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Memento Mori: Death and Wills

Karen J. Sneddon

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MEMENTO MORI: DEATH AND WILLS

*Karen J. Sneddon**

ABSTRACT

Death. The mere mention of the word sends a shiver down the spine or provokes a nervous giggle. Modern reactions to death range from avoidance, as shown by the abundance of death euphemisms, to fascination, as shown by the number of movies and television shows centered on death, including Twilight's vampires and The Walking Dead's zombies. Estate planning is the legal environment in which a person confronts his or her mortality and participates in the formulation of his or her legacy. Contextualizing the experience as a memento mori experience promotes the function of the estate planning process, specifically the drafting of the Will. The Will is more than the legal document used to transmit probate wealth upon death. The Will is the document that nominates the representatives of the testator and the guardians of the testator's minor children. The Will gives cherished mementos of a life lived. "Remember you must die" prompts reflection and contemplation.

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I. INTRODUCTION

The leering overbite of the skull. The sputtering wick of the candle. The oozing decay of the pomegranate. The drunken stem of the tulip.¹ As a testator executes his or her Will, these images should dance in front of his or her eyes. The Will-making experience—indeed the entire estate planning process—is a *memento mori* experience. “*Memento mori*” translates as “remember you must die,” a realization essential to the estate planning process. This remembrance spurs construction of a dispositive scheme to perpetuate the testator’s legacy.

Memento mori has resonance for today’s testators. First developed in Ancient Rome, *memento mori* blossomed in the late Middle Ages and early Renaissance. As the plague swept across Europe, the developing field of anatomy and the burgeoning sense of self contributed to anthropomorphizing death. Skulls and skeletons prompted circumspection and contemplation of the inevitability of death. Representations of *memento mori*, whether in art, music, or literature, were intended to remind audiences of mortality’s transience. At the same time, the representations urged the audience to assess life choices and to construct potential legacies. Consideration of one’s ultimate mortal fate—remembering you will die—encourages the reflection, assessment, and contemplation necessary for the estate planning process.

The estate planning process is the consideration, drafting, and implementation of a series of legal documents intended to dispose of property, to nominate individuals to manage the property, and to express final wishes. Personal reflection is a critical component of the process. The personal reflection is promoted by language choices and document cues. This article explores the changing views and experiences surrounding death (collectively referred to as “death dynamic”),² summarizing the development and use of *memento mori* to support the assertion that the Will-making process is properly viewed as a *memento mori* experience.³ This article then examines both the historical function of the Will and the new function of the Will in light of the proliferation of Will substitutes.⁴ This article

¹ For examples of *memento mori* iconography, see generally SARAH CARR-GOMM, THE DICTIONARY OF SYMBOLS IN WESTERN ART 45, 77–78, 211 (FactsOnFile 1995) (listing the commonly used symbols artists use to represent death).

² See *infra* Part III.

³ See *infra* Part IV.

⁴ See *infra* Part V.

concludes by critically examining language choices and document cues in the Will that, if embraced, enhance the *memento mori* experience offered by the Will.⁵ Ultimately, this article posits that an overly sanitized “modern” Will undercuts the personal reflection and contemplation necessary in the estate planning process. Embracing the *memento mori* experience by maintaining key language choices and document cues helps de-stigmatize the Will as a macabre document of death and prompts reflection that translates into careful construction of all estate planning documents, including the creation of Will substitutes. As a consequence, the estate planning process becomes a positive, transformative experience for each testator.

II. TESTATOR REFLECTION AND THE ESTATE PLANNING PROCESS

The Will is perhaps the most personal legal document an individual ever creates. Indeed, at its most basic level, the Will facilitates transmission of probate wealth and nomination of individuals who carry on the testator’s legal existence.⁶ The Will, however, does much more.⁷ The Will contributes to the creation and implementation of the testator’s legacy.⁸ The Will’s terminology and underlying message resonate with the testator’s beneficiaries, family, and friends. Yet, talking to many testators about their Wills and other estate planning documents often results in nervous giggles, dismissive statements, and uneasy utterances. For example, some individuals proclaim ignorance of the terms of their Wills, while others avoid discussing estate planning altogether, and ultimately may neglect completing any estate planning.⁹ Reluctance to discuss Wills and other estate

⁵ See *infra* Part IV.

⁶ The Restatement defines a Will as

a donative document that transfers property at death, amends, supplements, or revokes a prior will, appoints an executor, nominates a guardian, exercises a testamentary power of appointment, or excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. The term “will” includes a codicil. A codicil is simply a will that amends or supplements a prior will.

RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, cmt. a.

⁷ One author described Wills as “human documents in which men give away themselves . . .” Harry Hibschan, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932). Emily Dickinson referenced a similar concept in one her poems when she wrote, “I willed my Keepsakes—signed away/what portion of me be/Assignable . . .” Emily Dickinson, *I Heard a Fly Buzz—When I Died*, in *THE COMPLETE POEMS OF EMILY DICKINSON* 223, 224 (Thomas H. Johnson ed., Little, Brown & Co. 1960). For an examination of the Will’s potential to serve as a personal narrative, see Karen J. Sneddon, *The Will As Personal Narrative*, 20 ELDER L.J. 355, 359 (2013).

⁸ See also Russell N. James III & Michael W. O’Boyle, *Charitable Estate Planning as Visualized Autobiography: An fMRI Study of Its Neural Correlates*, 41 NONPROFIT & VOLUNTARY SECTOR Q. (Oct. 2012) (suggesting that estate planners consider “the visual autobiography and the management of death salience”), available at <http://nvs.sagepub.com/content/early/2012/10/17/0899764012463121.abstract>.

⁹ See Edith Green, Kethera Fogler, & Sheri C. Gibson, *Do People Comprehend Legal Language in Wills?*, 26 APPLIED COGNITIVE PSYCH. 500 (July/Aug. 2012) (studying the results of 155 participants who attempted to decipher the meaning of a range of Will forms).

planning documents may stem from the perception that focusing on estate planning is focusing solely on death,¹⁰ and personal death is a topic to avoid.¹¹ Myopic focus on death, however, blinds an individual to the broader functions of estate planning documents: assessing accomplishments and failures; recognizing bonds forged and broken; and formulating goals, tasks, and desired wishes.¹² Estate planning requires reflecting on one's past, assessing one's present, and pondering one's future. The Will prompts this reflection, assessment, and contemplation through language choices and document cues. The choices and cues facilitate the modern testator's understanding of the Will's function and the importance of the testator's engagement in the process.

III. THE DEPERSONALIZATION OF DEATH AND THE NEED TO "REMEMBER YOU MUST DIE"

Nor dread nor hope attend
A dying animal;
A man awaits his end
Dreading and hoping all

He knows death to the bone—
Man has created death.¹³

Death. The word alone sends a shiver down the spine. Yet, death was not always a dreaded topic. In a time when popular culture readably showcases death, such as *Twilight's* vampires and *The Walking Dead's* zombies, death would seem to be all around us. Yet, these portrayals of death lack the personal connection to death that previously characterized our relationship with death. As a result, this section undertakes a multi-disciplinary examination of death. The section highlights how the topic of death was once personal and ordinary as a facet of daily life. Today, death as a personal experience has become an increasingly unusual and extraordinary phenomenon.

Humans are the only animals on earth with the capability to acknowledge their own mortality.¹⁴ The finite nature of life is the "*sine qua non* of the human

¹⁰ "Estate planning can be a tough sell because it forces clients to contemplate their death, a depressing topic." Louis S. Harrison & Emily J. Kuo, *Fees: How to Charge, Collect and Defend Them*, 148.3 TR. & EST. 50, 50 (2009).

¹¹ See *infra* Part III.

¹² See generally Sneddon, *supra* note 7.

¹³ W.B. YEATS, *Death, in THE COLLECTED WORKS OF W.B. YEATS* 198 (Wordsworth Ed. Ltd. 2000).

