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Better Left Forgotten

AN ARGUMENT AGAINST TREATING SOME SOCIAL MEDIA AND DIGITAL ASSETS AS INHERITANCE IN AN ERA OF PLATFORM POWER

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INTRODUCTION

Platform power is everywhere. From Google to Facebook to Uber, legal scholars are concerned with the overwhelming power of online platforms.¹ Among the most pressing problems are data

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¹ See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1628 (2017) (arguing that Uber “can monitor and channel the behavior of all users” and that “their position as all-knowing intermediaries also presents unique opportunities for market manipulation”); Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1880 (2013) (“During the past decade, the problems involving information privacy—the ascendance of Big Data and fusion centers, the tsunami of data security breaches, the rise of Web 2.0, the growth of behavioral marketing, and the proliferation of tracking technologies—have become thornier.”); Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239, 250 (2013) (“[P]erhaps the most oft-cited example of the potential of big data analytics lies within the massive data silos maintained by the online tech giants: Google, Facebook, Microsoft, Apple, and Amazon”); K. Sabeel Rahman, *The Shape of Things to Come: The On-Demand Economy and the Normative Stakes of Regulating 21st-Century Capitalism*, 4 EUR. J. RISK REG. 652, 654 (2016) (arguing that certain platforms represent “a manifestation of deeper trends in the changing structure of capitalism, and the reallocation of economic power”).

ownership,² economic surveillance,³ privacy,⁴ information asymmetries, and consumer protection.⁵ Platforms monitor, nudge users toward over-participation and over-consumption, and sell information.⁶ There is widespread literature that analyzes the problem of platform practices and suggests various regulatory solutions.⁷ Despite the vastness and prominence of these discussions, they neglect to address the role of platforms in shaping personhood, relationships, and memory.

This role should nonetheless be salient in the discussion of postmortem access to social network profiles. Yet, the ongoing debate on inheriting digital assets remains largely oblivious of platform power, focusing on a much too narrow perspective.⁸ When a user dies, family members may ask to access his or her social network account (on Facebook, Twitter, Instagram, or LinkedIn) and manage its content.⁹ In the recent past, platforms refused to allow access, resulting in a public outcry and prompting

² See Daniel L. Rubinfeld & Michal S. Gal, *Access Barriers to Big Data*, 59 ARIZ. L. REV. 339, 359 (2017) (“Barriers to data collection might also arise from limited information on who owns the relevant data, or on the costs of locating and contracting with such data holders.”); Linnet Taylor, *What is Data Justice? The Case for Connecting Digital Rights and Freedoms Globally*, BIG DATA & SOC’Y, July-Dec. 2017, at 1 (2017) (arguing that a concept of justice is necessary to establish legal rules to the data economy).

³ Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 159 (2017) (discussing the “relative privilege and disentitlement in the evolving debate about the future of fair information practices in the era of pervasive commercial surveillance”).

⁴ *Id.* at 178 (“Many lawsuits against platform firms allege information privacy harms.”).

⁵ See generally Calo & Rosenblat, *supra* note 1, at 1631 (arguing that consumer protection laws are well equipped to address monitoring by platforms).

⁶ *Id.* at 1628.

⁷ See generally Rubinfeld & Gal, *supra* note 2; Cohen, *supra* note 3; Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 117 (2016) (“New technologies present new opportunities and new challenges for regulation. The rise of the platform adds new types of risk, implicating liability laws, consumer protection laws, insurance laws, employment and labor laws, and property and zoning laws. But they also provide new ways to address some of the very same social goals that law has attempted to reach.”).

⁸ See generally Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799 (2014) (arguing for reforming succession laws to include digital assets); Naomi Cahn, *Probate Law Meets the Digital Age*, 67 VAND. L. REV. 1697 (2014) [hereinafter Cahn, *Probate Law*] (promoting a reform in succession laws); Elizabeth Holland Capel, *Conflict and Solution in Delaware’s Fiduciary Access to Digital Assets and Digital Accounts Act*, 30 BERKELEY TECH. L.J. 1211 (2015); James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIAMI L. REV. 385 (2014); Elizabeth Sy, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught up with Technology?*, 32 TOURO L. REV. 647 (2016); Ashley F. Watkins, Comment, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193 (2014).

⁹ Banta, *supra* note 8, at 811 (“The increase in internet use makes access to digital financial accounts more important for caretakers and family members after the death of a loved one.”). Scholars and estate planners now encourage testators to grant explicit permission for family members to access online accounts. See Gerry W. Beyer & Naomi Cahn, *When You Pass on, Don’t Leave the Passwords Behind: Planning for Digital Assets*, 26 PROB. & PROP. 40, 41 (2012).

law reform efforts.¹⁰ Surprisingly, this important debate has not considered the role of platform involvement, including economic surveillance, monitoring, and nudging, in shaping new legal rules. This article calls for reevaluation of current legislation and contributes a novel perspective to these discussions. It emphasizes the need to protect users from platform power, motivated and fueled by economic interests, and exposes the structural conditions that distort and manipulate personhood and memory. To make this claim, this article focuses on one type of digital asset—social network profiles, such as those on Facebook, Twitter, Instagram, and LinkedIn accounts, highlighting in particular personal profiles that have *no* apparent economic value to the user or to immediate family members.

The core question in current regulatory debates is whether or not digital assets are inheritable property.¹¹ The legal answer is now gradually becoming “yes.”¹² The debate surrounding the legislation is mostly confined to a familiar set of arguments: the user’s presumed will, the interests of family members, privacy concerns, and terms of services agreements that underlie the transactions.¹³ Doctrinally, the question of access to the account has been quickly framed as a matter of the

¹⁰ See Naomi Cahn et al., *Digital Assets and Fiduciaries*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 91, 94 (John A. Rothchild, ed., 2016); REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (UNIF. LAW COMM’N 2015); see also *infra* Section I.B.

¹¹ See Banta, *supra* note 8, at 823 (“[P]rivate agreements controlling digital assets are the first widespread contracts to prohibit transfer of personal property instead of facilitating it.”); Cahn, *Probate Law*, *supra* note 8, at 1703 (“[N]ew technologies pose new conundrums for trusts and estates law. With every change in forms of wealth, technology, or entertainment, trusts and estates law has had to adapt correspondingly, with doctrines pressured to expand beyond real property to stocks, bonds, copyrights—and now, digital assets. Digital assets present the same problems as other forms of new property.”); Sy, *supra* note 8, at 648.

¹² See Natalie Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 CARDOZO L. REV. 1099, 1108 (2017) [hereinafter Banta, *Property Interests*] (stating there is a “compelling argument that an individual has ownership over digital assets to the extent that she should be able to devise the asset at death”); Cahn, *Probate Law*, *supra* note 8, at 1703–04 (noting that existing trusts and estates law can be interpreted to encompass digital assets); Sy, *supra* note 8, at 648–49 (explaining the development of legal rules in the field, from state law to a uniform act and to the revised act).

¹³ Sy, *supra* note 8, at 653 (discussing a survey that determines Americans believe “the law ‘should err on the side of privacy when individuals die without documenting their preference about how to handle their private communication and photos’”); Cahn, *Probate Law*, *supra* note 8, at 1704–05 (“For most sites, a user enters into some kind of a terms-of-service agreement, clicking through a series of statements. While early terms-of-use agreements set out terms on a separate site, they have evolved towards a requirement that users click ‘I agree’ before being bound.”); see also Cahn et al., *supra* note 10, at 95–96 (“Stories abound of grieving family members and friends searching for answers, comfort and support in the social media accounts, voicemails and other digital assets of their deceased friends and relatives. For example, a teenage boy discovered the ‘ghost’ of his deceased father in a computer game they had played together when the boy was only six years old. While the monetary value of social media accounts is generally small, access to the account may be priceless to family and friends.”).

law of wills, trusts, and estates.¹⁴ Indeed, the legal discourse frequently refers to social network accounts as part of the user's estate, devising legal rules that support this characterization.¹⁵ This rhetoric has also permeated popular discourse.¹⁶

Yet legal scholarship fails to consider the implications of this conception for users' vulnerability in the face of corporate power. Social media companies have tremendous power over their users, and they control users' experiences, information, and relationships.¹⁷ This article contends that a discussion of postmortem access is not complete, both normatively and analytically, without a full appreciation of the role of platforms in shaping memory and continuity. Access to profiles with no economic value (as opposed to Facebook influencers for example)¹⁸ is taken to project the personhood of the deceased, perpetuate her memory, and serve as a virtual tombstone for her loved ones.¹⁹ The question then becomes: what is the vision of self that is manifested in these user profiles? (a flawed, partial, hyper-documented vision).²⁰ Social network sites such as Facebook and Twitter have a strong interest in collecting personal data for commercial purposes.²¹ They encourage users' activity, including casual thoughts, occasional online activity, and incidental comments because each use produces profitable data.²² They accomplish this by documenting and preserving data for others to like, comment upon, and share.²³ This all-

¹⁴ See David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 588–93 (2017) (discussing digital assets as part of the deceased person's estate); Beyer & Cahn, *supra* note 9, at 41 (discussing the importance of planning the disposition of digital assets).

¹⁵ See Horton, *supra* note 14, at 548–49; Beyer & Cahn, *supra* note 9, at 41; see also *infra* Section I.B.

¹⁶ See EVAN CARROLL & JOHN ROMANO, YOUR DIGITAL AFTERLIFE 86 (2011) (characterizing private solutions for password management as “digital estate plans”).

¹⁷ See *infra* Section I.A.

¹⁸ See Yuyu Chen, *Influencer Marketing on Facebook is About to Get More Expensive*, DIGIDAY (Aug. 16, 2017), <https://digiday.com/marketing/influencer-marketing-facebook-get-expensive/> [<https://perma.cc/C66W-HMU9>] (Statement of Matt Britton, CEO of Crowdtap) (“Most brands are using influencers on Facebook to rely on their following base for organic reach . . .”).

¹⁹ See Cahn et al., *supra* note 10, at 95–96 (discussing stories of grieving family members).

²⁰ See discussion *infra* Part III.

²¹ Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75, 78–80 (2015); see also NICK SRNICEK, PLATFORM CAPITALISM 6 (2017); DANIEL TROTTIER, SOCIAL MEDIA AS SURVEILLANCE: RETHINKING VISIBILITY IN A CONVERGING WORLD 88 (2016).

²² See Cohen, *supra* note 3, at 154 (“Platform users seek access to the essential social, commercial, and cultural connectivity that platforms provide, while platform providers seek access to the data necessary to create and sustain competitive advantage in their chosen field(s) of intermediation.”).

²³ See discussion *infra* Part II.

encompassing preservation transforms people's casual online activities into what is regarded as an online extension of users' personhood, an "extended self."²⁴ According to Russell Belk, a prominent marketing researcher, "the Internet constantly asks us: 'Who are You?'"²⁵ Yet this seemingly harmless self-reflection conceals the power embedded in our digital experience.

The article uncovers the connection between corporate interests and the agency, personhood, and relationships projected by social network profiles, and calls for a reflexive move in evaluating these important questions. In support of the claim that platforms' active involvement in social network profiles significantly undermines agency, this article builds on the legal and philosophical concepts of agency, autonomy, and vulnerability. The term *agency* is defined in reference to a broad notion of selfhood, which is closely linked to, but does not overlap with autonomy, personhood, and identity.²⁶

In order to fully evaluate agency in social networks, this article engages with three theoretical approaches: (1) Joseph Raz's self-authorship theory; (2) Jennifer Nedelsky's relational autonomy account; and (3) Martha Fineman's vulnerability theory.²⁷ This article illustrates that despite their differences, each of these approaches calls into question the influence that a platform's power and economic interests have on its users' agency, personhood, and social relations. Relying on Christine Korsgaard's interpretation, we take agency to refer to the ability to act in a way that constitutes ourselves as the authors of our movements, while at the same time making ourselves "into [the] particular persons that we are."²⁸ Unlike autonomy, then, which is a state of self-governing,²⁹ agency here is an ongoing process of self-constitution. As Korsgaard puts it, in this sense, agency is not a state, but rather an "action itself."³⁰

This article finally argues that we are constantly asking the wrong questions. Instead of asking whether profiles are property, we need to ask how the agency of the user within this balance of powers should be protected in the context of postmortem access to social network profiles. It contributes a

²⁴ Russell Belk, *Extended Self in a Digital World*, 40 J. CONSUMER RES. 477, 484 (2013).

²⁵ *Id.*

²⁶ CHRISTINE KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY xii–xiii (2009).

²⁷ See *infra* Section II.A.

²⁸ KORSGAARD, *supra* note 26, at 130.

²⁹ JOSEPH RAZ, THE MORALITY OF FREEDOM 390 (1986).

³⁰ KORSGAARD, *supra* note 26, at 44.

critical consideration to an ongoing debate and suggests possible modifications to current reforms.

Part I of this article begins with a working definition of social network profiles, and identifies the interests protected by law. It then analyzes the current regulation of postmortem access to digital assets both in the United States and in Europe. Part II discusses theoretical approaches by Raz, Nedelsky, and Fineman, and studies the role of user agency and platform power in social networks, while highlighting corporate manipulation and economic surveillance. It further stresses the absence of the themes of autonomy, agency, and vulnerability from the current discourse. Part III reinforces this conclusion based on theories of property and inheritance, and explains the problem of memory and representation of the self in social network profiles. Finally, Part IV outlines possible implications for law reform.

