addition, as with body parts, people likely have idiosyncratic feelings about whether to pass on their messages. Some would prefer to preserve this wealth of information for future generations.[423] Yet others would be horrified to have their intimate correspondence preserved in electronic amber. Moreover, very few (if any) estate plans expressly address the issue,[424] making it impossible to identify any particular decedent's wishes. Contractual indescendibility can thus set a kind of privately crafted default rule that safeguards customers' privacy.[425] In turn, it should be more tolerable in this context than when it merely serves the drafter's narrow self-interest.

CONCLUSION

Assets that are immune from freedom of contract have sparked three decades of lively debate.[426] However, items and rights that are impervious to freedom of testation have flown beneath the scholarly and judicial radar. I have shown that the neglected phenomenon of indescendibility stems from sources of legal authority as diverse as the U.S. Constitution, the UAGA, and the inconspicuous text that regulates frequent-flier miles.

In addition, I have contended that the most prominent rationales for these prohibitions on posthumous transfer are unconvincing. The drafters of the UAGA have assumed that indescendibility rests on the same foundations as market inalienability. Yet the strongest justifications for the market inalienability of body parts—concerns about preserving altruism and preventing exploitation and commodification—do not apply to the dead. Likewise, the commonly voiced notion that certain things are not inheritable

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421. *See supra* text accompanying notes 213–15.

422. *See* 18 U.S.C. § 2707(c) (2012) (making violators of the SCA liable for statutory and punitive damages and attorneys' fees).

423. *See, e.g.*, Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMP. L. REV. 67, 79–84 (2008). Of course, nothing prevents individuals from printing out or forwarding important messages during their lives.

424. This may be changing as awareness of digital assets increases. *See, e.g.*, Arden Dale, *Make Sure You Know Who Will Inherit Your Twitter Account*, WALL ST. J. (Sept. 18, 2013, 5:27 PM), http://online.wsj.com/news/articles/SB10001424127887324577904578557572448026196 (noting that a rising number of estate planners are questioning clients about their digital portfolio).

425. By the same token, courts should be less receptive to non-inheritability clauses when faced with evidence that a decedent wanted to convey her email after death. *Cf.* Justin Atwater, Note, *Who Owns E-mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 415 (2006) (proposing that courts adopt a rebuttable presumption that decedents want their email accounts deleted).

426. *See generally* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 987–88 (1985); Calabresi & Melamed, *supra* note 235; Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1324 (2000); Radin, *supra* note 19.

because they are "not property" is circular. Rather than explaining why the inheritability stick is missing, it simply describes the fact that the stick is missing. Finally, some causes of action purportedly expire upon the plaintiff's death because they are too "personal" to pass to others—a harsh result that emanates from confusion about the shared heritage of tort and criminal law.

A better way to conceptualize this issue would be to focus on the burdens that some rights and objects pose as they pass from a decedent to her personal representative to the heirs and beneficiaries. For instance, although allowing body parts to be transmitted by will or intestacy would have many advantages, a monolithic approach that simply deemed them to be descendible property would also penalize many decedents. Likewise, permitting future causes of action to survive would create headaches for personal representatives and the legal system. Even the inheritability of email poses a range of privacy and management challenges. These administrability concerns—and not the conventional ways of thinking about indescendibility—should guide us as we decide what it means for decedents to convey everything they own.