¹⁴ See, e.g., FREDERICK PARKES WEBER, *ASPECTS OF DEATH AND CORRELATED ASPECTS OF LIFE IN ART, EPIGRAM, AND POETRY* 1 (Paul B. Hoeber ed., 3d ed. 1918) ("One might, indeed, define [c]ivilized man as the animal who knows that animals must die; for man (i.e., [c]ivilized man) is probably (almost certainly) the only animal who does know it."); see also THOMAS S. LANGER,

condition.”¹⁵ In other words, the ability to recognize our own mortality is an identifying characteristic of humanity. Over the centuries mortality has developed into a menacing topic to avoid rather than a matter-of-fact reality as personal exposure to death has diminished.

Unlike today, death before the twentieth century could strike at any moment, with little or no warning.¹⁶ The conceptualization of death before the twentieth century is evidenced in the following children’s bedtime prayer:¹⁷

Now I lay me down to sleep,
I pray Thee, Lord! my soul to keep;
If I should die before I wake,
I pray Thee Lord! my soul to take.¹⁸

As the bedtime prayer suggests, seemingly healthy children could die from medical conditions that would be diagnosable and treatable today.¹⁹ The children’s prayer remains popular with the following revision demonstrating the decreasing likelihood of young, healthy children suddenly dying in their sleep:

CHOICES FOR LIVING: COPING WITH FEAR OF DYING 4 (Kluwer Academic 2002) (observing that although animals do not appear to contemplate death, an animal nonetheless experiences fear when sensing a predator). As one scholar wrote, “Since our existence is forever shadowed by the knowledge that we will grow, blossom, and inevitably die, we may find ourselves wounded by our mortality.” Ilany Kogan, *Fear of Death: Analyst and Patient in the Same Boat*, in *THE WOUND OF MORTALITY: FEAR, DENIAL, AND ACCEPTANCE OF DEATH* 79 (Salman Akhtar ed., 2010). Ultimately, “[f]ear of death has an impact on the way a person acts or lives.” *Id.* at 80.

¹⁵ KARL S. GUTHKE, *LAST WORDS: VARIATIONS ON A THEME IN CULTURAL HISTORY* 49 (Princeton Univ. Press 1992) [hereinafter GUTHKE, *LAST WORDS*]. Immortality has at times been interpreted as a punishment. Immortality is a form of punishment given to Tithonus, the Trojan lover of Eros. *See, e.g.*, THOMAS ARMSTRONG, *THE HUMAN ODYSSEY: THE TWELVE STAGES OF LIFE* 223 (Sterling 2008). In the tale of Greek mythology, Tithonus was awarded the prize of eternal life. However, when failing to ask for eternal youth to accompany eternal life, the prize became a punishment whereby age-worn Tithonus could not die. Victorian Poet Alfred, Lord Tennyson retold the tale as a dramatic monologue in his poem “Tithonus.” For an analysis of the Tennyson poem, see ELAINE JORDAN, *ALFRED TENNYSON* 73–76 (Cambridge Univ. Press 1988); Geoffrey Ward, *Dying to Write: Maurice Blanchot and Tennyson’s “Tithonus,”* 12 *CRITICAL INQUIRY* 672 (Summer 1986). Immortality as punishment even formed the basis of the Bill Murray movie *Groundhog Day* in which an individual must relive the same day in perpetuity until he undergoes a personal transformation. *Groundhog Day* (Columbia Pictures 1993).

¹⁶ *See, e.g.*, TONY WALTER, *THE REVIVAL OF DEATH* 10 (Routledge 1994) [hereinafter WALTER, *THE REVIVAL OF DEATH*] (remarking that before the eighteenth century, death was considered to be “capricious, determined only by the inscrutable will of the Lord”).

¹⁷ WILLIAM OLAND BOURNE, *NOW I LAY ME DOWN TO SLEEP: THE PRAYER OF CHILDHOOD*, IN *LITERATURE AND SONG* 1 (Anson D.F. Randolph & Co. 1881). This prayer is claimed to have been a favorite of President John Quincy Adams. *Id.*

¹⁸ *Id.* at 3.

¹⁹ Eric J. Cassell, *Dying in a Technological Society*, in *DEATH INSIDE OUT: THE HASTINGS CENTER REPORT* 43 (Peter Steinfels & Robert M. Veatch eds., Harper & Row Publishers 1975).

Now I lay me down to sleep.
 I pray the Lord my soul to keep.
 May angels watch me through the night
 and wake me with the morning light.

Now I lay me down to sleep.
 I pray the Lord my soul to keep.
 God's love stay with me through the night
 and keep me safe till morning light.²⁰

The revision reflects diminishing personal experiences with death as influenced by decreased mortality rates, the developments of the hospital system, and the creation of the funeral industry.²¹

The twentieth century ushered in a new death dynamic due to increased longevity,²² an increased infant mortality rate, and the development of the hospital system.²³ At the beginning of the twentieth century, one household out of sixteen had a family member over the age of sixty-four.²⁴ By the end of the twentieth century, one household out of four had a family member over the age of sixty-four.²⁵ Moreover, by the end of the twentieth century, many families had four living generations.²⁶ Today, three-quarters of Americans die after age sixty-five,²⁷ with an average life expectancy of seventy-eight years and eight months.²⁸ This contrasts sharply with a life expectancy of approximately twenty years in the

²⁰ DEBBIE TRAFTON O'NEAL, *NOW I LAY ME DOWN TO SLEEP: ACTION PRAYERS, POEMS, AND SONGS FOR BEDTIME 6* (Augsburg Fortress 1994).

²¹ See WALTER, *supra* note 16, at 10.

²² For an analysis comparing the death rates in 1900 with the death rates in 2004, see CHARLES A. CORR, CLYDE M. NABE, & DONNA M. CORR, *DEATH AND DYING, LIFE AND LIVING 21–27* (Wadsworth Cengage Learning ed., 2009). For an analysis of longevity issues, ROBERT N. BUTLER, *THE LONGEVITY REVOLUTION: THE BENEFITS AND CHALLENGES OF LIVING A LONG LIFE* (PublicAffairs 2008). See also Donna L Hoyert, *75 Years of Mortality in the United States, 1935–2010*, 88 NAT'L CTR. FOR HEALTH STAT., March 2012, at 1, available at <http://www.cdc.gov/nchs/products/databriefs.htm>.

²³ See, e.g., GARY LADERMAN, *REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA 4* (Oxford Univ. Press 2003); HAROLD SCHECHTER, *THE WHOLE DEATH CATALOG: A LIVELY GUIDE TO THE BITTER END 82* (Ballantine Books 2009).

²⁴ MARILYN WEBB, *THE GOOD DEATH: THE NEW AMERICAN SEARCH TO RESHAPE THE END OF LIFE 193* (Bantam Books 1997).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at xvii.

²⁸ Arialdi M. Minino & Sherry L. Murphy, *Death in the United States, 2010*, 99 NAT'L CTR. FOR HEALTH STAT., July 2012, at 1, available at <http://www.cdc.gov/nchs/products/databriefs.htm>. See also Kenneth D. Kochanek et. al, *Deaths: Final Data for 2009*, 60 NAT'L VITAL STAT. REP. 3, 4 (Dec. 29, 2011).

Bronze Age and just under fifty years in the nineteenth century.²⁹ In terms of infant mortality at the beginning of the twentieth century, there were approximately 100 infant deaths for every 1,000 live births.³⁰ By the end of the twentieth century, the rate dropped to 6.89 infant deaths for every 1,000 live births.³¹ The increasing longevity and decreasing infant mortality rates reflect changes in causes of death. Before the twentieth century, infections, such as scarlet fever and measles, were a common cause of death.³² In contrast, in the twenty-first century the most common causes of death are diseases primarily attributable to age including heart disease, chronic obstructive pulmonary disease, and chronic liver disease.³³

In addition to changing mortality rates, institutional developments such as the growth of the hospital system and the funeral industry physically removed death from the family home, making death less ordinary and visible in daily life.³⁴ Before the advent of the hospital system in the nineteenth century, Americans typically died in their homes.³⁵ By the 1930s, an increasing number of Americans were dying in hospitals.³⁶ By the 1940s, almost all Americans died in a hospital.³⁷ The development of hospice care—although placing individuals in a home-like

²⁹ BUTLER, *supra* note 22, at xi.