I. THE LEGAL STATUS OF SOCIAL NETWORK PROFILES

A. *Defining Social Networks*

Digital technologies are becoming a big part of our lives.³¹ We rely on the internet for entertainment, banking, shopping, social interaction, and information.³² There are many differences among digital technologies, but as a matter of terminology, password-protected accounts are typically known as *digital assets*.³³ This term casts a wide net, encompassing various types of digital presence. Digital assets include digital bank accounts, emails, personal documents, blogs, and social network profiles.³⁴ This article, however, does not attempt to make an overreaching argument concerning all digital assets. We discuss only profiles on social network sites (SNS) such as Facebook, Twitter, LinkedIn, Instagram, Flickr, and the like. Financial assets are different from email accounts, and the latter differ from

³¹ See DEBORAH LUPTON, DIGITAL SOCIOLOGY 1–4 (2015) (noting that “we have reached a point where digital technologies’ ubiquity and pervasiveness are such that they have become invisible”); see also Banta, *supra* note 8, at 800 (“The internet and computers facilitate nearly every aspect of our personal lives. Our personal records, tax filings, bills, music, communication, books, photos, videos, and even journal entries are stored on our computer or in ‘the cloud’ in digital form.”).

³² LUPTON, *supra* note 31, at 1–4; Banta, *supra* note 8, at 800.

³³ Banta, *supra* note 8, at 800–01 (explaining that the “average American regularly accesses more than twenty password-protected sites, all of which could store personal information or assets. Our use of online accounts has created a new asset known as ‘digital assets.’”).

³⁴ *Id.* at 801.

alternate life quests in video games.³⁵ Grouping all types of digital assets together is problematic and potentially misleading. Social network profiles present a unique challenge, as they are often understood as a digital representation of social ties and a projection of the self.³⁶ In fact, most profiles (as opposed to Facebook business *pages*) do not have an immediate economic value.³⁷ For this reason, and in order to focus on the effect of corporate manipulation on memory, relationships, and expressions in social networks, this article discusses only profiles that do *not* have an economic value, and whose primary worth is personal and relational.

SNSs have become a massive force in today's society.³⁸ These sites function as online communities where users can interact and share information and preferences via posts, "likes," videos, or photos.³⁹ Social network sites are defined as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."⁴⁰ These sites have considerable cultural impact. Research shows that in 2012, Facebook ranked fourth among the most trafficked websites in the United States, and first in terms of photograph-sharing.⁴¹ A recent survey conducted by the Pew Research Center found that 68 percent of American adults have a

³⁵ See Banta, *Property Interests supra* note 12, at 1102–03 (distinguishing between emails and social networks on the one hand, and digital media on the other). Yet, the discussion in the literature is often broad and not sensitive to the differences. See, e.g., Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1039 (2011) ("Documents once found in wallets, desks, and safety deposit boxes are now accessed mainly through email and website accounts.").

³⁶ See, e.g., Soraya Mehdizadeh, *Self-Presentation 2.0: Narcissism and Self-Esteem on Facebook*, 13 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 357, 357–58 (2010).

³⁷ Cf. Sally Brown Richardson, *Classifying Virtual Property in Community Property Regimes: Are My Facebook Friends Considered Earnings, Profits, Increases in Value, or Goodwill?*, 85 TUL. L. REV. 717, 755–57 (2011) [hereinafter Richardson, *Virtual Property*] (distinguishing personal profiles from business pages, though treating all of them as property).

³⁸ *Id.* at 720–21.

³⁹ Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 358 (2010).

⁴⁰ danah boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007).

⁴¹ Donghee Sinn & Sue Yeon Syn, *Personal Documentation on a Social Network Site: Facebook, a Collection of Moments from Your Life?*, 14 J. ARCHIVAL SCI. 95, 98–99 (2014); see also James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149 ("Facebook knows an immense amount about its users. A fully filled-out Facebook profile contains about forty pieces of recognizably personal information, including name; birthday; political and religious views; online and offline contact information; gender, sexual preference, and relationship status; favorite books, movies, and so on; educational and employment history; and, of course, picture.").

Facebook profile and about three-quarters of them access it daily.⁴² A previous study found that “[a] majority of Americans now say they get news via social media, and half of the public has turned to these sites to learn about the 2016 presidential election.”⁴³ Similarly, as of June 2017, the most downloaded app of all time is Facebook, and the fourth is Instagram.⁴⁴

Social media activity typically includes a personal profile that contains the user’s biographical information (name, birthday, residence, and education), familial status, personal tastes, and list of friends.⁴⁵ These profiles, however, are not just aggregated personal information. They encourage users to communicate with one another through likes, shares, comments, and birthday wishes.⁴⁶ Profiles create hubs for social and communal interaction as well as a platform for self-expression.⁴⁷ The combination of information, social activity, and the projection of the self in social network sites makes profiles very hard to characterize legally. Are personal accounts expressions, a service, or property? Legal scholarship has addressed some of these questions,⁴⁸ and we will briefly mention the interests that are particularly important for the study of users’ autonomy and agency and its impact on personhood and relationships.

Three legal interests are particularly important for our purpose here: (1) social networks serve as a unique locus or mode of *expression*; (2) social networks’ function as a *public utility*; and (3) social network profiles as *property*. These interests are distinct but may overlap. First, social network activity is a form

⁴² Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. 1, 2 (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> [<https://perma.cc/5HBZ-92GN>].

⁴³ Shannon Greenwood et al., *Social Media Update 2016*, PEW RES. CTR. 1, 2 (Nov. 11, 2016), <https://www.pewinternet.org/2016/11/11/social-media-update-2016/> [<https://perma.cc/TA9U-JANC>].

⁴⁴ Chauncey Neyman, *A Survey of Addictive Software Design* (June 2017) (unpublished thesis, California Polytechnic State University at San Luis Obispo), <http://digitalcommons.calpoly.edu/cscsp/111> [<https://perma.cc/4L7F-R32A>].

⁴⁵ Grimmelmann, *supra* note 41, at 1149.

⁴⁶ See David Kasch, *Social Media Selves: College Students’ Curation of Self and Others Through Facebook* 94, 99, 187 (2013) (PhD Dissertation, University of California, Los Angeles).

⁴⁷ Grimmelmann, *supra* note 41, at 1157 (“[A] social network site lets you establish your social position. The basic desire is simple and age-old: to be recognized as a valued member of one’s various communities. On social network sites, this desire to fit in and be noticed has several important consequences. The most basic consequence of this desire is that people would enjoy using a social network site even if they had no reason to use it other than that their friends enjoy using it. If your friends are at the mall, you join them at the mall; if they’re on Facebook, you join them on Facebook.”).

⁴⁸ See *id.* at 1197 (“Thus, when the police get the information by demanding it from Facebook the company (rather than by logging in as users or having someone log in for them), they should be required to present a search warrant.”); Richardson, *Virtual Property*, *supra* note 37.

of expression. In a recent Supreme Court case, *Packingham v. North Carolina*, the Court determined that access to social media sites is protected by the First Amendment of the Constitution.⁴⁹ Expressions on social networks are diverse and include debating religious and political issues, sharing vacation photos, and connecting with elected representatives.⁵⁰ One of the many justifications for First Amendment protection of access to these platforms is a respect for the autonomy and dignity of individuals.⁵¹ According to the autonomy-argument, forms of communication and information are essential in making autonomous choices.⁵² In addition, from the speaker's perspective, we need to listen to each other, or at least allow the opportunity to speak and to listen as a matter of basic human respect.⁵³ Social networks should allow people to express their own views and expose them to the views of others.

Second, certain scholars argue that social network sites are a public utility and should be regulated as such.⁵⁴ According to the argument, social networks are an essential good in the digital world, controlled by private power.⁵⁵ These sites control information and facilitate communication with others, including the "distribution of and access to news, ideas, and information upon which our economy, culture, and increasingly politics depend."⁵⁶ This characterization exposes an inherent dependency of users on social media providers, one that if left unregulated, may expose them to harm.

A third legal interest in social network profiles is property. Property is a difficult interest to unpack. It has many different interpretations and justifications, and there are diverse legal problems that have a property-related aspect.⁵⁷

⁴⁹ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) (determining that "Social media offers 'relatively unlimited, low-cost capacity for communication of all kinds'" and "social media users employ [various] websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought'" (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997))).

⁵⁰ *Id.* at 1735.

⁵¹ Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 150–53 (1989).

⁵² *Id.* at 150–51.

⁵³ *Id.* at 152–53.

⁵⁴ K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1640–41 (2018).

⁵⁵ *Id.*

⁵⁶ *Id.* at 1670.

⁵⁷ See, e.g., JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2011) (discussing property as serving the purposes of a community of free and equal members); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517 (2003) (arguing that property is a group of institutions with different social functions); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) (arguing that property represents an exclusive power); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996) (discussing the bundle

Intellectual property, in particular, is one of the major concerns of digital society.⁵⁸ On Facebook, there is a clear distinction between content and profile. While the user owns all the information and other content he or she posts on Facebook, the actual use of the profile depends on Facebook's terms of service.⁵⁹ The legal characterization of the profile itself, not the information per se, is more challenging and merits further investigation, as the following parts explain.

Other property-related problems deal mostly with the economic value of a user profile, especially in cases where the profile was used for business purposes. Bankruptcy⁶⁰ and divorce⁶¹ are prominent examples. In such cases, the rules are less interested in the personal value of the profile.⁶² Personal profiles, which lack any immediate financial value, are more common.⁶³ When scholars and practitioners argue in favor of inheriting social network profiles, they engage with personal value directly.⁶⁴ Yet they typically do not attempt to explain, justify, or theorize the characterization of profiles as property.⁶⁵

These different legal interests reflect the centrality of questions of agency, self-representation, and relationships, as well as the vulnerability of users in social media, both of which are nonetheless absent from current legal discussion. The expression discourse brings to the fore issues pertaining to users' autonomy. The public utility debate uncovers the importance of regulating private power and the vulnerability of users to the potential harm posed by this unregulated power. The property discourse raises questions that touch upon the theoretical

of sticks approach to property); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (offering a relational approach to property).

⁵⁸ See, e.g., Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKLEY TECH. L. J. 1523, 1524 (2011) ("As technological progress and the digital revolution have reshaped the economic and social landscape The major titans of industry are no longer General Motors and U.S. Steel, but Google, Apple, Microsoft, and eBay. Their key assets and products are intellectual, not tangible.").

⁵⁹ See Sally Brown Richardson, *How Community Property Jurisdictions Can Avoid Being Lost in Cyberspace*, 72 LA. L. REV. 89, 119 (2011) [hereinafter Richardson, *Community Property*].

⁶⁰ Alexandra L. Jamel, *Mixing Business with Pleasure: Evaluating the Blurred Line Between the Ownership of Business and Personal Social Media Accounts under § 541(A)(1)*, 33 EMORY BANKR. DEV. J. 561, 562–63 (2017).

⁶¹ Richardson, *Community Property*, *supra* note 59, at 121 ("Upon termination of a marriage, a Facebook profile must be valued and assigned to one of the spouses. Additionally, any rights of reimbursement the community has due to the Facebook profile must be settled.").

⁶² *Id.* at 121–22.

⁶³ *Id.* at 122.

⁶⁴ Banta, *Property Interests*, *supra* note 12, at 1149 (arguing that digital assets are in direct correlation with personal identities).

⁶⁵ See *infra* notes 232–234 and accompanying text for discussion of an exception.

grounds, as well as the practical implications of the propertization of SNS profiles and the ways in which these accounts could (or should) be considered as a vehicle for the embodiment of the self and for creating communal ties.

B. *Legal Framework*

In recent years, popular media has exposed some painful stories of families devastated by the loss of a loved one, seeking access to their online account, only to have their request be rejected by the site.⁶⁶ The problem of postmortem access has subsequently been framed in terms of property rights.⁶⁷ The property framing has become so influential in public discourse that even private solutions such as SecureSafe and Legacy Locker (designed to guarantee postmortem access to chosen beneficiaries) are termed “digital *estate plans*.”⁶⁸

Generally, SNSs do not grant access to a user’s profile after his or her death.⁶⁹ Company policies are legally enforced by terms of service (TOS) agreements that each new user accepts upon opening an account.⁷⁰ Although social network profiles are commonly understood to “belong” to the user, the use is in fact controlled by the terms of the agreement between the service provider and the account holder.⁷¹ It is not possible to negotiate with the platform before accepting the contract, and many users do

⁶⁶ See Louise Boyle, *Grieving Parents Battle Facebook for Access to 15-year-old Son’s Profile After He Committed Suicide*, DAILY MAIL (Feb. 19, 2013, 2:16 PM EDT), <https://www.dailymail.co.uk/news/article-2280800/Facebook-bans-parents-accessing-sons-profile-committed-suicide.html> [<http://perma.cc/8ER8-KJCE>]; John Berlin, *My Appeal to Facebook*, YOUTUBE (Feb. 5, 2014), <https://www.youtube.com/watch?v=vPT28MGhprY> [<https://perma.cc/TTD7-XEAT>].

⁶⁷ See e.g., Cahn, *Probate Law*, *supra* note 8, at 1703 (“Digital assets present the same problems as other forms of new property . . .”).

⁶⁸ CARROLL & ROMANO, *supra* note 16, at 86 (emphasis added).

⁶⁹ See Lamm et al., *supra* note 8, at 400–01 (discussing terms of service agreements that deny third-party access).

⁷⁰ Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL’Y 405, 406 (2010).

