It was a pleasure and an honor for me to present the Keynote Address at Savannah Law Review’s Fall 2015 Colloquium, The Walking Dead. The topic of this event, The Walking Dead, or the Law of the Dead, is a fascinating one and one that has not really received that much attention—or at least not the attention that it is due. I am not one hundred percent sure of why that is the case, but a recent conversation with my sister gave me a little bit of insight. She said to me, “You might find this hard to believe, but not everyone thinks it’s so fun to contemplate matters of death. In fact, most people pretty much want to shy away from it.” So, that might be part of the reason there is a lot less research into this topic than we might imagine. Of course, here in Savannah, Georgia, where ghosts are a primary tourist attraction, conversations surrounding death generally seem to be embraced, as illustrated by the sold-out audience to my Keynote Address at The Walking Dead Colloquium. Certainly, there were also a lot of scholars at the event who have been working on the Law of the Dead and whose work shows it is, in fact, incredibly interesting, important, and even (dare I say) lively. And I have to say that while I am used to speaking about this topic to the living, people I like to call the future dead, I realized here, in Savannah, we might have had some of the current dead listening in as well, so I tried to make my comments relevant for them as well.

This Essay outlines my journey to and through the law of the dead: what brought me to this subject and what I found along the way.

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The subject of the Law of the Dead is not really one that most people think of when they think of legal scholarship. Most think of Contracts, Telecommunications, Criminal Law, and other subjects of that ilk. All of those subjects have their dedicated academics, who have all sorts of events in which everyone gets together to discuss their shared interest in these topics. But we Law of the Dead people really had not had this opportunity before. The Savannah Law Review Colloquium was our very first meeting.

So you might wonder what first brought me to this topic. I first came to this subject by way of the courses I teach: Trusts and Estates, Estate Planning, and Estate Gift Tax. All of these courses are grounded by the principle of freedom of testation. Freedom of testation generally means that in the United States, people can leave their wishes about what they want done with their property, and the law will expend significant effort to actually carry out those wishes. Well, of course, you might think, “yeah, that’s obvious.” But it is not that way everywhere, and it is really not so obvious that it would have to be that way. We could come up with all other rules about what happens to people’s property after death. For example, in some countries, as much as eighty percent of a person’s property must be distributed to the spouse and children after death, allowing that person to control only twenty percent of the posthumously distributed property. But in the United States, we love freedom of testation. It is a critical value to us.

After teaching about freedom of testation, I began to wonder why we care so much about it. Of course people want to provide for their families, but the inquiry goes way beyond that simple sentiment. People sometimes want to control who their kids marry or what their kids do in the future. Sometimes people want their property used in one way and not in another. These people try to do that through their wills. I began to wonder why people care so much about what happens to their stuff after they are dead. Don’t they realize they really are not going to care about these matters after they are dead? So it was sort of strange to me, and worth exploring.

I found that another context where this desire for posthumous property controls came up was in the political battle surrounding estate taxes. Opponents of the estate tax were very successful when they began calling the estate tax the “death tax.” I wondered why that rhetoric was so successful. Because it seems

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1 Civil law countries throughout continental Europe, South America, and in Japan have forced succession statutes, which generally prohibit disinheritance of a decedent’s spouse, children, and grandchildren; some extend this protection to decedent’s parents and more distant relatives. The Oxford Handbook of Comparative Law 1077, 1085–86 (Mathias Reimann & Reinhard Zimmerman eds., 2008); see also Thomas Glyn Watkin, An Historical Introduction to Modern Civil Law 192–218 (1999) (discussing the importance of the institution of the family-communion view of property ownership in civil law countries); see generally David J. Hayton, European Succession Laws (1991) (summarizing in detail the laws governing the transfer and inheritance of property throughout Europe on a country-by-country basis).

to me that when you are dead you are being separated from your property by forces far more powerful than the government. Since you no longer have your property after death, why do people think that is such a bad time for taxes? Isn’t that a good time for taxes?

One possible explanation for people’s attitudes towards posthumous property control is the human desire to live on after death. In this way, the controls our laws afford us can be seen as a form of consolation prize: sorry you are dead, but, hey, at least we are carrying out your wishes.