³⁰ Marian F. MacDorman & T.J. Mathews, *Recent Trends in Infant Mortality in the United States*, 9 NAT'L CTR. FOR HEALTH STAT., Oct. 2008, at 1, available at <http://www.cdc.gov/nchs/products/databriefs.htm>.

³¹ *Id.*

³² See generally Thomas McKeown & R.G. Record, *Reasons for the Decline of Mortality in England and Wales during the Nineteenth Century*, 16 POPULATION STUD. 94, 95–96 (Nov. 1962).

³³ The top ten causes of death are the following: (1) heart disease, (2) cancer, (3) cerebrovascular disease, (4) accidents, (5) chronic obstructive pulmonary disease, (6) pneumonia and influenza, (7) diabetes mellitus, (8) suicide, (9) chronic liver disease and cirrhosis, and (10) human immunodeficiency virus. See J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 278 J. OF THE AM. MED. ASS'N 2207, 2207 (Nov. 1993). See also Kochanek et al., *supra* note 28 (listing the top causes of death as (1) heart disease, (2) cancer, (3) chronic lower respiratory diseases, and (4) stroke).

³⁴ As one author noted, medical success may even allow death to become *more* hidden, lulling Americans into losing knowledge not just of the physical process of dying, but of the psychological and spiritual dimensions of death. WEBB, *supra* note 24, at xxiii. See also KEITH ALLAN & KATE BURRIDGE, *FORBIDDEN WORDS: TABOO AND CENSORING OF LANGUAGE 223* (Cambridge Univ. Press 2006) (“We are insulated from death by hospitals and other institutions which care for the sick and dying; and there is a funeral industry to dispose of the dead.”). LADERMAN, *supra* note 23, at 4 (“The cultural implications of this environmental shift in the hospital were profound and contributed to the literal displacement of the dead from the everyday social worlds of the living.”). For a consideration of the rise of the modern funeral industry, see MARK HARRIS, *GRAVE MATTERS: A JOURNEY THROUGH THE MODERN FUNERAL INDUSTRY TO A NATURAL WAY OF BURIAL 105* (Scribner 2007).

³⁵ WEBB, *supra* note 24, at 31.

³⁶ *Id.*

³⁷ *Id.*

atmosphere—continues to remove death from the personal home.³⁸ Today, the unusual nature of dying at home is reflected in real estate purchase agreements. Real estate agreements in many states require the disclosure of an occupant's death if the death occurred in the home within three years of the date of the agreement.³⁹

Death does not usually occur in the home today. Further, death no longer occupies a physical space in the modern home.⁴⁰ Before the twentieth century, rites of passage such as christenings, marriages, and deaths were observed in the home, usually in the parlor.⁴¹ The loved ones' bodies were laid out in the parlor for family and friends to pay their respects.⁴² The disappearance of servants' quarters and gender segregation in the home reduced the potential uses of the parlor.⁴³ Even the word "parlor"⁴⁴ was banished from the home in the twentieth century when the word itself was considered "old-fashioned and obsolete."⁴⁵ In the twentieth

³⁸ The term "hospice" is related to the words "host" and "hospitality" and is thought to reference "a lodging place or way station for travelers in need of assistance." SCHECHTER, *supra* note 23, at 57. The hospice movement is regarded as originating in South London in 1967 with the founding of St. Christopher's Hospice. WALTER, *THE REVIVAL OF DEATH*, *supra* note 16, at 29. In the Middle Ages, St. Christopher was thought to protect against sudden death. Margaret Aston, *Death, in FIFTEENTH-CENTURY ATTITUDES: PERCEPTIONS OF SOCIETY IN LATE MEDIEVAL ENGLAND* 202, 207 (Rosemary Horrox ed., Cambridge Univ. Press 1994). St. Christopher is most commonly known as the patron saint of travelers, but he is also the patron saint of bachelors, police officers, and skiers. THOMAS W. SHEEHAN, *DICTIONARY OF PATRON SAINTS' NAMES* 350 (Our Sunday Visitor 2001). For an examination of modern hospice's design and function, see KEN WORPOLE, *MODERN HOSPICE DESIGN: THE ARCHITECTURE OF PALLIATIVE CARE* (Routledge 2009).

³⁹ See, e.g., ALEXANDER E. HAMILTON, 1A CAL. REAL EST. FORMS *Supplemental Disclosures* § 1:118 (2013).

⁴⁰ See, e.g., LADERMAN, *supra* note 23, at 5 (stating that "living quarters for many families began to change, which affected the available suitable space for the dead in the home").

⁴¹ See, e.g., Arthur H. Cole, *The Price System and the Rites of Passage*, 14 AM. Q. 527 (Winter 1962). See also KATHERINE C. GRIER, *CULTURE & COMFORT: PARLOR MAKING AND MIDDLE-CLASS IDENTITY 1850-1930* (Smithsonian Institution Press 1988) (describing the nineteenth century parlor as "an appropriate setting, as the most ceremonious room of a house, for a traditional ritual [laying out of the dead for viewing] whose importance eclipsed that of other social ceremonies in mid-nineteenth-century parlor life").

⁴² For a short story about the laying out in the parlor of a loved one, see SARAH ORNE JEWETT, *Miss Tempy's Watchers*, in *TALES OF NEW ENGLAND* 7 (Houghton, Mifflin & Co. 1896) (referring to the parlor was "the unused best room").

⁴³ Homes were designed with a more open plan to reflect social equality. Judy Attfield, *Bringing Modernity Home: Open Plan in the British Domestic Interior*, in *AT HOME: AN ANTHROPOLOGY OF DOMESTIC SPACE* 76 (Irene Cieraad ed., Syracuse Univ. Press 1999).

⁴⁴ The word "parlor" was originally the room in a convent where the nuns could talk with visitors with derivations from the French word to speak, "parler." Joseph Twadell Shipley, *THE ORIGINS OF ENGLISH WORDS: A DISCURSIVE DICTIONARY OF INDO-EUROPEAN ROOTS* 137 (Johns Hopkins Univ. Press 1984).

⁴⁵ Attfield, *supra* note 43, at 76. See also Sally McMurry, *City Parlor, County Sitting Room: Rural Vernacular Design and the American Parlor, 1840-1900*, 20 WINTERTHUR PORTFOLIO 261, 261 (Winter 1985) (examining the interaction between urban and rural cultures as a factor in the demise of the parlor).

century, the space formerly known as the “parlor” became an adaptable space for family living and was rechristened “the living room.”⁴⁶ With no physical space for the dead left in the home, the funeral industry began to provide both care and space for the dead.

Although providing a physical space for the dead, the funeral industry initially developed as a result of the American Civil War, nineteenth century industrialization, and population shifts. The American Civil War sparked exponential growth of the funeral industry.⁴⁷ For the first time in American history, scores of Americans died far from home with no family to care for the remains.⁴⁸ The funeral industry promised to “undertake” the familial responsibility to care for deceased family members.⁴⁹ The funeral industry continued growing in the twentieth century.⁵⁰

The end result of the decreasing mortality rates, the development of the hospital system, and the creation of the funeral industry is that the funeral home’s parlor became the place for the dead.⁵¹ Consequently, “[d]eath and its immediate consequences has now surely moved almost wholly out of the home.”⁵²

⁴⁶ James J. Farrell, *The Dying of Death: Historical Perspectives*, 6 DEATH EDUC. 105, 119 (1988) (attributing the name change from “parlor” to “living room” to an editor of the *Ladies Home Journal*).

⁴⁷ Cole, *supra* note 41, at 538–39.