⁷¹ Banta, *supra* note 8, at 816–17.

not read it or fully understand it.⁷² Changes to the terms of service are also presented to the user as a sink or swim decision.⁷³

Facebook's TOS agreement currently offers users two choices with regard to postmortem access.⁷⁴ Users can choose in advance to have their profile either memorialized or permanently deleted from the site.⁷⁵ If the user chooses to have his or her profile memorialized, the user chooses a legacy contact that can respond to friend requests, change the profile or cover photo, and write a pinned post for the profile.⁷⁶ Nonetheless, the legacy contact cannot log into the account, read messages, or change past posts.⁷⁷ Similarly, Instagram offers two options: memorialization or deletion of the account based on the request of the family members.⁷⁸

Twitter's policies similarly deny access to the account of a deceased user.⁷⁹ The site deactivates an account upon the request of verified immediate family members or a person authorized to act on behalf of the estate.⁸⁰ LinkedIn's policy in the case of death is limited to closing the account and removing the deceased's profile.⁸¹ The no-access problem has inspired private technological solutions. Various private sites allow for

⁷² See Hartzog, *supra* note 70, at 408 ("Additionally, empirical and scientific research have demonstrated that an individual's cognitive limitations and the design and presentation of standard-form contracts significantly frustrate an individual's ability to properly read and understand standard-form contracts."); see also Laura McCarthy, *Digital Assets and Intestacy*, 21 B.U. J. SCI. & TECH L. 384, 390 (2015) ("Case precedent holds that whether a customer reads an agreement or not does not change the outcome of a dispute over a TOSA. The customer is still bound by the terms of the agreement. Thus, although a decedent may not have been aware of agreeing to any terms of service, the TOSA will apply when a representative of an intestate estate attempts to collect and subsequently distribute any digital assets to heirs. Further, just as a living account owner may not be able to delete his or her account, a TOSA may even prevent a representative of an intestate estate or an heir from deleting a decedent's account.").

⁷³ McCarthy, *supra* note 72, at 390 ("[A]n Internet business can change its TOSA with or without notice.")

⁷⁴ See *Memorialized Accounts*, FACEBOOK HELP CTR, <https://www.facebook.com/help/1506822589577997> [<https://perma.cc/SUS7-K6BY>] ("You can choose to either appoint a legacy contact to look after your memorialized account or have your account permanently deleted from Facebook.")

⁷⁵ *Id.*

⁷⁶ *Id.* ("A legacy contact is someone you choose to look after your account if it's memorialized.")

⁷⁷ *Id.*

⁷⁸ *How Do I Report a Deceased Person's Account on Instagram*, INSTAGRAM HELP CTR., <https://help.instagram.com/264154560391256/> [<https://perma.cc/6YAY-JE6B>].

⁷⁹ See *How to Contact Twitter About a Deceased Family Member's Account*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> [<https://perma.cc/2YCW-97C6>].

⁸⁰ *Id.*

⁸¹ *Deceased LinkedIn Member—Removing Profile*, LINKEDIN HELP, <https://www.linkedin.com/help/linkedin/answer/2842/deceased-linkedin-member-removing-profile?lang=en> [<https://perma.cc/3YUK-NVXQ>].

the management of digital accounts after death by appointing digital heirs and providing easy access to certain materials.⁸²

Other than the TOS agreements, federal legislation may also impede access. The Stored Communications Act (SCA), initially enacted in 1986, was designed to respond to privacy concerns on the internet.⁸³ The statute limits providers' ability to disclose information voluntarily to the government or any other person or entity, including family members. According to Naomi Cahn, "[t]he drafters were focused on privacy, not on how the SCA might affect fiduciary property management and distribution, and the SCA has not been amended since its original enactment."⁸⁴ In addition, the Computer Fraud and Abuse Act (CFAA) sanctions "unauthorized access of computer hardware and devices, and the data stored thereon."⁸⁵

In recent years, several states have begun advancing a concrete solution to the problem of managing postmortem access to digital assets. Some states have modeled legislation on a version of the Uniform Fiduciary Access to Digital Assets Act (UFADAA).⁸⁶ The purpose of fiduciary access is to ensure continuity in the management of assets, prevent identity thefts, and console family members.⁸⁷ The UFADAA was created, among other things, to incorporate digital assets into the estate plan and vest fiduciaries with the authority to access and manage digital assets.⁸⁸ The Act originally allowed fiduciaries to "access, delete, preserve, and distribute digital assets as appropriate."⁸⁹

Technology companies and privacy rights groups opposed this law due to "acute privacy concerns."⁹⁰ The association of e-commerce businesses, NetChoice, proposed a rival piece of legislation, the Privacy Expectation Afterlife Choice Act (PEACA), which "aims to let fiduciaries have access to digital service providers to view only select contents of accounts."⁹¹ The UFADAA

⁸² See *Step by Step Expert Guide to Protecting Yourself Online Before You Die*, FINDER AU, <https://www.finder.com.au/infographics/life-insurance/expert-guide-to-protect-yourself-online-before-you-die/> [https://perma.cc/44U7-K73Z].

⁸³ See 18 U.S.C. §§ 2701–2712 (2012); Cahn, *Probate Law*, *supra* note 8, at 1700.

⁸⁴ Cahn, *Probate Law*, *supra* note 8, at 1701.

⁸⁵ Cahn et al., *supra* note 10, at 98; see also 18 U.S.C. § 1030(a)(2)(C) (2012).

⁸⁶ See *Access to Digital Assets of Decedents*, NAT'L CONF. ST. LEGISLATURES (Feb. 25, 2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx>; Cahn et al., *supra* note 10, at 99; see also UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (UNIF. LAW COMM'N 2014).

⁸⁷ See Cahn et al., *supra* note 10, at 93.

⁸⁸ *Id.* at 107.

⁸⁹ Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know*, 29 PROB. & PROP. 8, 20 (2015).

⁹⁰ Sy, *supra* note 8, at 664 (internal quotation marks omitted).

⁹¹ *Id.* at 649 (internal quotation marks omitted). The PEACA required the executor to obtain a court order by proving that:

was subsequently revised to protect users' privacy.⁹² The current version allows access to content only in the case the user consented in a will, trust, power of attorney, or other record.⁹³

The debate therefore identifies privacy concerns as the main theoretical obstacle to the inheritability of digital assets, including SNS profiles. In other words, barring privacy concerns, current law reform efforts tend to include digital assets as part of the deceased's estate. This is not just one country's view, though American law seems to be at the forefront of the legislation addressing this problem. There is no specific legislation currently in Canada⁹⁴ or in England.⁹⁵ American law, however, serves as an inspiration for other jurisdictions. The European Law Institute, for example, has announced new research looking into the success of the American Uniform Act.⁹⁶

In addition, France has advanced the *Republique Numerique* (Digital Republic) Act.⁹⁷ One of its declared purposes includes securing users' right "to consciously specify how they wish their personal data to be used after their death."⁹⁸ Article 20 enables "any person, during his/her lifetime, to make

(1) the user is deceased; (2) the deceased user was the subscriber to or customer of the provider; (3) the accounts of the deceased user have been identified with specificity; (4) there are no other authorized users or owners of the deceased user's accounts; (5) disclosure is not in violation of the applicable federal laws; (6) the request for disclosure is narrowly tailored to effect the purpose of the administration of the estate; (7) the request seeks information spanning no more than a year prior to the date of death; and (8) the request is not in conflict with the deceased's will. Then, the executor or administrator must give the internet service provider: a written request; a copy of the death certificate; and the court order.

Id. at 665.

⁹² *Id.* at 649.

⁹³ See REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 7 (UNIF. LAW COMM'N 2015) [<https://perma.cc/L27U-WMYW>].

⁹⁴ See VICTORIA HOCKLEY ET AL., DIGITAL ASSETS: DISPOSAL, RIGHTS AND SUCCESSION IN CANADA 2, Westlaw Practical Law (Mar. 2015); see also Tobi Cohen, *Lawyers Raise Questions About Digital Data Rights After the Owner's Death*, CANADA.COM (Aug. 20, 2013), <http://o.canada.com/news/national/lawyers-raise-questions-about-digital-data-rights-after-the-owners-death> [<https://perma.cc/ZU6F-235E>].

⁹⁵ See generally James Ward & Seddons Solicitors, *Warning! Digital Assets—The Future Is Upon Us*, in PRIVATE CLIENT PRACTICE: AN EXPERT GUIDE 57 (Laura Slater ed., 2014) (discussing the lack of regulation of digital asset in England).

⁹⁶ See Panel IV: *Fiduciary Access to Digital Assets (feasibility study with ULC)*, EUR. L. INST. UPDATES (European Law Inst., Vienna, Austria), Sept.–Oct. 2015, at 7 [<https://perma.cc/XZ8Z-A2S3>].

⁹⁷ See Loi 2016-1321 du 7 octobre 2016 pour une République numérique [Law 2016-1321 of October 8, 2016 for a Digital Republic], Journal Officiel de la République Française [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 8, 2016, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&categorieLien=id> [<https://perma.cc/6CV5-GKPA>].

⁹⁸ *The Digital Republic Bill—Overview*, LA RÉPUBLIQUE NUMÉRIQUE, <http://www.republique-numerique.fr/pages/in-english> [<https://perma.cc/A8JD-3XFC>].

arrangements for the storage and communication of his/her personal data after his/her death,” and imposes a duty on Internet Service Providers to “inform the user about what will happen to this data after his/her death and let him/her choose whether or not to transfer it to the third party of his/her choice.”⁹⁹

Legislation seems to be moving in a certain direction. From a comparative law perspective, then, the time is ripe for engaging with the deeper questions of treating profiles as inheritable assets, including corporate manipulation of memory and loss.

II. PLATFORM POWER AND USER AGENCY

A. *Theoretical Framework*

The debate surrounding postmortem access to SNS profiles has been particularly oblivious to the threat to users’ agency posed by social network platforms. The discourse in the field has asked the wrong questions, and consequently developed legal rules that are far too narrow and often misguided.

In order to explore the impact of social network profiles on agency from a wider perspective, we engage with three very different approaches to the study of agency and power: (1) autonomy as choice and self-authorship (Joseph Raz)¹⁰⁰; (2) relational autonomy (Jennifer Nedelsky);¹⁰¹ and (3) a critical theory of vulnerability (Martha Fineman).¹⁰² Together, these three approaches enrich the study of agency as a process of self-constitution in the context of social networks.

Although these theorists develop very different, and at times conflicting, accounts, this article argues that all three approaches, as applied to profiles on social network sites, offer a significant critique of SNS activity and its negative impact on agency and relationships. This article will show that all three perspectives help to highlight different aspects of corporate involvement in social network activity, and together they provide a rich, full critique of the threats embedded in, and what is lost by, skewing the discourse on social networks away from autonomy, agency, and relationships, and towards propertization and inheritability.

⁹⁹ *Explanatory Memorandum*, LA RÉPUBLIQUE NUMÉRIQUE, <http://www.republique-numerique.fr/pages/digital-republic-bill-rationale> [<https://perma.cc/6VKT-ANLN>].

¹⁰⁰ RAZ, *supra* note 29.

¹⁰¹ JENNIFER NEDELSKY, LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND THE LAW 19 (2011).

¹⁰² Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 1 (2008) [hereinafter *Fineman, Vulnerable Subject*].

Raz develops a classic approach to autonomy, which focuses on the self.¹⁰³ Raz argues that “[p]ersonal autonomy is the ideal of free and conscious self-creation.”¹⁰⁴ It requires “choice among an adequate range of options.”¹⁰⁵ To be autonomous means to be the author of one’s life and have the necessary capabilities to perform this endeavor, free from coercion and manipulation. In Raz’s words:

If a person is to be maker or author of his own life then he must have the mental abilities to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties necessary to plan actions, etc. For a person to enjoy an autonomous life he must actually use these faculties to choose what life to have. There must in other words be adequate options available for him to choose from. Finally, his choice must be free from coercion and manipulation by others, he must be independent.¹⁰⁶

While the focus for Raz is on choice and the conditions for an adequate choice, Nedelsky focuses on relationships. In her book *Law’s Relations*, Nedelsky criticizes the liberal conceptions of autonomy and rights.¹⁰⁷ She argues that human beings are not separate entities but rather interrelated. The self is constituted by relationships with other people.¹⁰⁸ The selves “become who they are—their identities, their capacities, their desires—through the relationships in which they participate.”¹⁰⁹ Nedelsky adds, however, that human beings are not just the sum of their

¹⁰³ It is important to stress that our critique focuses on the threat of the current discourse to agency. Two of the three critical theories that we use to illustrate our point, namely Raz’s and Nedelsky’s, work with a conception of autonomy. While we believe that agency is a better theoretical concept for thinking about the harm in social network activity, we nonetheless see great value in using these accounts as a critical tool for two reasons: first, autonomy is closely linked to questions of personhood, agency, and the ability to form meaningful relationships. In this sense, autonomy analysis provides us with a sound framework with which to evaluate the harm of activity on SNS profiles. Second, in combination, and especially when complemented by vulnerability theory, we believe that all three theories form a broad spectrum along which to think about these questions. Vulnerability theory adds an important dimension to the analysis, as it stresses the vulnerable subject rather than the autonomous agent, whose independence and detachment from social context may mislead in the context of the power relations that characterize social media activity. Focusing on the social institutions that cultivate and preserve vulnerability, the theory is conducive to uncovering many of the harmful aspects of SNS profiles, as well as the limits of the current discourse. The aggregate critical weight of all three theories is therefore significant.

¹⁰⁴ RAZ, *supra* note 29, at 390.

¹⁰⁵ *Id.* at 389.

¹⁰⁶ *Id.* at 372–73.

¹⁰⁷ NEDELSKY, *supra* note 101, at 36.

¹⁰⁸ *Id.* at 3 (“[R]elationships are central to people’s lives—to who we are, to the capacities we are able to develop, to what we value, what we suffer, and what we are able to enjoy. This book makes that relational dimension of human experience central to the concepts and institutions by which we organize our collective lives.”).

¹⁰⁹ *Id.* at 4.

relationships. Relationships are constitutive, not determinative. Human beings have the ability to “make themselves who they are” through their capacity for creative interaction.¹¹⁰ Relational autonomy requires interaction with others and the capacity for genuine creativity within this interaction in order to avoid subordination and domination.¹¹¹ In other words, to be autonomous is to be able to choose from a range of relational influences that we want to make our own.¹¹² Nedelsky also argues for a different analysis of the law. A relational approach requires that the legal rules should be understood in terms of the relations they structure—and how those relations can foster core values.¹¹³

While Raz and Nedelsky accept the concept of autonomy but provide different theories to support and supplement it, Fineman offers a more critical position.¹¹⁴ She argues that vulnerability, rather than autonomy, is inherent to the human condition, and is therefore the key to understanding and analyzing ethics, politics, and law.¹¹⁵ Fineman argues that the emphasis on contract, choice, and autonomy in liberal thought obscures the innate vulnerability of persons, as well as the institutional design that leads to it and sustains it.¹¹⁶ The theory focuses on the responsiveness of social institutions to vulnerability, and on the different resources available to different people at different points in their lives.¹¹⁷ Vulnerabilities thus

¹¹⁰ *Id.* at 31 (“Part of the modern sense of self, which I embrace even as I try to shifts its dominant conceptualization, is that human beings have a significant ability to make themselves who they are. The language I use is the capacity for creative interaction . . . with the emphasis on interaction with others as well as the capacity of genuine creativity. This capacity has many similarities with Hannah Arendt’s concept of ‘the human ability to act . . .’”).