The problem with this explanation is that it cannot tell the whole story about the Law of the Dead because it does not explain the many areas where American law refuses to carry out posthumous wishes. Consider voting rights. As I write this, we are in a presidential election season, and many voters are deeply committed to supporting their candidate (or opposing other candidates). Now imagine a person who says, “OK, I am really enthusiastic about (fill in your blank: favorite party, candidate, whatever), and I want to make sure I can vote for this person even if I’m dead. And I’d like to leave those instructions.” Well, if that person spoke to a lawyer about it, the lawyer would say, “You, dear client, are crazy.” Our law does not allow this. If you are dead, you lose the right to vote.

Why is this the case? At first glance, we might think the problem is a practical one. How could a dead person exercise the right to vote? However, the law has mechanisms for doing so in the form of executors and other fiduciaries who can act on behalf of principals when they cannot act for themselves. More substantively, there are two reasons we do not like the idea of allowing the dead to vote. The first is that we do not think the dead are very good decision makers. They are not around to see how the world has changed, so we do not want to give them a lot of power. The second reason is: who cares? They are dead and not around to enjoy the benefits (or suffer the consequences) of their vote. When it comes to voting, it seems completely crazy to give rights to the dead. Yet, when it comes to controlling property, we take a very different approach. The law expends great effort in carrying out the interests of the dead.

Another area where American law gives scant attention to the interests of the dead is with respect to reputational interests.3 During life, most people are concerned about their reputations and would be rightfully upset if someone

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3 A number of European countries are much more concerned with the dignity of the dead. They often have governmental organizations that are specifically charged with protecting individuals’ privacy and reputational interests after death. Moreover, other countries also grant artists much broader posthumous protections over their work and name than are given in the United States. See infra pp. 8-10.
spread lies about them in the newspaper. We have lots of laws that protect against that for the living, including libel, slander, defamation, and right of privacy. But once a person is dead, all of those reputational protections are gone for both the individual and that person’s family.⁴

This loss of protection is well illustrated by the case of Johnson v. KTBS, Inc.⁵ The case arose from a gruesome murder in Louisiana, in which one mentally ill child from a very large family allegedly murdered his parents in the family home.⁶ The story was horrible and shocking, and the local news provided a lot of coverage to the double homicide.⁷ As if the facts themselves were not horrid enough, the TV station began adding an additional item of interest to its reporting: "A twin brother and sister, who investigators say later married and had children, are now dead allegedly at the hands of one of their sons."⁸ The Johnson family survivors immediately contacted the news station to correct them and requested that it stop referring to their murdered parents as twins.⁹ Two days later, the news station reported: "In an odd twist to this story, sources close to the investigation say that David Johnson, Sr. and his wife Ruby were also twins, brother and sister."¹⁰ Again, the Johnson family survivors telephoned the station, complaining about this awful and incorrect reporting.¹¹ One can only imagine how the story took hold of the public’s imagination and what happened to the news station’s ratings because of it—they undoubtedly went through the roof. The Johnson family survivors, eight total plaintiffs, sued the news station alleging defamation of their deceased relatives and defamation of plaintiffs’ reputations because they had become falsely known as children of an incestuous relationship.¹² But the court ruled: no remedy.¹³ The parents were dead, thus they were beyond harm and benefit because you cannot harm any body after they are dead.¹⁴ As for the Johnson family survivor plaintiffs, the court held there is no such thing as a relational right of recovery in defamation cases, no matter how badly the false reporting directly injured

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⁴ The Right of Publicity survives death in some states, but this right only protects the economic value associated with identity and not the reputational interest. See generally Jonathan Faber, Recent Right of Publicity Revelations: Perspective from the Trenches, 3 Savannah L. Rev. 37 (2016) (summarizing the development and current state of the Right of Publicity by focusing on technological development providing more means to commercialize another’s persona, the enactment of Indiana’s Right of Publicity statutory scheme, and Michael Jordan’s recent litigation against Chicago grocery stores for implying his persona in their advertisements).


⁶ Id. at 331.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id. at 331–32.

¹³ Id.