⁴⁸ *Id.* See also DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR (Vintage Books 2009). During the American Civil War, embalming was used to transport the remains from the battlefield to the family home. Cole, *supra* note 41. See also FAUST, *supra* note 48, at 92–93. The transportation of the remains of Abraham Lincoln from Washington D.C. to Illinois publicized the practice of embalming as an option to preserve the body for transport and ultimate burial in the individual’s home state. HARRIS, *supra* note 34, at 45; LADERMAN, *supra* note 23, at 6. For a narrative of the drama of the disposition of Lincoln’s remains, see THOMAS J. CRAUGHWELL, STEALING LINCOLN’S BODY (Harv. Univ. Press 2007).

⁴⁹ For a cross-cultural, multidisciplinary examination of the rituals of death, see PETER METCALF & RICHARD HUNTINGTON, CELEBRATIONS OF DEATH: THE ANTHROPOLOGY OF MORTUARY RITUAL (Cambridge Univ. Press 2d ed. 1993).

⁵⁰ For example, in 1870 there were 2,000 undertakers in America. Cole, *supra* note 41, at 539 (based on federal census data). In the 1950s, the number had swollen to 50,000.

⁵¹ See generally JAMES FARRELL, INVENTING THE AMERICAN WAY OF DEATH 1830–1920 (Temple Univ. Press 1980). The funeral industry and its reinvention of death rituals have been much criticized. For example, one author wrote of the death rituals created by the funeral industry that “it is not death that is celebrated in these rituals; it is rather death transformed into the appearance of life by the mortician’s art.” Phillippe Ariès, *Death Inside Out*, in DEATH INSIDE OUT, *supra* note 19, at 22. See also Ivan Illich, *The Political Uses of Natural Death*, in DEATH INSIDE OUT, *supra* note 19, at 31. For an exploration of modern funeral trends, including the development of “natural burials,” see HARRIS, *supra* note 34, at 2 (exploring alternatives to the modern funeral which are “doing nothing less than rewriting—and, in the process, re-righting—the American Way of Death”); Megan C. Wells, *Dead Bodies Everywhere (Dun Dun Dun): Funeral Trends in this Recession and the Laus Regulating These Changes*, 2 EST. PLAN. & CMTY. L.J. 485 (2010) (summarizing alternatives for the modern funeral).

⁵² Cole, *supra* note 41, at 540.

Moving actual death from the home does not mean that America is now a death-denying nation.⁵³ For instance, the mid-twentieth century witnessed an increased focus on death. International conflicts involving death, including the continued fallout from World War II, the Korean Conflict, and the Vietnam War, were top news stories.⁵⁴ Public assassinations of political leaders shocked the nation.⁵⁵ Fear of nuclear holocaust⁵⁶ riveted viewers to doomsday television programs and readers to books, such as *On the Beach* by Nevil Shute⁵⁷ and *Alas, Babylon* by Pat Frank.⁵⁸ Elisabeth Kubler-Ross's *On Death and Dying* was a global bestseller.⁵⁹ Attacks on the funeral industry⁶⁰ and the institution of probate⁶¹ spawned national bestsellers. Yet, even though readers were captivated by the death presented through these various media, these death experiences were usually not personally experienced by audiences. Like the gory death in summer blockbusters,⁶² screaming headlines⁶³ on twenty-four hour news shows⁶⁴ and dark

⁵³ See, e.g., Allan Kellehear, *Are We a "Death-Dying" Society? A Sociological Review*, 18 SOC. SCI. MED. 713 (1984).

⁵⁴ STEINFELS, DEATH INSIDE OUT, *supra* note 19, at 2.

⁵⁵ *Id.* (referencing the public assassinations of John F. Kennedy, Robert F. Kennedy, and Martin Luther King).

⁵⁶ See generally P.D. SMITH, DOOMSDAY MEN: THE REAL DR. STRANGELOVE AND THE DREAM OF THE SUPERWEAPON 78, 103, 348, 393–95 (St. Martin's Press 2007).

⁵⁷ (Knopf DoubleDay Publishing Group 2010).

⁵⁸ (HarperCollins Publisher 2005).

⁵⁹ ELISABETH KUBLER-ROSS, ON DEATH AND DYING: WHAT THE DYING HAVE TO TEACH DOCTORS, NURSES, CLERGY, AND THEIR OWN FAMILIES (Taylor & Francis 40th ed., 2009). See also Barbara L. Blaylock, *In Memoriam: Elisabeth Kubler-Ross, 1926–2004*, 23 FAMILIES, SYSTEMS, & HEALTH, 108–09 (2005).

⁶⁰ For the classic caustic critique of the funeral industry, see JESSICA MITFORD, THE AMERICAN WAY OF DEATH (Simon & Schuster 1963). For an autobiography of Jessica Mitford, one of the infamous Mitford sisters, see JESSICA MITFORD, HONS AND REBELS (New York Review Books Classics 2004). See also MARY S. LOWELL, THE SISTERS: THE SAGA OF THE MITFORD FAMILY 523 (Norton 2003) (noting that Jessica Mitford's funeral was the scattering of her ashes at sea for a total cost of \$475). Her sister Nancy Mitford wrote *The Pursuit of Love* and *Love in a Cold Climate*. THE PURSUIT OF LOVE & LOVE IN A COLD CLIMATE (First Vintage Books ed. 2001). One of her other sisters, Deborah Mitford, became the Duchess of Devonshire and was in large part the entrepreneurial brains behind the financial success of famed English estate Chatsworth. LOWELL, *supra* note 60, at 527. See also DEBORAH VIVIEN FREEMAN-MITFORD CAVENDISH, WAIT FOR ME!: MEMOIRS 249–62 (Picador 2011). A recent documentary followed a year-in-the-life of Chatsworth. *Chatsworth*, BBC DOCUMENTARY (2013), <http://www.chatsworth.org/documentary>.

⁶¹ NORMAN H. DACEY, HOW TO AVOID PROBATE! (Crown 1983). For a contemporaneous review of the now-infamous book with perforated pages, see Delmar R. Hoepfner, *Norman F. Dacey: How to Avoid Probate*, 1 VAL. U. L. REV. 197 (1966).

⁶² Violence in movies is not limited to those movies with R-ratings. See, e.g., Fumie Yokota & Kimberly M. Thompson, *Violence in G-Rated Animated Films*, 283 NO. J. AM. MED. ASS'N 2716, 2716–18 (2000) (analyzing seventy-four films available on videocassette before September 1999 to determine the level of violence in the films and discovering that each film had at least one act of violence). Death is a common element in children's stories and movies. For instance, Disney's early animated films, such as *Snow White and the Seven Dwarfs*, *Pinocchio*, and *Bambi* use death as a major plot-driving force. See LADERMAN, *supra* note 23, at 42. For an examination of the zombie

tourism⁶⁵ focused on the unusual and extraordinary event of “other people’s” deaths.⁶⁶ Ordinary personal experiences with death became an experience of the past, an experience to avoid in the modern world.

The widening distance between death and the personal, individual experience was anticipated by Leo Tolstoy in his novella *The Death of Ivan Ilych*.⁶⁷ As Tolstoy wrote from the perspective of one of Ivan Ilych’s co-workers, “[a]part from the curiosity it gave them about the changes in the office [the death of Ivan Ilych] may occasion, the very fact of the death of a close acquaintance awoke as ever in each of them a familiar gladness: it’s *he* who’s dead, not *me*.”⁶⁸ The themes in *The*

phenomena on the big screen and the small screen, see KYLE WILLIAM BISHOP, *ZOMBIE GOTHIC: THE RISE AND FALL (AND RISE) OF THE WALKING DEAD IN POPULAR CULTURE* (MacFarland & Co. 2010).