¹¹¹ *Id.* See generally Marilyn Friedman, *Relational Autonomy and Individuality*, 63 U. TORONTO L.J. 327, 331 (2013). For some of the influence of the ideas of relational autonomy, see the collection RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (Catriona Mackenzie & Natalie Stoljar, eds., 2000); DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE 138–40 (1989); John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD. 143 (2004).

¹¹² See NEDELSKY, *supra* note 101, at 31 (“The very concept of relational autonomy presupposes that autonomy is possible for relational selves; and if that is so, then relationships cannot *determine* who a person is or what she does or becomes. Otherwise there would be no true autonomy.”).

¹¹³ *Id.* at 32.

¹¹⁴ See Fineman, *Vulnerable Subject*, *supra* note 102, at 2.

¹¹⁵ *Id.* at 1–2; see also Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 3 (2014) (arguing that “vulnerability is inherent to the human condition, and that governments therefore have a responsibility to respond affirmatively to that vulnerability by ensuring that all people have equal access to the societal institutions that distribute resources. The theory thus provides an alternative basis for defining the role of government and a justification for expansive social welfare policies.”).

¹¹⁶ Fineman, *Vulnerable Subject*, *supra* note 102, at 10–12

¹¹⁷ *Id.* at 20; see also Martha Albertson Fineman, “Elderly” as Vulnerable: *Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71, 86

highlight power and privilege, as they “produce webs of advantages and disadvantages,” and expose “the institutional practices that produce the identities and inequalities in the first place.”¹¹⁸ Under vulnerability theory, the vulnerable subject replaces the autonomous and independent subject of the liberal tradition, which requires the state to be responsive to and responsible for the vulnerable subject.¹¹⁹

As applied to SNS profiles, all three approaches to persons’ autonomy, agency, and vulnerabilities raise a variety of concerns. They require that people possess a range of options, create functioning relationships and an awareness of vulnerability and institutionalized privilege and power. We now turn to uncover the traits of social network activity, with a particular emphasis on Facebook. Our overall argument in this part is that current conditions of activity are a threat to agency under all three theories.

B. Social Networks: Agency, Autonomy, and Power

SNS profiles work with representations of the self.¹²⁰ These profiles contribute to users’ projected identity and to their ability to maintain certain social ties.¹²¹ Some psychologists argue that social media contributes to one’s self-esteem, popularity, and sense of belonging.¹²² Studies have also emphasized the role of

(2012) (“The concept of a ‘vulnerable population’ is typically applied to those who are dependent in some regard, such as children or individuals with disabilities. There is certainly confusion between the terms, although dependency may even be more stigmatized than vulnerability. It should not be. As embodied beings, we are all constantly vulnerable to events that might render us dependent.”).

¹¹⁸ Fineman, *Vulnerable Subject*, *supra* note 102, at 16.

¹¹⁹ Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 13, 16 (Martha Albertson Fineman & Anna Grear eds., 2013).

¹²⁰ Grimmelmann, *supra* note 41, at 1152 (“[A] social network site lets you say who you are. Erving Goffman observed that daily social interactions are full of attempts, large and small, to convince others to accept your claims about yourself. Online interactions are no different; you can use everything from your chat nickname to your home page to influence how other people think of you.”).

¹²¹ *Id.* (“Social network sites offer a gloriously direct tool for what Goffman calls ‘impression management’: the profile page. Just as your choice of clothing and hairstyle signals how you think of yourself (and want others to think of you), so does your choice of profile photo. Many users choose to display the most flattering photographs of themselves that they can. Each additional datum is a strategic revelation, one more daub of paint in your self-portrait. Facebook’s profile fields aren’t a list of the things most important to its users; they’re a list of the things its users most want to say about themselves. The fact that half of the ‘Personal’ fields on a Facebook profile involve favorite forms of media isn’t an expression of consumerism; instead, it lets users communicate ‘prestige, differentiation, authenticity, and theatrical persona’ using a common cultural language.”).

¹²² Kasch, *supra* note 46, at 32; *see also* Amy L. Gonzales & Jeffrey T. Hancock, *Mirror, Mirror on My Facebook Wall: Effects of Exposure to Facebook on Self-Esteem*, 14 *CYBERPSYCHOLOGY, BEHAV., AND SOC. NETWORKING* 79, 79 (2011).

social media in building social capital because it facilitates the use of latent ties and maintains existing ties (creating a hybrid of offline and online relationships).¹²³ These benefits are important. They represent a transformation of relationships and voice in the digital age. At the same time, however, the representation of self and the relationships on SNS are deeply flawed.

To understand why, we must begin with the power structure of social network activity. The business model of social network platforms includes economic surveillance. Content on social media contains personally identifiable data that the networks systematically analyze, evaluate, and market to advertisers.¹²⁴ The scope of this surveillance is far-reaching.¹²⁵ SNSs encourage users to engage as much as possible with the social media site.¹²⁶ The result is that social media accounts archive “user activity, both intentionally shared user content and other transactional data, based on everything the user does via the site.”¹²⁷ Eric Schmidt, the former CEO of Alphabet, Google’s parent company, clearly explains:

With your permission you give us more information about you, about your friends, and we can improve the quality of our searches. We don’t need you to type at all. We know where you are. We know where you’ve been. We can more or less know what you’re thinking about.¹²⁸

¹²³ See Kasch, *supra* note 46, at 32; Nicole B. Ellison et al., *The Benefits of Facebook Friends: Social Capital and College Students’ Use of Online Social Network Sites*, 12 J. COMPUTER-MEDIATED COMM. 1143, 1144 (2007) [hereinafter Ellison et al., *The Benefits of Facebook*].

¹²⁴ THOMAS ALMER ET AL., MAPPING APPROACHES TO USER PARTICIPATION AND DIGITAL LABOUR: A CRITICAL PERSPECTIVE IN RECONSIDERING VALUE AND LABOUR IN THE DIGITAL AGE (Fuchs Christian & Fisher Eran eds., 2015) at 153, 165.

¹²⁵ See Jan Fernback, *Sousveillance: Communities of Resistance to the Surveillance Environment* 30 TELEMATICS AND INFORMATICS 11 (2013). Additionally, there is a lack of protection against surveillance. FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 3 (2015) (“Surveillance cameras, data brokers, sensor networks, and ‘supercookies’ record how fast we drive, what pills we take, what books we read, what websites we visit. The law, so aggressively protective of secrecy in the world of commerce, is increasingly silent when it comes to the privacy of persons.”).

¹²⁶ Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 893 (2013) (“[S]ocial media websites are multifaceted platforms that encourage users to perform other functions across the Internet—via the social media site itself or through third-party applications that are integrated with the social media site. The result is that social media websites contain layers of data that are either compiled by the website or created by the user.”).

¹²⁷ *Id.* at 894.

¹²⁸ Eric Schmidt: *Google Gets Close to ‘The Creepy Line’*, BIOCENTRE, <http://www.bioethics.ac.uk/news/eric-schmidt-google-gets-close-to-the-creepy-line.php> [<https://perma.cc/LA43-L3J8>].

Indeed, according to one study, SNS providers regard their audience as self-concerned, frenetic, and willing to be monitored.¹²⁹

Avoiding economic surveillance proves to be difficult, probably impossible, even if users change their privacy settings.¹³⁰ These companies typically offer users a terms of service agreement.¹³¹ These terms of use include privacy policies.¹³² A previous analysis of privacy statements on internet sites demonstrates that these statements offer little consumer protection and are targeted towards the commercial interests of the companies.¹³³ The corporate attitude is perhaps most poignantly illustrated by another quote from Eric Schmidt: “If you have something that you do not want anyone to know, maybe you should not be doing it in the first place.”¹³⁴

Several key conditions create and maintain this power structure. First, many users are unaware of the scope of surveillance.¹³⁵ A recent example is the Cambridge Analytica case. The company harvested the personal data of millions of users without their consent for political purposes.¹³⁶ This controversy exposed the enormous vulnerability of personal data to various commercial companies.

Second, even users who are aware of privacy concerns have an extremely limited decisional spectrum. Because many companies offer a “sink or swim” choice, if one wants to participate in social networks, there is no effective way to decline these policies altogether.¹³⁷ Indeed, a user can decide not to participate at all. Considering the centrality of social networks, however, complete avoidance is difficult.¹³⁸ Social networks

¹²⁹ See Joseph Turow, *Audience Construction and Culture Production: Marketing Surveillance in the Digital Age*, 597 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 105 (2005).

¹³⁰ SEBASTIAN SEVIGNANI, PRIVACY AND CAPITALISM IN THE AGE OF SOCIAL MEDIA 95 (2015); see also McPeak, *supra* note 126, at 888–89; M. Ryan Calo, *People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 PENN ST. L. REV. 809, 825 (2010).

¹³¹ Hertzog, *supra* note 70, at 406.

¹³² ALMER ET AL., *supra* note 124, at 165.

¹³³ Jan Fernback & Zizi Papacharissi, *Online Privacy as Legal Safeguard: The Relationship Among Consumer, Online Portal, and Privacy Policies*, 9 NEW MEDIA SOC'Y 715, 716 (2007).

¹³⁴ CNBC, *Google CEO Eric Schmidt On Privacy*, YOUTUBE (Dec. 8, 2009), <https://www.youtube.com/watch?v=A6e7wfDHzew> [<https://perma.cc/563Y-T8G2>].

¹³⁵ SEVIGNANI, *supra* note 130, at 100.

¹³⁶ Sheera Frenkel & Kevin Roose, *Zuckerberg, Facing Facebook's Worst Crisis Yet, Pledges Better Privacy*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/technology/facebook-zuckerberg-data-privacy.html> [<https://perma.cc/H4X6-HMGE>].

¹³⁷ SEVIGNANI, *supra* note 130, at 100–01.

¹³⁸ See Rahman, *supra* note 54, at 1670–72 (discussing Facebook centrality for access to media and its part in creating our informational infrastructure); see also *How to Win Friends and Influence People; The New Face of Facebook*, ECONOMIST (Apr. 9, 2016), <https://www.economist.com/briefing/2016/04/09/how-to-win-friends-and-influence-people> [<https://perma.cc/MP4F-RVJ4>].

control information and communication in the digital age and, as previously discussed, have been characterized as a public utility.¹³⁹ Within the digital communication world, Facebook, Twitter, Instagram, and other social networks ultimately offer the same service. Many users cannot find alternatives easily. They are therefore dependent on the platform and are exposed to manipulation and power imbalance. In addition, as previously discussed, the First Amendment now protects access to social networks.¹⁴⁰ Social network accounts are an important path for personal expression and social interaction.¹⁴¹ The choice to opt out is necessarily bounded.

Third, there is a built-in imbalance of power between SNSs' platforms and users. SNS companies own the platform and control the terms of use.¹⁴² Users do not own the profile, nor do they control the terms of use or share the economic profit gained by using users' personal data.¹⁴³

Take, for example, the frequent changes on SNSs to the terms of use, privacy issues, and even the characteristics of the "feed"—the heart of SNS relationships.¹⁴⁴ These are all aligned with corporate interests and introduced unilaterally by the social network platforms in a "top-down" manner, instantly influencing the nature of the "res-publica" of millions of users.¹⁴⁵ In this important sense, SNSs should not be thought of as neutral facilitators of communication and relationships.¹⁴⁶ They are, rather, a well-constructed arena, designed to maximize the profits of the corporations who own it.¹⁴⁷ What we take to be

¹³⁹ See *supra* notes 55–56 and accompanying text.

¹⁴⁰ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); see also Trevor Puetz, *Facebook: The New Town Square*, 44 SW. L. REV. 385, 385 (2014) ("Centered on self-expression and the sharing of content, social networking sites (SNS) are now one of the strongest avenues for self-expression and are dependent upon freedom of speech.").

¹⁴¹ Puetz, *supra* note 140.

¹⁴² ALMER ET AL., *supra* note 124, at 66.

¹⁴³ *Id.*

¹⁴⁴ See Cheryl B. Preston, "Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts, 64 AM. U.L. REV. 535, 585 (2015) ("Although the change required users to expressly grant permission for their information to be shared, the surrounding confusion and frequent changes made to Facebook's privacy policy fueled public skepticism.").

¹⁴⁵ See *id.*; David Thompson, "I Agreed to What?": A Call for Enforcement of Clarity in the Presentation of Privacy Policies, 35 HASTINGS COMM. & ENT. L.J. 199, 203, 210, 218, 220 (2012).

¹⁴⁶ José van Dijck, *Datafication, Dataism and Dataveillance: Big Data Between Scientific Paradigm and Ideology*, 12 SURVEILLANCE & SOC'Y 197, 199–204 (2014) (explaining and criticizing the industry position that SNS are neutral facilitators).