¹⁴ Id. at 332 ("Defamatory communications violate one’s right to a good reputation and give rise to a cause of action to recover damages because of the violation. Once a person is dead, there is no extant reputation to injure or for the law to protect.").
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them.\textsuperscript{15} While the United States is very different from other countries, this Louisiana court correctly stated our black-letter law on defamation.\textsuperscript{16}

So, now we see how my theory about American law providing immortality was incomplete. I had this idea that we give rights to the dead because people want the feeling that they will live on after they are dead, but it turns out we only \textit{sometimes} give rights to the dead. There are all these other areas, like the right to vote and protections for reputation, for which we do not give rights to the dead.

How do we understand these differences?

To answer this question, I began surveying all of the ways American law treats the interests of the dead. I imagined a client asking her lawyer about how the law would and would not continue to protect her interests—with respect to her body, her property, and her reputation—after she was no longer living.

My inquiry began with the law of the body, by asking to what extent American law gives people the ability to control their bodies after death. My research quickly brought me to an interesting phrase that is the starting point of the law of the body: \textit{corpus nullius in bonis} (the body belongs to no one).\textsuperscript{17} It turns out that this thing that we all occupy, that we identify with more than probably anything else is not ours. Instinct tells us that if we own anything, it is our own bodies. During life, the law affords us with nearly complete corporeal autonomy.\textsuperscript{18} But it turns out that under American law, once you are dead, you do not own your body. The body belongs to no one, which is a rather incredible notion when compared to one’s rights while living.

Without a recognized property interest, we lose a wide range of constitutional protections.\textsuperscript{19} Something that is property has a designated

\textsuperscript{15} Id. at 333 (“The tort action of defamation is personal to the party defamed. The general rule precludes a person from recovering for a defamatory statement made about another, even if the statement indirectly inflicts some injury upon the party seeking recovery.”).

\textsuperscript{16} \textit{Madoff, supra} note 2, at 121–23.

\textsuperscript{17} The United States inherited this tenet from English common law. See Williams v. Williams (1882) 20 Ch.D. 659 (1882) (ruling that a testator’s instructions that executors deliver his corpse to his friend to arrange for disposition by cremation were unenforceable as a matter of law, because “there can be no property in a dead body”); Lori Andrews, \textit{Who Owns Your Body? A Patient’s Perspective on Washington University v. Catalona}, 34 J.L., Med. & Ethics 398, 400 (2006) (suggesting that under English common law, people’s bodies belonged to the Crown).

\textsuperscript{18} \textit{See, e.g.}, U.S. Const. amend. XIII (abolishing slavery); Lawrence v. Texas, 539 U.S. 558 (2003) (extending the fundamental right to privacy to freedom from prosecution for certain sex acts between consenting adults); Roe v. Wade, 410 U.S. 113 (1973) (extending \textit{Griswold} to abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing a fundamental right to control reproduction through birth control. Further, criminal law prosecutes those who cause intentional bodily injury to another, and tort law grants a cause of action for negligently caused bodily injuries. There is also the right to refuse medical treatment. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990). During life, one can also donate organs to another person and carry another’s baby.

\textsuperscript{19} The Fifth Amendment provides that “no person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V, cl. 5.
property owner who can assert claims related to the property. To help resolve disputes over disposition of family remains, statutes have been enacted that list in order of preference which survivor’s decision regarding disposition trumps, but gaps in these statutes can lead to litigation and odd dispute results. To give individuals some say in this decision with respect to their own bodies (and to protect the interests of the funeral industry from being dragged into litigation), some states have also enacted legislation to provide people the ability to leave reasonable directions in their wills regarding the disposition of their remains or to designate another to do so for them. However, unlike regular property interests, these statutes impose no liability for failure to follow the testator’s instructions, and public health statutes generally will trump any wishes of the decedent or the survivors.

My research of the concept of corpus nullius in bonis brought me to very interesting subjects like grave robbery, including stories of people rioting at

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20 See, e.g., Frances H. Foster, Individualized Justice in Disputes over Dead Bodies, 61 Vand. L. Rev. 1351, 1362 (2008) (recounting how the dispute over the disposition of Anna Nicole Smith’s remains resulted in the Florida probate court awarding decision-making power to her infant daughter, Dannielynn); see generally Susan Etta Keller, Only Love Remains: Straddling the Real and the Symbolic in the Disposition of Cremated Remains Between Divorced Couples, 3 Savannah L. Rev. 117 (2016) (arguing for courts to embrace symbolic meaning in cremated remains in a manner to allow their equitable distribution).