⁶³ See WYNNE A. WHITMAN, ESQ. & SHAWN D. GLISSON, M.D., *WANTS, WISHES, AND WILLS: A MEDICAL AND LEGAL GUIDE TO PROTECTING YOURSELF AND YOUR FAMILY IN SICKNESSES AND IN HEALTH* xxi (Financial Times Press 2007) (noting that “many of us can’t talk about, acknowledge, or plan for our own infirmity or mortality” despite our attraction to the news and reports of disasters); LANGER, *supra* note 14, at 6 (“I feel that we are so obsessed with the death of other people because we have repressed thought of our *own* death.”).

⁶⁴ For an analysis of the second-hand and vicarious experiences with death in the media, see CORR ET AL., *supra* note 22, at 87–90.

⁶⁵ Malcolm Foley & J. John Lennon, *JFK and Dark Tourism: A Fascination with Assassination*, 2 INT’L J. OF HERITAGE STUD. 198, 198 (1996) (defining dark tourism as the “phenomena which encompass the presentation and consumption (by visitors) of real and commodified death and disaster sites”). See also Tony Walter, *Dark Tourism: Mediating between the Dead and the Living*, in *THE DARKER SIDE OF TRAVEL: THE THEORY AND PRACTICES OF DARK TOURISM* (Richard Sharpley & Philip Stone eds., Channel View Publishers 2009). Dark tourism is not solely a modern creature. Pilgrimages, such as those popular in the Middle Ages, are examples of dark tourism. See, e.g., J. JOHN LENNON & MALCOLM FOLEY, *DARK TOURISM: THE ATTRACTION OF DEATH AND DISASTER* 3 (Thomson Learning 2006). For a travelogue of approximately 200 sites, including Lizzie Borden’s home and the memorial to the victim called the Black Dahlia, see J.W. OCKER, *THE NEW ENGLAND GRIMPENDIUM: A GUIDE TO MACABRE AND GHASTLY SITES* 62–65, 67–69 (Countryman Press 2010).

⁶⁶ See ALLAN & BURRIDGE, *supra* note 34, at 223 (noting that the taboo nature of death has resulted in a fascination of death, akin to the thriving pornography industry during the prude Victorian era). The digital present and the possibilities of the digital future will continue to affect the dynamics of death. See, e.g., *DYING, DEATH, AND GRIEF IN AN ONLINE UNIVERSE FOR COUNSELORS AND EDUCATORS* (Carla J. Sofka, Kathleen R. Gilbert, & Illene Noppe Cupit eds., Springer Publishing Co. 2012). See also Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185 (2012); Tyler G. Tarney, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773 (2012).

⁶⁷ LEO TOLSTOY, *THE DEATH OF IVAN ILYCH* (Ian Dreiblatt trans., Melville House Publishing 2008). In analyzing the novella, one scholar wrote. “Men go on, however, from day to day forgetting or ignoring or denying their mortality; and this to Tolstoy, is a fantastic, incomprehensible mistake. For, while it may be that the sane man would never choose death, yet, paradoxically, without death, life itself would hold no meaning.” James Olney, *Experience, Metaphor, and Meaning: The Death of Ivan Ilych*, 31 J. AESTHETICS & ART CRITICISM 101, 104 (Autumn 1972). For use of Ivan Ilych in the medical classroom, see Warren Lee Holleman, *The Play’s the Thing: Using Literature and Drama to Teach about Death and Dying*, 32 FAM. MED. 523, 523 (Sept. 2000).

⁶⁸ TOLSTOY, *supra* note 67, at 3–4.

Death of Ivan Ilych of industrialization and the resulting bureaucratization show the danger of losing personal experiences with death.⁶⁹ Only in the face of death does Ivan Ilych achieve self-understanding revealing that he has been living life unreflectively, almost unconsciously.⁷⁰ With no personal experience with death, he fails to grasp the meaning of his own life and ponder his legacy. This self-understanding need not be a deathbed revelation as it was for Ivan Ilych. Instead, living a reflective life is part of the goal of a *memento mori* experience. “Remember you must die” becomes “remember to live.”

IV. GENERAL DEFINITION AND FUNCTION OF *MEMENTO MORI*

Conceptualizing the Will as a *memento mori* experience requires defining “*memento mori*” and considering the function of *memento mori* experiences. “*Memento mori*” is a Latin phrase literally translated to “be mindful of dying,”⁷² but more commonly translated “remember (that you are) are mortal,”⁷³ “remember you will die,”⁷⁴ or “remember to die.”⁷⁵ Recognizing our own mortality is not only a distinguishing characteristic of humanity, but also a motivating force in the development of the humanities.⁷⁶ As Thomas Mann quipped, “[w]ithout death there would scarcely have been poets.”⁷⁷ A natural topic for exploration in the humanities, *memento mori* cuts across all genres in the humanities.⁷⁸ Paintings,⁷⁹

⁶⁹ See generally WALTER, *supra* note 16, at 163 *et seq.*

⁷⁰ Mark Freeman, *Death, Narrative Integrity, and the Radical Challenge of Self-Understanding: A Reading of Tolstoy's Death of Ivan Ilych*, 17 AGEING & SOC'Y 373 (1997).

⁷¹ “Memento” is a Latin word meaning “a hint to awaken the memory.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, AND ILLUSTRATED IN THEIR DIFFERENT SIGNIFICATIONS BY EXAMPLES FROM THE BEST WRITERS cxiv (J.F. and C. Rivington ed., 6th ed. 1785) (offering one definition of execution as “to put in act; to do what is planned or defined”).

⁷² ELIZABETH HEIMBACH, LATIN EVERYWHERE, EVERYDAY: A LATIN PHRASE WORKBOOK 40 (Bolchazy-Carducci Publishers, Inc. 2004).

⁷³ *Id.*

⁷⁴ *E.g.*, SCHECHTER, *supra* note 23, at 269.

⁷⁵ *E.g.*, MARTIN H. MANSER, THE FACTS ON FILE OF FOREIGN WORDS PHRASES 271 (Infobase Publishing 2d ed. 2008).

⁷⁶ Knowing that we will die is what distinguishes us from animals. Therefore, death is an essential part of our humanity and by extension of the humanities. Farrell, *supra* note 46, at 108.

⁷⁷ ELISABETH KUBLER-ROSS, DEATH: FINAL STAGE OF GROWTH 2 (Prentice-Hall 1975) (quoting Thomas Mann).

⁷⁸ *Id.* at 2 (stating that death is “the great inspirer” of philosophy, literature, art, and music). For a collection of poems, essay excerpts, and reproductions of woodcuts, etchings, and oil paintings about death, see SANDRA L. BERTMAN, FACING DEATH: IMAGES, INSIGHTS, AND INTERVENTIONS: A HANDBOOK FOR EDUCATORS, HEALTHCARE PROFESSIONALS, AND COUNSELORS (Hemisphere Publishing Co. 1991) (developed as part of the Medical Humanities program for the University of Massachusetts, Medical Center).

⁷⁹ *E.g.*, KRISTINE KOOZIN, THE *VANITAS* STILL LIVES OF HARMEEN STEENWYCK (1612–1656): METAPHORIC REALISM (Edwin Mellon Press 1990).

sculptures,⁸⁰ poetry,⁸¹ literature,⁸² and music present ample representations of *memento mori*.⁸³ Each of these media were used to promote reflection on the transience of life and inevitability of death. Images associated with time and death appeared in and on a variety of objects, such as embroidered samplers, drawings, painted books, medals, and trade tokens.⁸⁴

Throughout the centuries *memento mori* representations evolved. What started as benign, stylized images became realistic, gruesome, and haunting images. In Ancient Rome, the *tempus fugit* and *carpe diem* philosophies seated stylized images of skeletons at banquets urging attendees to revel in the physical excesses of the moment.⁸⁵ In the Middle Ages, the sentiment morphed into the Christian edict focusing attention on heavenly rather than worldly rewards.⁸⁶ These representations may have evolved as a result of the bubonic plague sweeping across Europe.⁸⁷ The extent to which the plague influenced the development of *memento mori* remains a disputed topic.⁸⁸ However, following the plague, the population and topography of Europe changed. The European population in the mid-fourteenth century declined by at least twenty-five percent in a five year period because of the ravages of the bubonic plague.⁸⁹ Wild, overgrown cultivated land

⁸⁰ For a selected bibliography of art history resources about death, see Richard A. Pacholski, *Death Themes in the Visual Arts: Resources and Research Opportunities for Death Educators*, 10 DEATH STUD. 59 (1986).