¹⁴⁷ See Nicole S. Cohen, *The Valorization of Surveillance: Towards a Political Economy of Facebook*, 22 DEMOCRATIC COMMUNIQUÉ 5, 11 (2008); PASQUALE, *supra* note 125, at 5 ("As middlemen, they specialize in shifting alliances, sometimes advancing the interests of customers, sometimes suppliers: all to orchestrate an online world that maximizes their own profit.").

based on human reflection and decision making is often a manipulation, as “[t]he values and prerogatives that the encoded rules enact are hidden within black boxes.”¹⁴⁸

Fourth, and perhaps most importantly for our purposes, is the *type* of engagement that the networks encourage users to partake in. Under the guise of a neutral platform, facilitating personal expression and fostering community ties, (“Be connected. Be discovered. Be on Facebook.”¹⁴⁹), social network sites drive users to a particular type of expression and a specific mode of communication and connection with others. This is manifested in two ways: hyper-engagement, and a competitive, reward-laden environment that flattens social contexts, as the next section clarifies. All these factors demonstrate that the imbalanced power structure between users and SNSs distort the representation of the self, manifested in social media profiles.

1. Hyper-Engagement

Corporate power pushes users into any activity that provides more information that can be aggregated and sold¹⁵⁰: the “share,” “comment” and “like” buttons are just one click away and users are constantly urged to communicate “[w]hat’s on [their] mind.”¹⁵¹ Similarly, the “feed” is designed as an infinite display of news, keeping the user scrolling down a page that never ends.¹⁵² No matter how far down one scrolls, the

¹⁴⁸ PASQUALE, *supra* note 125, at 8.

¹⁴⁹ *Be Connected .Be Discovered .Be on Facebook*, SPEAKERHUB, <https://speakerhub.com/files/be-connected-be-discovered-be-facebook-0> [<https://perma.cc/KR3G-A4KS>]. Facebook’s mission, as stated on its Facebook page, is to “[g]ive people the power to build community and bring the world closer together.” See Facebook, *Bringing the World Closer Together*, <https://www.facebook.com/pg/facebook/about/> [<https://perma.cc/5CE3-PKKS>].

¹⁵⁰ Tomer Shadmy, *The New Social Contract: Facebook Community and Our Rights*, 37 BOS. INT’L LJ (forthcoming 2019) (manuscript at 26) (“According to its yearly financial reports, Facebook generates most of its revenue from selling targeted advertisements and other commercial and sponsored content, based on the users’ private data and information.” (citation omitted)).

¹⁵¹ See Amy Morin, *How You Answer Facebook’s ‘What’s On Your Mind?’ Question Reveals Your Personality Type*, FORBES (Aug. 6, 2015), <https://www.forbes.com/sites/amymorin/2015/08/06/how-you-answer-facebooks-whats-on-your-mind-question-reveals-your-personality-type/#51d229162421> [<https://perma.cc/C3HN-WQCP>] (discussing how people answer the what’s on your mind question); Josh Constine, *Facebook Returns ‘What’s On Your Mind?’ Prompt to the Home Page*, ADWEEK (Jan. 12, 2011), <http://www.adweek.com/digital/whats-on-your-mind-home-page/> [<https://perma.cc/3ZVT-KDFA>] (explaining that users will always be greeted by this question, “which should lead them to contribute content more frequently”).

¹⁵² Cf. Christian Holst, *Infinite Scrolling, Pagination or ‘Load More’ Buttons? Usability Findings in eCommerce*, SMASHING MAG. (Mar. 1, 2016), <https://www.smashingmagazine.com/2016/03/pagination-infinite-scrolling-load-more-buttons/> [<https://perma.cc/62BN-VWV5>] (discussing the benefits and costs of infinite scroll for usability).

information keeps flowing, as users are kept engaged.¹⁵³ Studies show that the infinite scroll design contributes to a sense of loss of orientation and of time invested on the site: “Because there is virtually no end to the materials we can consume via infinite scrolling, we are vulnerable to consuming much more than we would normally without realizing it.”¹⁵⁴

Social network profiles also use notifications of “likes” and friend requests that are granted unpredictably.¹⁵⁵ Facebook and Twitter send notifications to users when they are mentioned in someone else’s post.¹⁵⁶ Instagram, for instance, sends notifications when someone likes a user’s photo.¹⁵⁷ LinkedIn uses notifications in the same way, and notifies users of connection requests and potential job opportunities.¹⁵⁸ These methods encourage hyper-engagement with profiles, and manipulate the representation of the self that the profile embodies.

2. Competitive Environment.

Corporate platforms influence and shape relationships on SNSs through the construction of the site and the structure of information flow. SNS encourages competition between users supporting a unique sensitivity to feedback. As pointed out in a study of addictions on the web, we are vulnerable to the responses of others, as well as inclined to reciprocate others’ social gestures: “human beings receive chemical satisfaction when they receive social gratification, such as likes.”¹⁵⁹ SNSs take advantage of this and assume the role of “the attention merchants”:¹⁶⁰ when a post does not receive any response, it is

¹⁵³ Neyman, *supra* note 44, at 3.

¹⁵⁴ *Id.*

¹⁵⁵ There are many posts on how to increase likes and shares. See, e.g., Darren Rowse, *A Quick Way to Get More Facebook Likes for Your Facebook Page*, PROBLOGGER (Mar. 9, 2016), <https://problogger.com/a-quick-way-to-get-more-facebook-likes-for-your-facebook-page/> [<https://perma.cc/D95S-UKQE>].

¹⁵⁶ See *What is Tagging and How Does it Work?*, FACEBOOK HELP CTR., <https://www.facebook.com/help/124970597582337?helpref=search&sr=3&query=tagging> [<https://perma.cc/8HY7-7BDM>]; *About Notifications on Mobile Devices*, TWITTER HELP CTR., <https://help.twitter.com/en/managing-your-account/notifications-on-mobile-devices> [<https://perma.cc/6SZ3-T9SQ>].

¹⁵⁷ *How Do I Turn Push Notification on or off?*, INSTAGRAM HELP CTR., <https://help.instagram.com/546541825361643> [<https://perma.cc/65E4-MBVW>].

¹⁵⁸ *Managing Your LinkedIn Notification Updates*, LINKEDIN HELP, <https://www.linkedin.com/help/linkedin/answer/76636/managing-your-linkedin-notification-updates?lang=en> [<https://perma.cc/GQ6V-YK4V>].

¹⁵⁹ Neyman, *supra* note 44, at 3 (citation omitted).

¹⁶⁰ TIM WU, *THE ATTENTION MERCHANTS: FROM THE DAILY NEWSPAPER TO SOCIAL MEDIA, HOW ARE TIME AND ATTENTION IS HARVESTED AND SOLD* 5–6 (2017).

considered unsuccessful.¹⁶¹ Facebook, for instance, designs its default settings of the news feed to show “top stories,” which are the posts by other users that got the most “likes,” “comments,” or “shares.”¹⁶² This is intended to reward the stories that have produced the most activity by others, and are therefore the most valuable to the corporate platform.

These characteristics constitute an environment that is hypersensitive to social feedback—one that fosters a dependency on the approval of the crowd. This dependency again serves the corporate interest, as it encourages the production of information and the formation of links between pieces of information.¹⁶³

From a Razian perspective, it is clear that the users are neither independent nor self-governing in their activity on SNS profiles: choices are nudged, sometimes dictated; interaction is heavily mediated and manipulated.¹⁶⁴ Vulnerability theory also shifts our attention from concepts such as “contract” and “consent” to actual vulnerability, and to the social institutions that exploit it, thus perpetuating the power imbalance between platforms and users, rather than enabling resilience.¹⁶⁵ As a social institution, SNSs take advantage of people’s vulnerabilities for their economic ends.¹⁶⁶ This is especially important, as studies show that the most vulnerable users are more exposed to manipulation than others: people’s need for popularity is strongly correlated with information disclosure, and indeed younger or single people tend to disclose more personal information than others.¹⁶⁷ More disclosure means

¹⁶¹ Kasch, *supra* note 46, at 169. Non-response also engenders a negative personal feeling. *Id.* (“This focus or interest in comments and Likes also speaks to an often implicit underlying purpose for posting content to Facebook: to have others endorse your thoughts and ideas, and by extension, socially endorse you.”).

¹⁶² When users choose to change their setting to show the “most recent” posts—thus undermining popularity and ratings—the site defaults back into “top stories” the next time the user logs back in. See Sean R. Nicholson, *Permanently Set Your Facebook Feed To Show Most Recent Instead Of Top Stories*, SOCMESEAN, <http://www.socmedsean.com/permanently-set-your-facebook-feed-to-show-most-recent-instead-of-top-stories/> [<https://perma.cc/UJ8E-HWFB>] (“In the desktop view of Facebook, there is an option to change from Top Stories to Most Recent, but Facebook only maintains that setting for about 24 hours and then it automatically reverts back to Top Stories.”).

¹⁶³ See, e.g., danah boyd, *Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications*, in *A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES* 39, 46 (Zizi Papacharissi ed., 2011) [hereinafter boyd, *Social Network Sites as Networked Public*].

¹⁶⁴ See *supra* note 104 and accompanying text.

¹⁶⁵ Fineman, *Vulnerable Subject*, *supra* note 102, at 2, 7, 10–11 (viewing contract as based on the liberal premise of consent and privacy and contesting this premise).

¹⁶⁶ See *supra* notes 124–128 and accompanying text.

¹⁶⁷ See Emily Christofides et al., *Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin or Two Different Processes?*, 12 *CYBERPSYCHOLOGY, & BEHAV.* 341, 343 (2009); cf. Fineman, *Vulnerable Subject*, *supra* note 102 (arguing that everyone is vulnerable as a basic human condition based on our physical embodiment that leads to dependency).

more time spent, which means more information divulged. Studies also show that “social pressure and *the Facebook environment* affected the amount of information users presented.”¹⁶⁸

Within this distinct social arena, SNSs steer users’ activity into readymade templates.¹⁶⁹ Social network sites are far from a neutral arena for interaction and are actually highly structured,¹⁷⁰ with much less authorship than might be expected. In fact, SNS profiles cultivate a selective, inattentive to context and overly persistent persona, vulnerable to corporate control and manipulation. First, profiles on social media project a selective and partial representation of the self. Online representation tends to be overly positive.¹⁷¹ Kasch explains that “[s]tudents created these digital self-presentations as curations of their thoughts, personalities, and interests with *selective and intentional gaps* between who they were on Facebook and who they were in-person as a way to exert more control over their digital social lives through Facebook.”¹⁷² Although there are social psychologists that see the self as performing to an audience, this element is exacerbated in social media, where its presence is manifestly selective, dynamic, and distinct from the user.¹⁷³ People are drawn to constant comparisons with what are often the idealized versions of the lives of others. Indeed, according to a recent survey, the pressure to present an image of a “perfect life” on social media is affecting the wellbeing of one in three girls.¹⁷⁴ A poll conducted by the U.K. charity Girlguiding found that one third of girls between the ages of eleven and twenty-one consider their biggest worry online to be how they compare with others.¹⁷⁵

Indeed, SNS profile presence is highly selective and often amounts to no more than “role playing,” as if acting onstage. Accordingly, there is no enduring sense of self, but rather a constant need for the approval of an imaginary audience.¹⁷⁶ This theory

¹⁶⁸ Sinn & Syn, *supra* note 41, at 99 (emphasis added).

¹⁶⁹ Examples include the public display of connections and the creation of public networking. See Kasch, *supra* note 46, at 28 (reviewing the relevant literature and explaining that “connections or links on these websites are mutual, public, un-nuanced, and decontextualized”).

¹⁷⁰ *Id.* at 29 (discussing structural affordances of social networks, including data persistence, replicability of content, scalability of content and networks, and searchability of uploaded content).

¹⁷¹ Gonzales & Hancock, *supra* note 122.

¹⁷² Kasch, *supra* note 46, at 91 (emphasis added).

¹⁷³ *Id.* at 92.

¹⁷⁴ Sara Marsh, *Girls Suffer Under Pressure of Online ‘Perfection’, Poll Finds*, GUARDIAN (Aug. 22, 2017), <https://www.theguardian.com/society/2017/aug/23/girls-suffer-under-pressure-of-online-perfection-poll-finds> [<https://perma.cc/DS6H-UCUD>].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*; see also Nina Haferkamp & Nicole C. Krämer, *Social Comparison 2.0: Examining the Effects of Online Profiles on Social-Networking Sites*, 14 CYBERPSYCHOLOGY,

correlates nicely with the “SNS profile self”: users assume a selective, flat, online identity that is chosen for the purpose of getting them the love of the audience (in the form of likes and shares).¹⁷⁷ In some cases or life events, people become interchangeable. On these occasions, the resemblance of users to each other is staggering: just think of your Facebook friends’ posts on Christmas morning, on the first day of school, and on Election Day.¹⁷⁸

These SNS traits support the observation that the power imbalance is not just the background to the activity, but rather shapes personal profiles as well as the activity itself. Indeed, *Packingham v. North Carolina* identifies the centrality of this activity to human interactions, but focuses on constraining state power and protecting access to these accounts.¹⁷⁹ It is *private* power, however, that ultimately shapes the activity through subtle manipulation, affecting not only the level of activity but also its type, frequency, and nature, and with it, interpersonal interactions.¹⁸⁰

Yet another implication of commercial involvement in shaping the activity on profiles is that social network sites flatten social context.¹⁸¹ In offline social interactions, people present

BEHAV., & SOC. NETWORKING 309, 309–12 (2011) (discussing the comparison culture on SNS and its impact on self-esteem).

¹⁷⁷ See Marsh, *supra* note 174 (quoting Tom Madder, director of campaigns and communications at YoungMinds) (“With feeds full of idyllic holiday photos or groups of friends, it can be hard not to compare yourself to others or feel like you should be living the ‘perfect life.’ While it’s important to recognise [sic] and teach young people against dangers online, it’s also really important to acknowledge that social media can have an impact on young people’s wellbeing or exacerbate feelings of being left out.”); see also Erin A. Vogel & Jason P. Rose, *Perceptions of Perfection: The Influence of Social Media on Interpersonal Evaluations*, 39 BASIC & APPLIED SOC. PSYCHOL. 317 (2017) (discussing self-presentation on SNSs and explaining that it allows for unique opportunities to present a selective image of the self). The study found that Facebook indeed influences perception of socially desired characteristics. *Id.* at 325.