22 These statutes were the result of lobbying by the funeral industry, whose paramount concern was avoiding liability from dissenting survivors of the decedent.

23 See, e.g., Snyder v. Holy Cross Hospital, 352 A.2d 334 (Md. Ct. Spec. App. 1976) (allowing an autopsy to determine cause of death, following the sudden and unexplained death of an eighteen-year-old male who had been in apparent good health, over the religious objections of the father); 18 Am. Jur. 2d Coroners or Medical Examiners § 7 (2015) (stating that states have broad discretion to determine when a medical investigation into the death of an individual, including an autopsy, should be held); Asmara M. Tekle, Have a Scoop of Grandpa: Composting as a Means of Final Disposition of Human Remains, 3 Savannah L. Rev. 137 (2016) (arguing that the law should accommodate a testator’s wishes to be composted just as it previously was modified to permit embalming, cremation, and alkaline hydrolysis).

24 See generally Michael Sappol, A Traffic of Dead Bodies: Anatomy and Embodied Social Identity in Nineteenth-Century America (2002) (exploring the link between formalized medical education, anatomical research, and body snatching); Richard H. Underwood, Notes from the Underground (Sometimes Aboveground, Too), 3 Savannah L. Rev. 161 (2016) (recounting specific stories of resurrection men and various funereal technologies developed to prevent such activities).
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medical schools because of rampant grave robbery for anatomy lessons.\(^{25}\) This research also led to the evolving definition of death itself, which began during ages when the threat of premature burial was very real.\(^{26}\) One of my favorite finds was the story of Jean-Jacques Winslow, an eighteenth-century French physician and anatomist who devoted his life to coming up with a definitive surgical test to determine whether death had occurred.\(^{27}\) He came by his interest quite honestly because he was twice left for dead and woke up in a coffin.\(^{28}\) Given his personal experience, I think it is no surprise he chose an extremely conservative definition of death: putrefaction (i.e., decomposition of the body).\(^{29}\) While Winslow was understandably attracted to that standard, it was an inconvenience and health risk for neighbors and family members who had to wait for decay—Is he dead yet? No, not decaying. In addition, this standard significantly affected the ability of medical students and other anatomists to study cadavers because they had to wait until the body began to decay.\(^{30}\) The definition of death continued to change over time to respond to societal needs. Most notably, once organ donation became technologically possible, it was necessary to change the definition of death from cessation of heart function, to cessation of brain function, in order to enable organ retrieval from a person whose blood flow was maintained by a machine.\(^{31}\)

The law of the body has continued to change as technological advances have developed. Some of the most recent issues involve posthumous conception and cryonics. Another example is the exhumation of sperm from dead men for posthumous procreation.\(^{32}\) Apparently it is not hard to do. Also, embryos and gametes can now be created and frozen before death for later use, even after the death of both biological parents.\(^{33}\) For both means of posthumous conception, legal issues arise involving who determines the use of reproductive material after death of the donor and when a person will be treated as the parent of a

\(^{25}\) One riot that occurred at Columbia University lasted for two days, and seven people were killed. Sappol, supra note 24, at 4.

\(^{26}\) As a practical matter, people did not have the tools to determine whether death had in fact occurred until the advent of medical technology that measured brain and heart activity; thus, the fear of premature burial was indeed a realistic fear before the mid-twentieth century.


\(^{28}\) Id.

\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) Madoff, supra note 2, at 37.

\(^{32}\) See generally Kristine S. Knaplund, Postmortem Conception and a Father’s Last Will, 46 Arizona L. Rev. 91 (2004) (discussing legal issues surrounding a loved one’s use of cryopreserved sperm after the donor’s death); Ellen Trachman & William E. Trachman, The Walking Dead: Reproductive Rights for the Dead, 3 Savannah L. Rev. 91 (2016) (exploring the legal complications surrounding posthumous procreation through the use of artificial reproductive technology).

posthumously conceived child, particularly for purposes of inheritance and other survivor benefits. There is no comprehensive federal or state statutory scheme governing these issues; thus, they are generally left to the private realm of civil litigation. Lastly, the yet-to-be-perfected science of cryonics raises a number of legal issues, including those surrounding its permissibility under public policy, honoring the decedent’s wishes, autopsy avoidance, timing, and financial security in the event of successful reanimation. In Boston, we all became very interested in cryonics when the son of baseball legend Ted Williams had his father’s body cryonically preserved after his death in 2002, spurring a court battle among Williams’s children. All of these new scientific and technological developments pose interesting challenges to the development of the law of the body.