⁸¹ E.g., W. Hutchings, *Syntax of Death: Instability in Gray's Elegy Written in a Country Churchyard*, 81 STUD. IN PHIL. 496 (Autumn 1984); Harry Morris, "Hamlet" as a "Memento Mori" Poem, 85 PMLA 1035, 1040 (Oct. 1970) (asserting that Shakespeare structured *Hamlet* on the *memento mori* timor mortis lyric).

⁸² Bruce Redwin, *The Uses of Memento Mori in Vanity Fair*, STUD. IN ENG. LITERATURE 1500–1900, 17 NINETEENTH CENTURY 657 (Autumn 1977).

⁸³ See, e.g., THE SYMBOLISM OF VANITAS IN THE ARTS, LITERATURE, AND MUSIC: COMPARATIVE AND HISTORICAL STUDIES (Liana DeGirolami Cheney ed., Edwin Mellen Press 1992).

⁸⁴ See, e.g., NIGEL LLEWELLYN, THE ART OF DEATH: VISUAL CULTURE IN THE ENGLISH DEATH RITUAL C. 1500–1800 19 (Reaktion Books 1991).

⁸⁵ LEWIS R. AIKEN, DYING, DEATH AND BEREAVEMENT 165 (Lawrence Erlbaum Assoc. Publishers 4th ed. 2001) (interdisciplinary study of death and dying); Faya Causey, *Skulls and Skeletons in Roman Art*, 109–11, in VANITAS, *supra* note 83.

⁸⁶ SCHECHTER, *supra* note 23, at 269.

⁸⁷ See, e.g., AIKEN, *supra* note 85, at 163–66.

⁸⁸ See, e.g., MICHAEL NEILL, ISSUES OF DEATH: MORTALITY & IDENTITY IN ENGLISH RENAISSANCE TRAGEDY 376 (Clarendon Press 1997); PHILIPPE ARIES, THE HOUR OF OUR DEATH 124–25 (Helen Waver trans., Knopf 1981) (positing that asserting the plague to be the cause of the rise of *memento mori* is too simplistic an explanation for the development and resonating popularity of *memento mori*). But see Rudolph Binion, *Europe's Culture of Death*, in THE PSYCHOLOGY OF DEATH IN FANTASY AND HISTORY 122 (Jerry S. Piven ed., Praeger 2004) ("The Black Death trauma itself gave rise almost out of nowhere to the most popular artistic channel for reliving it vicariously, one with just a few older folk elements mixed in: the Dance of the Dead.").

⁸⁹ See, e.g., AIKEN, *supra* note 85, at 163–66. Other estimates place the death rate as high as fifty percent of the European population. See also Alicia Faxon, *The Perspectives on the Transformations of the Dance of Death in Art*, in VANITAS, *supra* note 83, at 50.

and derelict, decaying housing caused by population losses and years of drought marred the Medieval landscape.⁹⁰ Surrounded by death, the emerging Medieval field of anatomy gave death a human face.⁹¹ This eerie human face would become central to *memento mori*.

Three enduring thematic representations of death emerged in the Middle Ages: the *Danse Macabre*,⁹² the *Triumph of Death*,⁹³ and the *Ars Moriendi*.⁹⁴ The *Danse Macabre*, usually translated as the Dance of Death, originated as a Medieval French burial ritual performed by gravediggers wearing skeleton costumes.⁹⁵ The Dance of Death—exemplified by the woodcuts of Hans Holbein the Younger⁹⁶—featured a procession of living individuals from all social classes being led by a skeletal figure on a dance to the grave.⁹⁷ The haunting message was that everyone—regardless of the protections of status, wealth, and youth—was destined for the grave.⁹⁸ Likewise, the *Triumph of Death* confronted the audience with scenes of the insatiable figure indiscriminately trampling multitudes,⁹⁹ as

⁹⁰ Aston, *supra* note 38, at 206–07. Also dotting the Medieval landscape were the hung, drawn, and quartered bodies of traitors. *Id.* at 204.

⁹¹ NEILL, *supra* note 88, at 5 (noting that during the late Medieval and early Renaissance period, death was “*envisaged*, given a face”); LILAH WENDELL, ENCOUNTERING DEATH: A COMPENDIUM OF ANTHROPOMORPHIC PERSONIFICATIONS OF DEATH FROM HISTORY TO PRESENT DAY PHENOMENON (Westgate Press 1996). *See also* KARL S. GUTHKE, THE GENDER OF DEATH: A CULTURAL HISTORY IN ART AND LITERATURE 7–37 (Cambridge Univ. Press 1999) [hereinafter GUTHKE, GENDER] (exploring whether the face of death is male or female).

⁹² ENRICO DE PASCALE, DEATH AND RESURRECTION IN ART 86–92 (J. Paul Getty Trust 2009). *See also* Sophie Oosterwijk, *Of Corpses, Constables and Kings: The Danse Macabre in Late Medieval and Renaissance Culture*, 157 J. OF B. ARCHEOLOGY 61, 61, 83 (2004) (noting the popularity of the danse macabre theme from Hans Holbein the Younger to Camille Saint-Saens to Walt Disney).

⁹³ DE PASCALE, *supra* note 92, at 227–29.

⁹⁴ *Id.* at 82–85.

⁹⁵ Alma Espinosa, *Music and the Danse Macabre: A Survey*, in VANITAS, *supra* note 83, at 15.

⁹⁶ *E.g.*, Ivan Illich, *The Political Uses of Natural Death*, in DEATH INSIDE OUT, *supra* note 19, at 30.

⁹⁷ “The Danse Macabre presents images of the following: a smirking, skeletal Death, animated and usually wearing a crown, [who] leads kings and beggars, laborers and ladies, doctors and monks in a stunned procession to their demise. Everyone dies, was the message, regardless of wealth or status” DEBORAH NOYES, ENCYCLOPEDIA OF THE END: MYSTERIOUS DEATH IN FACT, FANCY, FOLKLORE, AND MORE 33 (Houghton Mifflin Co. 2008). *See also* Faxon, in VANITAS, *supra* note 83, at 33.

⁹⁸ Faxon, in VANITAS, *supra* note 83, at 33; Aston, *supra* note 38, at 225. *See also* Illich, in DEATH INSIDE OUT, *supra* note 19, at 29 (“Now, he sees himself in the mirror as his own lifelong *memento mori*. It is not Death, but rather his own dead self with whom he dances”). Edgar Allan Poe’s “The Mask of the Red Death” is considered a version of the danse macabre. EDGAR ALLAN POE, *The Mask of the Red Death*, COMPLETE STORIES AND POEMS OF LATE EDGAR ALLAN POE 256 (DoubleDay 2012).

⁹⁹ *See, e.g.*, THE PSYCHOLOGY OF DEATH IN FANTASY AND HISTORY 122 (Jerry S. Piven ed., Praeger Publishers 2004).

epitomized in Peter Bruegel's "The Triumph of Death."¹⁰⁰ Similarly, the *Ars Moriendi* presented the audience with the images of dying individuals.¹⁰¹ The *Ars Moriendi* was a collection of Medieval texts the clergy used when attending to the dying.¹⁰² These illustrated educational texts showed the art of dying with scientifically accurate images of death.¹⁰³ Beyond the intended audience, the images "both whetted and satisfied the appetites of people of the time for ghoulish macabre art."¹⁰⁴

The now-iconic image of the hood-cloaked Grim Reaper, scythe poised to harvest souls, emerged from the Roman and Medieval representations of *memento mori*.¹⁰⁵ Concurrently, the late Renaissance and Baroque period saw a representational shift from gruesome figural¹⁰⁶ representations in *memento mori* to abstract images of death. For instance, in seventeenth century Netherlands, the still life genre of painting known as *vanitas* focused on *memento mori* representations.¹⁰⁷ Latin for "vanity" and literally translated as "emptiness,"¹⁰⁸

¹⁰⁰ Plate 2. PETER L. BONN, *PAINTING LIFE: THE ART OF PIETER BRUEGEL, THE ELDER 7* (Chaucer Press Books 2006). See also Peter Thon, *Bruegel's The Triumph of Death Reconsidered*, 21 *RENAISSANCE Q.* 289 (Autumn 1968).