¹⁷⁸ Cf. Carmen K.M. Lee, *Micro-blogging and Status Updates on Facebook: Text and Practices*, in DIGITAL DISCOURSE: LANGUAGE IN THE NEW MEDIA 110, 115–16 (Crispin Thurlow & Kristine Mroczek eds., 2011) (studying statuses on Facebook and creating categories including: “everyday life,” “What are you doing right now?,” “opinion and judgement,” and “reporting mood.”).

¹⁷⁹ See *Packingham*, 137 S. Ct. at 1735–36.

¹⁸⁰ See Rahman, *supra* note 54; see also Ronit Donyets-Kedar, *Rethinking Responsibility in Private Law*, in PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE 34 (Martha Albertson Fineman et al. eds., 2017) (rethinking certain private law rules and doctrine to adapt to new forms of private power, discussing not only economic power but also the cultural and social role of corporations, and arguing that in a post privatization world, “where an increasing number of individuals are exposed to private law arrangements, a new, more robust concept of responsibility is required”); Gemma Newlands et al., *Power in the Sharing Economy* (The EU H2020 Research Project Ps2Share, working paper no.732117, 2017).

¹⁸¹ Alice E. Marwick & danah boyd, *I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience*, 13 NEW MEDIA SOC’Y 114, 114–15 (2010) (“We present ourselves differently based on who we are talking to and where the conversation takes place—social contexts like a job interview, trivia night at a bar, or dinner with a partner differ in their norms and expectations. The same goes for socializing online. Participants have a sense of audience in every mediated conversation,

themselves to others quite differently, depending on the social context.¹⁸² A job interview, a social gathering, or an intimate conversation will each yield different forms of communication.¹⁸³ We behave differently around our friends, family, coworkers and strangers. SNSs, however, employ a “one size fits all” platform.¹⁸⁴ A user maintains a single profile for all communication with family, friends, coworkers, and the broader audience.¹⁸⁵ This uniform platform for all types of communication not only flattens users’ communication with others, but essentially streamlines the interaction into pre-constructed, corporate-manufactured patterns. The number of “friends” or “followers” on an SNS is extremely influential when it comes to impressions.¹⁸⁶

This is a product of social media sites’ operation as a private platform in a mediated public or semi-public space.¹⁸⁷

whether on instant messenger or through blog comments. This audience is often imagined and constructed by an individual in order to present themselves appropriately, based on technological affordances and immediate social context.”).

¹⁸² *Id.* at 114.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 115 (“Every participant in a communicative act has an imagined audience. Audiences are not discrete; when we talk, we think we are speaking only to the people in front of us or on the other end of the telephone, but this is in many ways a fantasy. (Social norms against eavesdropping show how ‘privacy’ requires the participation of bystanders.) Technology complicates our metaphors of space and place, including the belief that audiences are separate from each other. We may understand that the Twitter or Facebook audience is potentially limitless, but we often act as if it were bounded.”).

¹⁸⁵ Kasch, *supra* note 46, at 25 (“Instead of being able to communicate in particular ways with each of those groups, and even with individual members within each of those groups, users are limited to only one form of communication with all users across all social contexts.”); see also danah boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in YOUTH, IDENTITY, AND DIGITAL MEDIA 119, 133 (David Buckingham, ed., 2008) (explaining the problem through analogy. The problem of flattening of social context is presented in all forms of mediated public. boyd considers Stokely Carmichael’s experience with radio and television, and clarifies that, “[a]s an activist in the 1960s, Carmichael regularly addressed segregated black and white audiences about the values and ideals of the burgeoning Black Power movement. Depending on the color of his audience, he used very different rhetorical styles. As his popularity grew, he started attracting media attention and was invited to speak on TV and radio. This opportunity was also a curse because both black and white listeners would hear his speech. As there was no way to reconcile the two different rhetorical styles he typically used, he had to choose. By maintaining his black roots in front of white listeners, Carmichael permanently alienated white society from the messages of Black Power. Faced with two disjointed contexts simultaneously, there was no way that Carmichael could successfully convey his message to both audiences.”).

¹⁸⁶ See generally Sonja Utz, *Show Me Your Friends and I Will Tell You What Type of Person You Are: How One’s Profile, Number of Friends, and Type of Friends Influence Impression Formation on Social Network Sites*, 15 J. COMPUTER-MEDIATED COMM. 314, 326 (2010) (arguing that a person’s “profile, profile pictures of the *friends* and number of *friends* jointly influence impressions”).

¹⁸⁷ See boyd, *supra* note 185, at 125 (explaining the term *mediated public* by arguing that “[t]he types of publics that gather on social network sites and the types of publics that such sites support are deeply affected by the mediated nature of interaction. For these reasons it is important to distinguish these sites as publics, not simply public, and networked publics, not simply publics.”).

The implications are clear: when there is only one level of social relations, diversity, and complexity are obscured. In order to manage this flattening of social context, users exercise self-censorship, write to a strategic audience,¹⁸⁸ and present only a partial portrayal of themselves. Relations with others in SNSs become unified, with less sensitivity to differences.

Birthdays are a good example of the flattening of social context and of the structural replicability that supports a pseudo-community. Facebook reminds users of friends' birthdays and encourages users to congratulate them.¹⁸⁹ Friends write birthday wishes on the user's timeline as a way to foster intimacy and affection.¹⁹⁰ Nonetheless, those sentiments are a superficial manifestation of intimacy.¹⁹¹ All of a user's Facebook friends receive the same notification, including life partners, family members, coworkers, and casual acquaintances.¹⁹² They are all similarly encouraged to congratulate the user, making their birthday wishes effortless and, to some extent, impersonal. In addition, the user's friends can see who congratulated them, and feel obligated to join the well-wishers.¹⁹³ Birthday wishes

¹⁸⁸ See, e.g., Marwick & boyd, *supra* note 181, at 119 ("The strategic use of Twitter to maintain followers, or to create and market a 'personal brand,' is part of a larger social phenomenon of using social media instrumentally for self-conscious commodification. In this process, strategically appealing to followers becomes a carefully calculated way to market oneself as a commodity in response to employment uncertainty.")

¹⁸⁹ Glenn Fleishman, *How Facebook Devalued the Birthday* FAST COMPANY (June 4, 2018), <https://www.fastcompany.com/40550725/how-facebook-devalued-the-birthday>; Cf. Martin S Fiebert et al., *It's Your Birthday!: Greetings as a Function of Gender and Relationship Status on Facebook*, 4 INT'L REV. SOC. SCI. & HUMAN. 206 (2013) (measuring the percentage of birthday wishes a Facebook user received, along the lines of relationship status and gender, finding women in a relationship received the most greetings).

¹⁹⁰ Mike Thelwall & David Wilkinson, *Public Dialogs in Social Network Sites: What is Their Purpose?*, 61 J. AM. SOC'Y INFO. SCI. & TECH. 392, 401 (2010) (arguing that that birthday wishes posts generally served to initiate and maintain contact between friends).

¹⁹¹ See Nicole B. Ellison et al., *Cultivating Social Resources on Social Network Sites: Facebook Relationship Maintenance Behaviors and Their Role in Social Capital Processes*, 19 J. COMPUTER-MEDIATED COMM. 855, 859 (2014) [hereinafter Ellison et al., *Cultivating Social Resources*] ("Our measure also includes an item about publicly posting birthday wishes to a Friend's Wall, which we believe signals attention to the recipient and performs a social grooming function. In summary, engaging in these relationship maintenance and attention-signaling behaviors may be linked to expectations of access to social resources, both from one's Facebook network and from one's social network more generally.")

¹⁹² See Kathy H. Chan, *Never Forget a Birthday*, FACEBOOK (Nov. 14, 2008), <https://www.facebook.com/notes/facebook/never-forget-a-birthday/38780477130/> [<https://perma.cc/2QGD-S7BY>]; see also Nukul, *My Friends Don't Get my Birthday Notification. How to Set it So?*, FACEBOOK HELP COMMUNITY, <https://www.facebook.com/help/community/question/?id=1399245620381345> [<https://perma.cc/VRX6-UZZA>].

¹⁹³ Cf. Jen Doll, *Please Don't Wish Me Happy Birthday on Facebook*, WEEK (Mar. 28, 2017), <http://theweek.com/articles/685933/please-dont-wish-happy-birthday-facebook> [<https://perma.cc/DT2P-8QVZ>] (portraying her experience of receiving a birthday greeting on Facebook) ("Everyone came forth to say 'Happy Birthday!!' (with two exclamation marks or more, or it doesn't count), or 'Happy!' (must have gotten cut off before he finished), or 'HBD,' which in terms of stylistic birthday wishing has to be the laziest version on the planet. Some left full messages featuring inside jokes and deep, thoughtful feelings and

thus are flat, generic, and meaningless, yet are disguised as acts of affection, only to encourage cooperation.

Hypersensitivity to feedback and flattening of social context distorts the user's representation of self and social ties and harms the user's autonomy and agency. Razian self-authorship, at least in its broadest interpretation, is harmed by the strong link between the representation of the self and the hyper-dependency on the response of others.¹⁹⁴ SNSs encourage users to communicate a self that is likely to receive a response, and this greatly narrows the scope of choice that is free from corporate manipulation.¹⁹⁵

According to Nedelsky's relational autonomy, rules and institutions should be evaluated by their influence on relationships.¹⁹⁶ Social networks create and maintain relations that lack depth and sincerity. The platform encourages rapid responses and information-producing activity.¹⁹⁷ The importance of social capital and the preservation of weak and latent ties is indisputable. Yet, as the representation of the self is inflexible and influenced by the corporate interest, relations remain superficial and even fictitious.¹⁹⁸ Because social networks constitute a distinct area of activity that has become central in digital life, the characteristics of interaction are extremely significant for a relational inquiry. The constitution of autonomy as the ability to choose from a myriad of influences requires a rich field with various social contexts and a variety of interactions.¹⁹⁹ Facebook's option of closed groups²⁰⁰ provides a valuable communal alternative to typical interactions. For the most part, however, the activity in groups usually (though not always) is similar to the typical Facebook interaction.²⁰¹ Group activity also reflects selectivity, replicability, and hypersensitivity to social feedback. This type of relationship stands in stark

vaguely inappropriate gifs, but most just expressed the sentiment plain and true, as handily urged to do by Facebook's birthday calendar reminder. I had more than 100 such messages on my birthday, and a handful of belated wishes the day after.”)

¹⁹⁴ See *supra* notes 104–106 and accompanying text.

¹⁹⁵ See *supra* notes 184–186 and accompanying text.

¹⁹⁶ See *supra* notes 107–113 and accompanying text.

¹⁹⁷ See *supra* notes 184–188 and accompanying text.

¹⁹⁸ See *supra* notes 189–193 and accompanying text.

¹⁹⁹ See NEDELSKY, *supra* note 101, at 58.

²⁰⁰ See Shih-Ming Pi et al., *A Study of Facebook Groups Members' Knowledge Sharing*, 29 COMPUTERS HUM. BEHAV. 1971, 1971 (2013); see also Richardson, *Virtual Property*, *supra* note 37, at 756 (“There are also group pages, which ‘are meant to foster group discussion around a particular topic area.’ Some group pages are used to simply announce group meetings and highlight press clippings about the organization, while other group pages such as ‘Betty White to Host SNL (please?)’ are used as a tool to campaign for a particular goal.”); *How Do I Create a Group on Facebook?*, FACEBOOK HELP CTR., <https://www.facebook.com/help/167970719931213?helpref=related> [<https://perma.cc/KS2N-FFG7>].

²⁰¹ Shadmy, *supra* note 150 (Section I.B).

opposition to Nedelsky's theory of relational autonomy. In Nedelsky's terms, SNS profiles condition our relations with others, rather than allow us to constitute relationships.²⁰²

Vulnerability theory by Martha Fineman exposes the power structure that enables these relations. With its sensitivity to power and privilege, vulnerability analysis is helpful in uncovering the artificiality of SNS profiles as a reflection of the self, as well as the sparsity of the social ties formed within their context.²⁰³

Vulnerability analysis also allows us to focus on social network sites as powerful, privately controlled, social institutions that shape the public sphere of speech and interaction.²⁰⁴ This privately-owned public arena does not foster resilience or respect for subjects, but rather preserves their inferior position vis-à-vis corporate power and exploits it. While a user's consent to the terms of service seemingly fits with the liberal vision of a contract, it nonetheless obscures the vulnerability involved in the transaction.²⁰⁵ Acknowledging that all individuals are vulnerable even if they do not belong to a so-called vulnerable group allows us to recognize the vulnerability of users *qua* users.²⁰⁶ It raises the need for protection and regulation of private power.

Another, final problem with SNS activity is hyperdocumentation. A large part of the content on these profiles comprises random thoughts, chatter, and casual reactions.²⁰⁷ While our real life actions and interactions are passing, ephemeral, and fleeting, our online activities are documented, without any hierarchy or sifting process.²⁰⁸ SNSs such as Facebook thus become a repository for people's activity—both the trivial and significant, the meaningless and thoughtful.²⁰⁹ This continuing curation is part of

²⁰² NEDELSKY, *supra* note 101, at 4, 31.

²⁰³ Fineman, *Vulnerable Subject*, *supra* note 102.

²⁰⁴ Cf. Puetz, *supra* note 140, at 391 ("Beyond the opportunities for expression on the Timeline, News Feed, or within messages or group pages, Facebook has apps, such as Pages, Games, and the Marketplace, which allow users to delve even deeper into the community.").

²⁰⁵ See *supra* note 165 and accompanying text.

²⁰⁶ See Fineman, *Vulnerable Subject*, *supra* note 102, at 9. Fineman's theory suggests that we are all vulnerable because of our physical embodiment. Her argument detaches vulnerability from a specific population (elderly, children) and engages broadly with the human condition. She further explains "[v]ulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise." *Id.* This wider premise allows us to understand the vulnerability of all users, regardless of a particular affiliation.