Then I turned to the other subjects—like controlling property and controlling reputation—and everywhere I went I found these really surprising stories. One of my favorites is the story of the Nobel Peace Prize that is awarded annually by a foundation established by Alfred Nobel. Most people know that Alfred Nobel’s fortune derived from the development of dynamite and other armaments. However, what is less well known is the odd story that is believed to have given rise to this charitable gift.

Alfred’s brother Ludwig died in 1888, and a French newspaper, mistakenly believing that Alfred had died, ran an obituary on Alfred Nobel. This obituary read: “Le marchand de la Mort est mort. Le Dr. Alfred Nobel, qui fit fortune en trouvant le moyen de tuer plus de personnes plus rapidement que jamais auparavant, est mort hier.” (The merchant of Death is dead. Dr. Alfred Nobel, who became rich by finding ways to kill more people faster than ever before, died yesterday.) Is it any wonder that shortly after, Alfred Nobel decided he had better do some serious name rehabilitation? He rewrote his will to devote the bulk of his fortune to establish the Nobel Foundation with the express purpose to award annual Nobel Prizes to those deemed to have contributed the greatest benefits to

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34 See generally John A. Robertson, Posthumous Reproduction, 69 Ind. L. J. 1027 (1994) (arguing for protection of reproductive autonomy in posthumous reproduction only if that person expressly consented while alive).
35 “Cryonics is a process in which people who are legally dead are cooled to extremely low temperatures in the hope that future technology will be able to revive and cure the of whatever illness was responsible for their death.” MADOFF, supra note 2, at 48.
36 Id. at 48–56.
37 David Hancock, Ted Williams Frozen in Two Pieces, CBS News (Dec. 20, 2002, 10:30 AM), http://www.cbsnews.com/news/ted-williams-frozen-in-two-pieces (reporting Williams’s daughter’s losing claim against disposition by cryonics, and the additional litigation against the cryonics company that decapitated Williams while losing several samples of his DNA).
38 MADOFF, supra note 2, at 87.
40 Id.
humanity—thus, Nobel managed to have his name associated with the people who were most valued in every generation through this charitable foundation.\textsuperscript{41}

However, even more important than the fun stories I found in my research on the Law of the Dead, was this: although death is universal, the Law of the Dead is very local and differs significantly from country to country. As I mentioned in the beginning, the United States expends a lot of effort to effect people’s wishes about the disposition of their property at death through the principle of freedom of testation. Commitment to this principle even allows a parent to disinherit a minor child, even if the effect is that the child becomes a ward of the state. However, many other countries instead start with protection of the family and only allow freedom of testation with respect to a small portion of a person’s estate.

Another area where there are significant differences is with respect to protecting the reputations of the dead. Although the United States provides no legal protections for the reputations of the dead, many other countries provide great protections for the dead’s dignitary and reputational interests.

These global differences seem to only add more confusion to understanding why we make the choices we do with respect to recognizing the interests of the dead. However, I then came across the work of Polish social-theorist Zygmunt Bauman, and his book called Mortality, Immortality and Other Life Strategies.\textsuperscript{42} Bauman’s work provided an important construct for understanding the Law of the Dead.

According to Bauman, the function of all societies is to provide the permanence that human life lacks.\textsuperscript{43} According to Bauman, societies do this by providing forms of generalized immortality for all of its members, such as death notices and grave markers, as ways for individuals to be remembered.\textsuperscript{44} In this way, we can understand that many laws protecting the interests of the dead (like the right to write a will in the United States) also serve this function of providing generalized immortality.

Bauman also provides insights for understanding the differing rules among different countries. Bauman noted that we can tell what a society most values by seeing to whom it gives particularized immortality.\textsuperscript{45} Everyone might get a death notice, but who gets the long obituaries? Who gets the buildings named after them? Who gets the statues and memorials? In Savannah, there are monuments to Nathanael Greene, and Casimir Pulaski, and many others.\textsuperscript{46} Who are they?