¹⁰¹ Liana DeGrolami Cheney, *Dutch Vanitas Paintings: The Skull in Vanitas*, in *VANITAS*, *supra* note 83, at 114.

¹⁰² *Id.* See also Karen Ingham, *Tissue to Text: Ars Moriendi and the Theatre of Anatomy*, 15 *PERFORMANCE RES.: A J. OF THE PERFORMING ARTS* 48 (2010) (observing that the early Renaissance interest in anatomy affected both art and medicine).

¹⁰³ Aston, *supra* note 38, at 208 (describing the text as "virtually a do-it-yourself handbook, being a practical guide to the dreaded process of dying, that could be read and kept on hand for that last hour").

¹⁰⁴ AIKEN, *supra* note 85, at 164–65. The transi tombs also explored this concept with the sculptural representation of two versions of the deceased's body. One version presented the life-like image of the deceased with the clothes of the deceased's social caste as though in sleep. The second version was represented in state of decomposition. See also ELIZABETH HALLAM & JENNY HOCKEY, *DEATH, MEMORY AND MATERIAL CULTURE* 54–55 (Berg 2001) (presenting the image of the transi tomb of Archbishop Henry Chichele c. 1444).

¹⁰⁵ The image of the Grim Reaper continues to be "found not only in advertisements, but in comic strips, films, music, professional wrestling, books, cyberspace, and other settings that entertain, as well as educate, the masses." LADERMAN, *supra* note 23, at 172. See also Stacy Thompson, *This Business of Death*, 17 *UTOPIAN STUD.* 491 (2006). The Showtime television series "Dead Like Me" follows the trials and tribulations of a group of modern day Grim Reapers. For information about the show, see *DEAD LIKE ME*, <http://www.deadlikeme.tv/> (last visited Nov. 21, 2013).

¹⁰⁶ "Death and the Maiden" is thematic exploration of Death. For a general discussion about the theme "Death and the Maiden," see GUTHKE, *GENDER*, *supra* note 91, at 82–127. See also David Luban, *On Dorfman's Death and the Maiden*, 10 *YALE J.L. & HUMAN.* 115 (1998).

¹⁰⁷ SCHECHTER, *supra* note 23, at 270.

¹⁰⁸ JAMES HALL, *DICTIONARY OF SUBJECTS AND SYMBOLS IN ART* 291 (Westview Press rev. ed. 1979).

vanitas¹⁰⁹ still-lifes created detailed¹¹⁰ iconography of death.¹¹¹ Such images include the leering overbite of a skull, the delicate wilting of a petal, the overturned glass, the oozing decay of oranges, apples, and pomegranates, the sputtering candle, the hovering bubble, and the hourglass;¹¹² all symbolizing “the transience of life and the vanity of all earthly achievements and pleasures.”¹¹³

Although today *memento mori* is most commonly associated with seventeenth-century vanitas painting, *memento mori* images are still in use. Images of *memento mori* reference skulls and skeletons beyond the Middle Ages,¹¹⁴ as seen in the work of nineteenth century artist James Ensor.¹¹⁵ The Victorian Age created a cult of death¹¹⁶ with tangible personal *memento mori* objects including jewelry woven from the hair of a deceased loved one and daguerreotypes of fully dressed, posed corpses.¹¹⁷

¹⁰⁹ The word “vanitas” is thought to reference the following phrase from the King James Bible: “vanitas vanitatum et omnia vanitas.” HALLAM & HOCKEY, *supra* note 104, at 65. “Vanity of vanities, all is vanity.” *Id.* at 65 (referencing Eccles. 1:2 (King James Version)).

¹¹⁰ The seventeenth-century scientific inventions of the microscope and the camera obscura heightened the power of observations for both painters and cartographers. HANNEKE GROOTENBOER, *THE RHETORIC OF PERSPECTIVE: REALISM AND ILLUSIONISM IN SEVENTEENTH-CENTURY DUTCH STILL-LIFE PAINTING* (Univ. of Chicago Press 2005).

¹¹¹ See generally GOMM, *supra* note 1, at 45, 211 (iconography dictionary). See also DEBORAH NOYES, *ENCYCLOPEDIA OF THE END: MYSTERIOUS DEATH IN FACT, FANCY, FOLKLORE AND MORE* (Houghton Mifflin Co. 2008) (presenting an alphabetical exploration of the objects of death, burial, and mourning from amulet to wreath).

¹¹² See ARIES, *supra* note 88, at 193 (listing candles, pipe smoke, flowers, butterflies, half-full glasses, and hour glasses as typical iconography of vanitas paintings); Taryna Cooper, *Exhibition Review, A Post-Mortem on Refashioning Death*, 2 MORALITY 267 (1997) (listing the bubble, smoke, wilting flowers, extinguished candle, and shadows as typical iconography of vanitas paintings); Cheney, *supra* note 101 (noting that flowers, particularly tulips and roses were used as symbols in vanitas painting).

¹¹³ SCHECHTER, *supra* note 23, at 270. See also HALLAM & HOCKEY, *supra* note 104, at 51 (noting that the *memento mori* iconography reflects the passage of time).

¹¹⁴ Patricia Scott, *The Skull and Skeleton in Self-Portraits of James Ensor*, in VANITAS, *supra* note 83, at 203.

¹¹⁵ For a survey of the life and work of James Ensor, see INGRID PFEIFFER ET AL., *JAMES ENSOR* (MoMA 2005) (companion to the 2009 exhibition at the Museum of Modern Art). James Ensor was the subject of a They Might Be Giants Song titled “Meet James Ensor” on the album “John Henry” released in 1994.

¹¹⁶ See generally JAMES STEVENS CURL, *THE VICTORIAN CELEBRATION OF DEATH* (History Press 2004); PAT JALLAND, *DEATH IN THE VICTORIAN FAMILY* (Oxford Univ. Press 1996). For an examination of three nineteenth-century *memento mori* glass domes evidencing the Victorian cult of death, see Lynne Moore, *‘Herein is Love’: Performance and Identity in Three Welsh Memento Mori*, 1 CULTURAL HIST. 226 (2012).

¹¹⁷ Hair jewelry as personal mementos faded from fashion with the refinement of photographic techniques. HALLAM & HOCKEY, *supra* note 104, at 141. For an examination of daguerreotypes, see M. SUSAN BARGER & WILLIAM B. WHITE, *THE DAGUERRETYPE: NINETEENTH-CENTURY TECHNOLOGY AND MODERN SCIENCE* (Smithsonian Institution 1991). See also MERRY A. FORESTA & JOHN WOOD, *SECRETS FOR THE DARK CHAMBER: THE ART OF THE AMERICAN DAGUERRETYPE* (Smithsonian Press

In the twentieth century, writers tackled the reflection and contemplation of *memento mori* experiences. For instance, Muriel Spark, best known today for *The Prime of Miss Jean Brody*,¹¹⁸ tackled mortality, memory, and remembrances in her 1959 novel *Memento Mori*.¹¹⁹ The characters of the novel all receive anonymous phone calls simply saying “[r]emember you must die.”¹²⁰ The novel is not, however, a detective story unraveling the identities of the mysterious voices on the phone.¹²¹ Rather, the novel examines the characters’ responses to the *memento mori* call. The characters undertake actions, sometimes foolish or inept, in an attempt to create a meaning to the calls. For the characters, the actions ultimately “lead[] nowhere—except to return [the reader] to the unpalatable fact of our mortality.”¹²² Notwithstanding the tragic end of some of the novel’s characters, the novel’s overall message is positive. As Spark wrote: “[t]he words, ‘Remember you must die.’ It is . . . an excellent thing to remember this, for it is nothing more than the truth. To remember one’s death is, in short, a way of life.”¹²³ In a similar vein, the widely-acclaimed Nolan brothers’ movie *Memento*¹²⁴ was based on a short story by Jonathan Nolan titled “Memento Mori.”¹²⁵ The fragmented manner of the tale forces the audience to cobble together the shards of memories into a reflective whole.¹²⁶