²⁰⁷ See Kasch, *supra* note 46, at 8–11 (describing Facebook's different functions and possibilities, including Likes, places, friends, etc.).

²⁰⁸ boyd, *Social Network Sites as Networked Public*, *supra* note 163, at 46–47.

²⁰⁹ Kasch, *supra* note 46, at 107.

the modern inclination toward self-musealization and the cultural celebration of memory and the past.²¹⁰ Because documentation is a default, almost every moment online is preserved and stored. The structural characteristics of SNSs encourage an ongoing, continuous exchange through shares, likes, and comments.²¹¹ Moderate documentation may contribute to a sense of stability and permanence, but this hyper-documentation creates a clutter and blurs any potential hierarchy in an enormous body of information and communication.²¹² The overwhelming documentation does not clearly distinguish among bits of meaning, and it celebrates the casual and trivial. Aggregating and documenting all these expressions not only creates clutter, but also interferes with our need for mundane, banal, non-memorialized moments. As discussed in Part IV, over-documentation is particularly problematic when it comes to representations of memory and continuity after death.²¹³

III. INHERITANCE, MEMORY, AND SOCIAL NETWORKS

A. *Why Property?*

Access to social network profiles could be legally framed in various ways: as an essential commodity, as an expression, or as control of one's privacy.²¹⁴ The decision to characterize postmortem access as property is likely due to Anglo-American legal rules that distinguish between property rights that survive death and personal rights that do not.²¹⁵ The question remains then as to which theory of property supports this characterization. Because most social network profiles do not

²¹⁰ See Andreas Huyssen, *Present Pasts: Media, Politics, Amnesia*, 12 PUB. CULTURE 21, 24–25 (2000) (discussing “a popular obsession with ‘self-musealization’ by video recorder, memoir writing, and confessional literature; the rise of autobiography and of the postmodern historical novel with its uneasy negotiation between fact and fiction; the spread of memory practices in the visual arts, often centered on photography; and the increase of historical documentaries on television, including (in the United States) a whole channel dedicated entirely to history, the History Channel”).

²¹¹ See *supra* notes 185–189 and accompanying text.

²¹² Cf. Sinn & Syn, *supra* note 41, at 95, 119–20 (discussing Facebook as creating a form of personal documentation and its implications for archival studies of personal history).

²¹³ See *infra* Part IV.

²¹⁴ See *supra* notes 49–63 and accompanying text.

²¹⁵ See Lilian Edwards & Edina Harbinja, *Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World*, 32 CARDOZO ARTS & ENT. L.J. 83, 102–03 (2013) (“In the English, U.S., and other common law systems, the reigning principle has traditionally been *actio personalis moritur cum persona*, meaning personal causes of action die with the person By contrast, economic claims traditionally survive death in common law and pass to the heirs in testacy or intestacy. Indeed, the widest and most accepted definition of property (as opposed to personal right) is that which survives and transmits on the death of the proprietor. Reflecting this emphasis on economic rights, the term ‘personality rights’ is itself not recognized as a term of art in common law.”).

have an economic value,²¹⁶ proponents of this approach need a theory that accounts for the personal and communal aspects of property. There are several possible avenues for such an exploration: personhood theory and the value of community are key alternatives. We begin by exploring some of these theories.

Property's role in shaping and reflecting identity is celebrated by modern personhood theories. These theories emphasize the role of possessing and controlling property as conducive to self-development.²¹⁷ Property, according to the argument, is a vehicle for the embodiment of the self, because property has a stable and continuous presence that carries memories, ideas, and plans.²¹⁸ In this light, Margaret Radin argues that the home is a "scene of one's history and future, one's life and growth,"²¹⁹ and the private car is "the repository of personal effects" and serves as "the backdrop for carrying on private thoughts or intimate relationships."²²⁰ Note that this argument has a strong temporal component. Jeremy Waldron explains that "the actions that an individual performs on or with the object now may constrain or determine the actions that he can perform on or with it later."²²¹ Property therefore embodies a will by forcing the individual to become consistent and stable over time.

This position is not monolithic.²²² Margaret Radin's argument, for example, relies on a foundational distinction between fungible assets and personhood property.²²³ Money differs from a wedding ring or someone's home. She suggests "a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement."²²⁴ This hierarchy

²¹⁶ See *supra* note 18 and accompanying text.

²¹⁷ See Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982); Malla Pollack, *Your Image is My Image: When Advertising Dedicates Trademarks to the Public Domain—with an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1392, 1397–1406 (1993); Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J. L. & POL'Y 93, 135 (2011) (arguing that attachment to possession is so abundant that there is no need of legal possession); Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55, 56–57 (1994); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280 (1998); see also Dudley Knowles, *Hegel on Property and Personality*, 33 PHIL. Q. 45, 56–57 (1983); compare Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343 (2008), for the analysis of cultural property.

²¹⁸ ALAN BRUDNER, THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE 34–38 (1995); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 352 (2002).

²¹⁹ Radin, *supra* note 217, at 992.

²²⁰ *Id.* at 1001.

²²¹ WALDRON, *supra* note 218, at 373.

²²² Shelly Kreiczer-Levy, *Property Without Personhood*, 47 SETON HALL L. REV. 771, 783–99 (2017) (contributing a critique of Radin's theory and discussing the normative aspects of the theory).

²²³ Radin, *supra* note 217, at 986.

²²⁴ *Id.*

reflects the right-holder's subjective evaluation. This reflection, however, is accompanied by a normative judgment. Radin is well aware of the duality that lies in property relations. She explains:

In this view, the relationship between the shoe fetishist and his shoe will not be respected like that between the spouse and her wedding ring. At the extreme, anyone who lives only for material objects is considered not to be a well-developed person, but rather to be lacking some important attribute of humanity.²²⁵

This normative judgment clarifies that the value of property cannot be reduced to the right-holder's preference: there are normatively valuable attachments and, contrarily, there are attachments that the law does not endorse.

Personhood theory is not limited to physical property, personal and real. Intellectual property scholars also refer to personhood theories to justify the protection of intellectual property generally,²²⁶ and to support the moral standing of copyright in particular.²²⁷ Creative work, according to the argument, reflects "an embodiment of [the author's] message."²²⁸

It is tempting to consider social network profiles along these lines. SNS profiles have a strong temporal component because they provide consistent documentation of experiences.²²⁹ The profile is a stable, persistent manifestation of thoughts, feelings, and opinions, which supposedly could be considered as a "scene of one's history and future."²³⁰ In addition, the information they host tends to be personal and reflect the preferences and tastes of the user.²³¹ The profile represents the user's persona: her wants, needs, status, and choices. In a similar spirit, Natalie Banta argues that people personally

²²⁵ *Id.* at 961.

²²⁶ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–31 (1988).

²²⁷ See Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 845 (2001) ("Conceptually, the dignity-based right of integrity is a *personal* right, one that demands respect for the author's person (and the person's artist), her *personhood*, and inviolate *personality*, as reflected in her creation. All of these interests must be said to terminate with the death of the author.") (emphasis in original); See also Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746 (2012) ("Another group of scholars reasons instead that creators deserve moral rights in their works . . . because the works are important components of creators' personhoods (the aspects of creators' personalities infused into and bound up in their works).").

²²⁸ ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 25 (2010).

²²⁹ Lanfranco Aceti, *Eternally Present and Eternally Absent: The Cultural Politics of a Thanatophobic Internet and its Visual Representations of Artificial Existences*, 20 MORTALITY 319, 319–20 (2015).

²³⁰ Radin, *supra* note 217, at 992.

²³¹ Belk, *supra* note 24.

identify with social network accounts.²³² They reflect “how the world sees us and how we see ourselves.”²³³ Banta’s conclusion is that social network accounts are property, and that users should possess the power of alienability.²³⁴

Although this conclusion is intuitively tempting, the intuition is misleading. Personhood theory is not merely reflective; it requires a normative evaluation. This analysis misses other important traits of SNS profiles, including the exact forms of representation, the tendency towards over-documentation, the hypersensitivity to the feedback of others, and corporate involvement, all of which constitute and construct a performative self. The harm to agency and to autonomy influences the embodiment of personhood. These traits create a distorted representation of the self, which is potentially normatively questionable, much like the shoe fetishist.²³⁵ Personhood theory allows us perhaps to engage with SNS profiles and characterize them as property *prima facie*. It requires, however, significant normative work and legal reform to ensure the agency of the user. The normative stance of personhood as self-development crumbles without it.

Moreover, property is not only a construct of individual identity. As many scholars have noted, it is also a platform for human interactions.²³⁶ Relational and communal approaches to property insist that property does not just set boundaries but also

²³² Banta, *Property Interests*, *supra* note 12, at 1147 (“These accounts are more like tangible personal property identified by Radin as personal. Like heirlooms, jewelry, or our houses, we personally identify with our e-mail and social networking accounts.”).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See *supra* text accompanying note 225.

²³⁶ See generally HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 48–54 (2011) (discussing multiple property values, including community); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 30–31 (2003) (offering a nuanced understanding of property, and community and public values); HANOCH DAGAN & MICHAEL A. HELLER, *The Liberal Commons*, 110 YALE L. J. 549 (2001) (explaining the benefits of cooperation in property related projects); SHELLY KREICZER-LEVY, *The Informal Property Rights of Boomerang Children in the Home*, 74 MD. L. REV. 127 (2014) (arguing that sharing a home creates informal property rights in the home); DAVID LAMETTI, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. TORONTO. L.J. 325 (2003); EDUARDO M. PEÑALVER, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) (discussing the importance of community for the value of land). see also GREGORY S. ALEXANDER, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) (presenting an alternative to the dominant property view that highlights the social obligation norm). Alexander explains:

[A]n owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing. These are the benefits necessary to the members’ development of those human qualities essential to their capacity to flourish as moral agents and that have some reasonable relationship with ownership of the affected land. *Id.* at 774.

constructs relationships,²³⁷ and that sharing property interests serves to protect vulnerable parties.²³⁸ Property builds, creates, and shapes community, because people who share a space gradually become meshed together.²³⁹ Whether they share a home, a condominium, a neighborhood, or even a workspace, a property's spatiality contributes to communal ties.²⁴⁰ Property serves as the foundation for the community, a platform for cooperation and sharing, and inspires duties to the community.²⁴¹

SNS profiles cultivate relationships and support communities, and presumably serve as valuable platforms for interaction and cooperation. The nature of these relations, however, is disputed. The research on social media demonstrates that Facebook facilitates the maintenance of latent, weak ties, or ties that already exist.²⁴² It has a significant role in building social capital, as it allows for a wide network of thin connections and makes it easier to communicate information and form common ground with others.²⁴³ As explained above, however, social networks often maintain superficial ties that obscure

²³⁷ Singer, *supra* note 57, at 621; Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 163, 168–70 (1990) (arguing against an autonomy-based property law).

²³⁸ Singer, *supra* note 57, at 623.

²³⁹ On critical accounts of space and society, see MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* (1992); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 226–41 (1990); Davina Cooper, *Regard Between Strangers: Diversity, Equality and the Reconstruction of Public Space*, 18 CRITICAL SOC. POLY 465, 473–75 (1998).

²⁴⁰ See Peñalver, *supra* note 236, at 838 (“[O]wnership of property in a particular community creates and reinforces social ties among neighbors, the maintenance of which provides owners with market-independent reasons for acting.”).

²⁴¹ Property is essentially a platform of collaboration and sharing resources. See *supra* note 236. Some argue that property cannot be adequately understood and theorized without considering the ways people share property and cooperate in property-related projects. See Carol M. Rose, *Property as Story Telling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 51–53 (1990). Among those who see sharing as fundamentally tied up with property, there are many theoretical and normative differences. Some understand sharing as a central feature of ownership that ultimately depends on the owner's will, see J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* 5 (1997); Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 859 (2014), while others stress dependency as a core feature of property, see Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Communities*, 10 THEORETICAL INQUIRIES L. 127, 138–44 (2009). Relational accounts insist that property constructs relationships and does not just set boundaries. See Nedelsky, *supra* note 237. Dagan and Heller claim that the sharing of property that successfully builds on cooperation with others strengthens interpersonal relations and is a good in and of itself. See Dagan & Heller, *supra* note 236; see also GREGORY S. ALEXANDER, *PROPERTY AND HUMAN FLOURISHING* 80 (2018).

²⁴² Kasch, *supra* note 46; Ellison et al., *The Benefits of Facebook*, *supra* note 123, at 1162.

²⁴³ Nicole B. Ellison et al., *With a Little Help from My Friends: How Social Network Sites Affect Social Capital Processes*, in *A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES* 124, 137–39 (Zizi Papacharissi ed., 2010).

diversity and complexity.²⁴⁴ They flatten social contexts and breed a form of corporate structured intimacy.

The interim conclusion is that conceptualizing social network profiles as digital property is complex. Analytically, it requires further development; normatively, it faces critical obstacles considering the harm to users' agency discussed above.²⁴⁵

B. *Memory and Loss*

There are two possible arguments that support the current legal trend in favor of treating social network profiles as digital assets. The first argument concerns the user's wishes to grant access to loved ones, because he or she wants to be remembered at least partly for their online activity.²⁴⁶ The second argument highlights the need of loved ones to hold on to the memory of the deceased. Posts, likes, shares, and photos represent, according to this view, the deceased and his or her persona.²⁴⁷ They provide relatives with a way to remember who he or she was. Both arguments make the implied assumption that the profile represents the identity of the user, and as such, serves as a desired platform for continuity of the self, relationships, and memory. This assumption, however, is not self-evident. It calls for a detailed examination of the characteristics and practices of identity building in the digital world, and the communal relationships it hosts.