\textsuperscript{41} Id.
\textsuperscript{42} Zygmunt Bauman, Mortality, Immortality and Other Life Strategies (1992).
\textsuperscript{43} Id., supra note 2, at 153.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} The Nathanael Greene Monument is located in Johnson Square, and the Casimir Pulaski Monument is located in Monterey Square in Savannah, Georgia, which also is home to Fort Pulaski, a National Monument. Savannah is home to over twenty monuments and memorials commemorating the dead, not including Bonaventure Cemetery, Colonial Park Cemetery, and Laurel Grove Cemetery (each containing
These are the people that society most values, and we give them particularized immortality. And if you look at the Law of the Dead through that lens, you can work backwards to see what each society truly values.

A really interesting example comes up with respect to the question of who controls a work of art after death. A great painter creates a painting, and somebody buys the painting, and then they both die. Who controls that painting? In the United States, the answer is obvious. You do not have to go to law school to know this is what it means to be an owner. Owners get to do whatever they want with artwork. But not so in France. France is a country where artists are very much valued, and artists continue to have rights over their artwork even after they are dead, even after they have sold legal ownership of their artwork. These moral rights survive death because artists are greatly valued in that society. In the United States, we value property owners.

And when I looked into this area, I found this very interesting illustration of this difference in the case of the film director John Huston, who directed The Asphalt Jungle among many other great films. Huston was a very famous director, and a dispute arose because a lot of his films were originally created in black and white. Turner Entertainment bought the copyright to them and wanted to colorize all of the movies, which they did in the 1980s. Huston was very much opposed to this because he thought colorization absolutely ruined the artistry. However, Huston no longer owned the copyright and, thus, had no recourse. A little time passed, and John Huston died, after which Turner Entertainment went to France to try to show the new colorized The Asphalt Jungle. And, what happens? John Huston’s family goes to France and demands that Turner Entertainment stop. In France, the court says: “Yes, we are going to stop this, because, regardless of who owns the copyright, John Huston as the film’s director retained moral rights in his creation. These rights could not have been transferred to Turner because Huston did not have the power to transfer his moral rights except to his heirs at death. Moreover, these moral rights never expire, so his

47 The United States does not recognize moral rights, unlike several countries in Europe, as well as other parts of the world, including Japan, Mexico, Canada, and Nigeria, with France being the foremost defender of moral rights. Cambra E. Stern, A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights, 51 UCLA L. Rev. 849, 853-54 (2004).
48 Id. at 879.
51 David A. Honicky, Film Labelling as a Cure for Colorization and Other Alterations: A Band-Aid for a Hatchet Job, 12 Cardozo Arts & Ent. L.J. 409, 409 (1994) (“‘I just can not watch anymore . . . please I can’t watch anymore.’ This simple statement, by noted film director John Huston [after viewing the first few minutes of the colorized version of The Asphalt Jungle], encompasses the anger, pain, and frustration at his inability to protect the integrity and essence of his films.”).
52 Id.
53 Swanson, supra note 50, at 40.
54 Id.
heirs can exert his interest in order to protect his reputation for a really long time because they continue in the family. Thus, the United States and France have two very different approaches to the same type of issue, illustrating how the Law of the Dead shows what is most valued.

In exploring the development of the Law of the Dead, I also found that not only do American property owners have greater legal protections after death than anyone else, but in each of these areas where property owners have rights, we have seen a tremendous expansion of these rights over time. We see evidence of this in charitable trusts, copyright law, right of publicity, and dynasty trusts. These are all areas where property owners have received more and more posthumous rights over time.

A charitable trust allows somebody to set aside money for some charitable purpose, but throughout most of the nineteenth century, the law was resistant to allowing charitable trusts and was particularly resistant to allowing them to exist in perpetuity. But of course, now anybody (anybody being anyone who has money) can set aside money for whatever purpose in perpetuity, and the law will respect that person’s wishes forever.

The history of our copyright law is similar. When Thomas Jefferson suggested a term for copyright law, he was interested in it lasting for the life of the creator and even looked at actuarial tables to come up with a copyright protection period of twenty-eight years. Now, copyright lasts until seventy years after the death of the creator—a huge expansion. There are many issues about whether the expansion of copyright law is a good idea.