The arguments revolve around memory and continuity. These arguments understand access to profiles as a way to cope with the death of a loved one. The human need to transcend mortality is well documented in an array of studies from several disciplines.²⁴⁸ Continuity offers individuals a connection to the world of culture, which may transcend our concrete existence.²⁴⁹ This connection is

²⁴⁴ See *supra* note 191 and accompanying text.

²⁴⁵ See *supra* Part II.

²⁴⁶ Cahn et al., *supra* note 10.

²⁴⁷ *Id.*

²⁴⁸ See, e.g., ZYGMUNT BAUMAN, MORTALITY, IMMORTALITY AND OTHER LIFE STRATEGIES 1–3 (1992); ERNEST BECKER, THE DENIAL OF DEATH 33 (1973); ROBERT J. LIFTON, THE BROKEN CONNECTION—ON DEATH AND THE CONTINUITY OF LIFE 13–14 (1979); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1052 (1990). The Terror Management theory also looks into the interrelation of culture and mortality. See Eric Strachan et al., *Coping with the Inevitability of Death: Terror Management and Mismanagement, in COPING WITH STRESS: EFFECTIVE PEOPLE AND PROCESSES* 114 (C.R. Snyder ed., 2001); Abram Rosenblatt et al., *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681, 681–89 (1989).

²⁴⁹ Kronman, *supra* note 248.

established through cultural artifacts such as architecture and art, family and friendship, or history and symbols.²⁵⁰

There are two corresponding needs: individuals seeking to transcend their own mortality by controlling their memory (writing letters, executing a will, or engaging in meaningful relationships), and family and friends' need for roots, to belong to the deceased and cherish their memory.²⁵¹ In the case of postmortem access, these corresponding needs are packed into the property law discussion. They are characterized as property, which allows for their management as part of the decedent's estate.²⁵²

Profiles are understood as artifacts of continuity and representations of the self. These are, however, flawed representations. In addition to the flaws mentioned above (hypersensitivity to feedback, power structure, and flattening of social context),²⁵³ over-documentation is particularly distortive when it comes to memory and representation.²⁵⁴ All information on social networks is preserved and documented. Every casual interaction, random expression or occasional reaction is stored as a default.

In terms of self-construction, this clutter is reductive. To better illustrate the point, think of Jorge Luis Borges' famous short story "Funes, the Memorious."²⁵⁵ The story tells the tale of Funes, disabled by a terrible accident, who also suddenly possesses the extraordinary capacity to remember everything: "Funes remembered not only every leaf of every tree of every wood, but also every one of the times he had perceived or imagined it."²⁵⁶ This powerful ability proved to be destructive. The narrator concludes, "I suspect, however, that he was not very capable of thought. To think is to forget differences, generalize, make abstractions. In the teeming world of Funes, there were only details, almost immediate in their presence."²⁵⁷

Now imagine, for example, that one's every move, conversation, idea, and interaction is recorded and documented.

²⁵⁰ *Id.* at 1051.

²⁵¹ Shelly Kreiczer-Levy, *Property's Immortality*, 23 CARDOZO J.L. & GENDER 107, 109 (2016) ("[C]ontinuity is not only about individual owners seeking to transcend their mortality by controlling property after death. Continuity is equally about potential recipients' connection to their roots."); see also MICHAEL OAKESHOTT, *THE VOICE OF LIBERAL LEARNING* 28 (1989); Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 32–33 (Amy Gutmann ed., 1994); SIMONE WEIL, *THE NEED FOR ROOTS: PRELUDE TO A DECLARATION OF DUTIES TOWARDS MANKIND* 43 (Arthur Wills trans., 1952).

²⁵² See *supra* notes 14–16 and accompanying text.

²⁵³ See *supra* Section II.B

²⁵⁴ See *infra* notes 255–259 and accompanying text.

²⁵⁵ JORGE LUIS BORGES, *Funes the Memorious*, in LABYRINTH 65–71 (Donald A. Yates & James E. Irby eds., 1964).

²⁵⁶ *Id.* at 70.

²⁵⁷ *Id.* at 71.

This documentation is made available after one's death. What is the value of this all-encompassing documentation? Suppose further that Skype conversations are automatically recorded, that one's ongoing presence on closed-circuit television²⁵⁸ could be snipped and made available to her family after her death, or that Waze²⁵⁹ or Google Maps stores information about travel routes and preferences: will family members ask for access to this information as well? Is such a request reasonable or desirable? Indeed, after a loved one passes away, there is something comforting in accessing every available piece of memory. Yet aggregating and documenting all of these expressions not only creates clutter, but also interferes with our need for mundane, banal moments that are not memorialized. Continuity is a project of interconnectedness, and it builds on culturally significant forms of communication and meaning. It does not, however, suggest an unfiltered amassing of every passing expression, every fleeting gesture, and every click of a mouse.

The characterization as artifacts of continuity heavily relies on the tenets of succession. Anglo-American succession law is fundamentally tied to testamentary freedom.²⁶⁰ Although certain common law jurisdictions protect the interests of family members, the will of the deceased is the primary concern of the law.²⁶¹ Postmortem access is similarly understood as a matter of the will of the deceased, according to the current version of the

²⁵⁸ A TV system monitored for surveillance purposes. See Margaret Rouse, *Definition: Closed Circuit Television (CCTV)*, WHATIS.COM (Mar. 22, 2001), <https://whatis.techtarget.com/definition/closed-circuit-television-CCTV> [<https://perma.cc/497L-YC57>].

²⁵⁹ Waze is a community-based GPS navigating systems. See WAZE, <https://www.waze.com> [<https://perma.cc/JNK9-76PY>].

²⁶⁰ See *Fischer v. Heckerman*, 772 S.W.2d 642, 645 (Ky. Ct. App. 1989); Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 554 (2001); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12–13 (1992); Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 751, 756–62 (2006); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975). It is quite an expansive freedom and includes the ability to make trusts and conditions. See RESTATEMENT (THIRD) OF PROP: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003); Judith G. McMullen, *Keeping Peace in the Family While You are Resting in Peace: Making Sense of and Presenting Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 78 (2006); Joshua C. Tate, *Conditional Love: Incentive Trusts and Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 466–68 (2006).

²⁶¹ Shelly Kreiczler-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. TR. & EST. L.J. 495, 509, 512 (2012). In fact, Lawrence Friedman observes that the right to devise property at death has always been in tension with forced heirship. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 352–53 (1966); see also Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 966–69 (2006).

American Uniform Fiduciary Access to Digital Assets Act, as is discussed before.²⁶²

Combining representation and memory with the framework of property and succession, however, requires more analytical work. The extant literature does not fully explain why the best conceptualization is inheritance.²⁶³ Moreover, the argument is also normatively incomplete. The harm to agency and autonomy should affect the legal conception of representations. The current discourse frames postmortem access as a standard inheritance case where the decedent and her family members are the only stakeholders. In reality, of course, the platforms are de facto stakeholders in a specific profile and more generally in all the profiles, active and inactive, as they constitute the platform's activity and main assets. They manipulate the presumed asset and its devolution.²⁶⁴ Given this triad, the problem of postmortem access to profiles is peripheral. The central discussion remains how to protect the agency of users.²⁶⁵ Only once regulation has secured their agency can SNS profiles start serving as a representation of their self and ties.

IV. LAW REFORM

The thrust of this project is critical. It aims to prompt a rethinking of current law reform trends and highlight the lack of consideration of corporate manipulation and user protection. The argument, however, has implications for the regulation of postmortem access to these profiles. This article discussed these implications in broad strokes, leaving the details for future research. Our general recommendation is that the power structure between the corporation and the users should stand at the center of regulation. This problem is not directly related to inheritance, but the inheritance debate presupposes it. Unless agency, in its broader sense, is secured and liberated from power, a discussion of inheritance is futile. It actually serves to perpetuate dominance.

The current argument in favor of inheriting digital assets does not call for a significant change in the terms or conditions of the activity.²⁶⁶ Such a narrow claim reproduces and reinforces

²⁶² See *supra* notes 89–90 and accompanying text.

²⁶³ The discussion typically begins with a declaration of property as an evolving field, with new assets being produced in changing times. See, e.g., Cahn, *supra* note 8, at 1702–03.

²⁶⁴ See *supra* Section III.A.

²⁶⁵ *Id.*

²⁶⁶ Banta, *supra* note 8 (arguing voiding TOS contracts as a matter of public policy but calling for no substantive changes to the terms); Cahn, *Probate Law*, *supra* note 8, at 1701 (arguing in favor of reforming federal and state laws to include new

corporate power. By recognizing the importance of profiles for one's personhood and relations with others,²⁶⁷ the current claim reaffirms the cultural force of SNS profiles and solidifies its standing. The more culturally valuable the profile becomes in the eyes of users, the harder it becomes to avoid participation.²⁶⁸ Once participation is in motion, SNSs encourage sharing of additional information and the documentation of the self, which is in turn aggregated and sold to third parties.²⁶⁹ This article therefore calls for resistance to corporate power.

Possible reforms include limiting economic surveillance, providing more user choice in privacy setting vis-à-vis the platform, and regulation of SNSs' control of access to new and existing users.²⁷⁰ These suggestions are far-reaching and may be hard to implement, but they are nonetheless a necessary step.

The threat to representation of self and memory is not only a product of corporate manipulation. Over-documentation threatens the oral, fleeting, casual part of our identity. Because social media profiles are structured as consistent and permanent, documentation becomes obvious and imperative. A new wave of social networks like Snapchat, however, follows the younger generation's preferences for unpreserved information.²⁷¹ Snapchat is based on the opposite principle: communication is immediately deleted after it is read.²⁷² As Snapchat clarifies: "Snapchat is not—and never has been—stockpiling your private Snaps or Chats. And because we continue to delete them from our servers as soon as they're read, we could not—and do not—share them with advertisers or business partners."²⁷³ Although we do not endorse Snapchat's business model, its policy

technologies in the decedent's estate but not arguing for changes to terms of typical activities in SNS); Horton, *supra* note 14, at 588–93 (discussing reforms in the area but not arguing in favor of changing in the typical activity of SNS).

²⁶⁷ See, e.g., Banta, *Property Interests*, *supra* note 12, at 1147.

²⁶⁸ Rahman, *supra* note 54, at 1670–72 (discussing Facebook's centrality for access to media and its part in creating our informational infrastructure).

²⁶⁹ See *supra* Part II.

²⁷⁰ Cf. EUROPEAN REPORT ON FUNDAMENTAL RIGHTS IMPLICATIONS OF BIG DATA: PRIVACY, DATA PROTECTION, NON-DISCRIMINATION, SECURITY AND LAW-ENFORCEMENT (2017), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0044+0+DOC+XML+V0//EN> [<https://perma.cc/KK3U-7XNH>]; Fernback, *supra* note 125, at 14–20; Lisa M. Austin, *Towards a Public Law of Privacy: Meeting the Big Data Challenge*, 71 SUP. CT. L. REV. 541, 542 (2015) (discussing the regulation of privacy and big data in Canadian law).

²⁷¹ Hannah Kuchler & Tim Bradshaw, *Snapchat's Youth Appeal Puts Pressure on Facebook*, FIN. TIMES (Aug. 21, 2017), <https://www.ft.com/content/07e4dc9e-86c4-11e7-bf50-e1c239b45787> [<https://perma.cc/DMX3-DFH3>].

²⁷² Oren Soffer, *The Oral Paradigm and Snapchat*, SOC. MEDIA + SOC'Y, July–Sept. 2016, at 2.

²⁷³ See *Protecting Your Privacy*, SNAP INC. (Nov. 1, 2015), <https://www.snap.com/en-US/news/post/protecting-your-privacy/> [<https://perma.cc/4FEA-E2QQ>].

demonstrates the function of documentation for business purposes. Nonetheless, Facebook, Instagram and other SNSs continue to control the market.²⁷⁴

We suggest that the SNSs periodically delete content of the profile as a default rule. Users will be able to characterize certain posts as “memories,” signifying that they have unusual importance for the user. This mechanism would separate the trivial, casual, and mundane from the occasional significant moment. It therefore confronts the normative problem of clutter and lack of hierarchy that is inherent in over-documentation. We suggest including this rule as part of the legislation that regulates the postmortem devolution of assets.

It is important to distinguish between this proposed exception and the approach of the revised UFADAA. The revised UFADAA’s default rule is that a fiduciary will have access to a catalogue of the deceased’s communications, but not access to their content, unless the user consented.²⁷⁵ The reason, as described in Part I.B, is privacy concerns.²⁷⁶ The concern is that people who were close to the deceased will be exposed to private information; it is not an economic surveillance concern. In contrast, the proposed mechanism of “memories” concedes that some activity may have normative value for personhood and continuity. The mechanism serves as a proxy for processing huge amounts of information and managing over-documentation without ignoring possible meaningful forms of communication.

These suggestions serve as examples of the kind of normative analysis that should guide law reform. The general principle persists: unless social network sites are substantially reformed, a discussion of inheritance is unproductive and harmful. Deletion is a form of resistance to the normative problems embedded in social media.

CONCLUSION

Platform power is one of the main policy concerns of our era. Despite its importance, scholars have not explored its application to the problem of postmortem access to digital assets. This article has asked whether it is normatively sound to conceptualize social network profiles on such sites as Facebook, Twitter, Instagram, and LinkedIn as inheritable property. It

²⁷⁴ See *supra* notes 41–42 and accompanying text.

²⁷⁵ REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 7 (UNIF. LAW COMM’N 2015).

²⁷⁶ See *supra* Section I.B.

considered platform power to structure interaction, manipulate relationships, and support a selective representation of the self.

Following this new perspective, this article has examined the current trend in popular opinion and legislative reforms to include these assets in the deceased's estate. Against this background, we claim that SNS profiles should not be viewed as inheritable property and argue in favor of a broader perspective. The inheritance debate must be both mindful of the triad of stakeholders and sensitive to platform power and the harm to autonomy and agency. This article thus serves to provoke an in-depth normative analysis of social media profiles before reaching a conclusion with regard to their inheritability.