Another example is the right of publicity, which grants a property right in the economic value of a person’s identity. This was formerly not recognized as

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55 The case truly turned on whether French or American laws would apply because, per the French Copyright Act, Huston’s moral right to The Asphalt Jungle is perpetual, inalienable, imprescribable, and superior to Turner Entertainment’s economic rights in the film. Id. The heirs won because the court applied the Berne Convention Article 14(2)(a), which signaled the court to apply the law of the country where protection is being requested. Id.


57 Id. at 920–28.

58 U.S. Const. art. I, § 8, cl. 8 ("Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

59 Based on actuarial tables, Thomas Jefferson proposed nineteen years, and the original copyright term essentially accomplished this by having a fourteen-year term with the possibility for renewal for an additional fourteen-year term, provided that the author was still living. Paul K. Saint-Amour, The Copywrights: Intellectual Property and the Literary Imagination 125 (2003).


61 See Eldred v. Ashcroft, 537 U.S. 186 (2002) (Breyer, J., dissenting) (arguing that the extension, from an economic viewpoint, is the equivalent of a monopoly that can last in perpetuity, and that inhibits, rather than promotes, creative expression).

62 See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (holding that unauthorized use of photographs on baseball cards violated the right
a property right at all, but now a number of states have expanded the right, allowing movie stars, baseball players, and other celebrities to control their persona for a hundred years or longer.63

Lastly, the most pernicious example is the dynasty trust, which enables wealthy people to set money aside for their children, grandchildren, and great grandchildren in tax-free, creditor-proof trusts.64 Dynasty trusts were once limited by the Rule Against Perpetuities, a technical property rule that limited the term of non-charitable trusts to approximately ninety years.65 Then, bankers realized they could increase their trust business if they convinced their local legislatures to repeal their states’ Rule Against Perpetuities statutes.66 Today, wealthy people can set money aside for their heirs for 360 years,67 1000 years,68 or even in perpetuity.69 Remember, this is tax-free, creditor-proof money. This is going to greatly exacerbate problems of wealth inequality in our society.

Why have we allowed this expansion of the Law of the Dead, even at the expense of the living? I think one reason is the stealth nature of these changes. Other than Savannah Law Review’s Colloquium, there really are no Law of the Dead conferences. These changes are happening in different fields and often at the state level without much recognition of such expansions.

Moreover, the American public has been particularly receptive to these changes because Americans as a people are quite anti-death. British historian Arnold Toynbee noted that, for Americans, death is “un-American” and an affront to every American citizen’s inalienable right to life, liberty, and the pursuit of happiness—“the American way of life.”70 Death is really not our thing, so we really like laws that allow us to live on after death.

to publicity of prominent baseball players, who had previously and exclusively licensed their pictures for use on plaintiff’s baseball cards); Jonathan Faber, supra note 4, at 37; Jonathan L. Kranz, Sharing the Spotlight: Equitable Distribution of the Right of Publicity, 13 Cardozo Arts & Ent. L.J. 917, 914 (1995).

64 Madoff, supra note 2, at 76.
65 Id. at 76–78.
68 See, e.g., Utah Code Ann. § 75-2-1203 (West 2015) (“A nonvested property interest is invalid unless within 1,000 years after the interest’s creation the interest vests or terminates.”); Wyo. Stat. Ann. § 34-1-139(b)(ii) (West 2015) (validating 1000 years vesting or terminating period for trusts created after July 1, 2003).
Further, the United States is a relatively young nation that is distinctly ahistorical, and the founders of this country were very anti-dead-hand control. Thus, we have little experience with the negative consequences of living with dead-hand control. It is much more appealing to imagine our own future dead hand control than to live with the dead hand control of the past. Our lack of direct experience with dead hand control has also allowed the Law of the Dead to grow.

Finally, I think it is important to note that in all of the areas in which there has been the greatest expansion of the interests of the dead, this expansion has also served corporate interests, including those of the banking industry and the entertainment industry.

After all this research on the Law of the Dead, I find myself with the following hope: when we think about policies that are going to work best for us as a country, we should not only think about the current living and the future dead, but we must consider the future living as well.