1995). During the Victorian Age, the ceremony of death took on a ritualistic ostentation never seen before or since. See generally CURL, *supra* note 116. Other objects associated with Victorian death and its rituals include black bombazine fabric, jet beads, and shrouded mirrors were intended to minimize reflection that was thought to potentially distract the progression of souls to heaven. *Id.* at 195, 199–203; TREVOR MAY, THE VICTORIAN UNDERTAKER 18–23 (Shire Publications Ltd. 1996). Post-World War I burials and displays of mourning became simplified, retreating from the ostentatious Victorian displays of dying and mourning. *E.g.*, JULIE-MARIE STRANGE, DEATH, GRIEF AND POVERTY IN BRITAIN, 1870–1914 18 (Cambridge Univ. Press 2005).

¹¹⁸ MARTIN STANNARD, MURIEL SPARK: THE BIOGRAPHY 1, 325 (W.W. Norton & Co. 2009). Edinburgh-born author Muriel Spark, Evelyn Waugh, and Graham Greene are considered the British “triumvirate of Catholic-convert novelists.” *Id.* at xv.

¹¹⁹ MURIEL SPARK, MEMENTO MORI (J.B. Lippincott Co. 1959).

¹²⁰ *Id.* at 1.

¹²¹ Each character in the novel hears a different voice speaking on the telephone. See, e.g., Allan Pero, “Look for One Thing and You Find Another”: The Voice and Deduction in Muriel Spark’s *Memento Mori*, 54 MODERN FICTION STUDIES 558, 560 (2008). See also Lyndsey Stonebridge, *Hearing Them Speak: Voices in Wilfred Bion, Muriel Spark and Penelope Fitzgerald*, 19 TEXTUAL PRAC. 445, 448 (2005) (exploring the “strangeness of voice” in selected works of fiction).

¹²² STANNARD, *supra* note 118, at 208. See also Pero, *supra* note 121.

¹²³ SPARK, *supra* note 119, at 154.

¹²⁴ MEMENTO (Lions Gate 2001).

¹²⁵ JAMES MOTTRAIM, THE MAKING OF MEMENTO App. (Faber & Faber 2002) (reproducing the short story “Memento Mori” first published in Esquire Magazine).

¹²⁶ Ilana Shiloh, *Adaptation, Intertextuality, and the Endless Deferral of Meaning: Memento*, 10 M.C.J. (May 2007), available at <http://journal.media-culture.org.au/0705/08-shiloh.php>; Jo Alyson Parker, *Remembering the Future: Memento, the Reverse of Time’s Arrow and the Defects of Memory*, 4 KRONOSCOPE 239 (2004).

Religious services continue to reference *memento mori*, as demonstrated by Ash Wednesday liturgy.¹²⁷ “Remember that you are dust, and to dust you shall return.”¹²⁸ But in the secularized global world of the twenty-first century, *memento mori* experiences are necessary for individual reflection on life goals, assessing experiences, and contemplating legacies.

V. FROM PRIMARY ESTATE PLANNING INSTRUMENT TO SECONDARY DOCUMENT: THE WILL’S EVOLVING FUNCTION

The functional equivalent of the Will, a mechanism to dispose of property after death, likely predates written history.¹²⁹ The Will itself is a document steeped in history and continues to bear the imprint of the past.¹³⁰ Nonetheless, the form of the Will, patterns of testation, and interactions with the Will have changed throughout time.

In Ancient Rome, Wills were called “vessels of truth.”¹³¹ Not merely a device transferring property upon death, the Will provided “a final accounting of the testator’s likes and dislikes and reveal[ed] the essence of his [or her] character.”¹³² Further underscoring the prominent place Wills held in Ancient Rome, “no curse seems to have been bitterer than that imprecated upon an enemy ‘that he might die without a will.’”¹³³

¹²⁷ See, e.g., LEONEL L. MITCHELL, LENT, HOLY WEEK, EASTER, AND THE GREAT FIFTY DAYS: A CEREMONIAL GUIDE (Rowman & Littlefield Publishers Inc. 1996) (referencing the Anglican Book of Common Prayer). See also THE OXFORD GUIDE TO THE BOOK OF COMMON PRAYER: A WORLDWIDE SURVEY (Charles Hefling & Cynthia Shattuck eds., Oxford Univ. Press 2006).

¹²⁸ *Id.* at 4.

¹²⁹ ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION 8 (Callaghan & Co. 1928).

¹³⁰ See, e.g., FRANCIS LLEWELLYN, WILLS IN ANCIENT EGYPT (Stevens & Sons 1898). See also *On the Origin and History of Wills*, 1 LEGAL REPORTER 223 (1840–1841). See also Malcolm A. Moore, *The Joseph Trachtman Lecture: The Origin of Our Species: Trust and Estate Lawyers and How They Grew*, 32 ACTEC J. 159 (2006); Julius Leetham, *Probate Concepts and Their Origins*, 9 WHITTIER L. REV. 763 (1988).

¹³¹ EDWARD CHAMPLIN, FINAL JUDGMENTS: DUTY AND EMOTION IN ROMAN WILLS, 200 B.C.-A.D. 250 10 (Univ. of Cal. Press 1991) (“[I]t is abundantly clear that the will was indeed perceived as a vessel of truth, a document carefully weighed and written free of ordinary constraints and without fear or favor, since it became public knowledge only when its author was past caring.”). See also CHRISTOPHER FRANCESE, ANCIENT ROME IN SO MANY WORDS 230 (K & P Publishing 2007) (equating the word for “final judgment” with the word of “will and testament”). For an analysis of selected Wills of Ancient Rome, see Anton-Hermann Chroust, *Estate Planning in Hellenic Antiquity: Aristotle’s Last Will and Testament*, 45 NOTRE DAME L. REV. 629 (1969–1970) (presenting and analyzing Aristotle’s Last Will as evidenced by writings of Dogenes Laertius, Abn An-Nadim, Al-Qifti Gamaladdin, and Ibn Abi Usaib’a).

¹³² Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth Century America*, 119 HARV. L. REV. 959, 966 (2006). See also CHAMPLIN, *supra* note 131, at 9–10; PAUL VEYNE, THE ROMAN EMPIRE 31 (Arthur Goldhammer trans. 1987).

¹³³ VIRGIL M. HARRIS, ANCIENT, CURIOUS AND FAMOUS WILLS 74 (Stanley Paul & Co. 1912) (quoting Sir Henry Sumner Maine).

In Medieval Europe, the hallmarks of modern Wills coalesced under the watchful gaze and guiding hand of the Church.¹³⁴ The Church was instrumental in developing record-keeping for transferring real property¹³⁵ and attempting to extend the right to make a Will to additional members of the Medieval population.¹³⁶ The Church declared that dying intestate would be considered a sin, using the threat of burial in unconsecrated ground to increase testation rates.¹³⁷

Not surprisingly, Wills in this period contained two main components: the pious provisions and the dispositive provisions.¹³⁸ Pious provisions began with declarations such as “I commend my soul to the Creator.”¹³⁹ The pious provisions also included affirmations of the testator’s religious beliefs and sometimes even attacked the religious beliefs.¹⁴⁰ The dispositive provisions gifted the testator’s physical property. Bridging the pious provisions and the dispositive provisions were confessions—an expected component of a document executed in front of Church representatives huddled around the testator’s deathbed.¹⁴¹ A gift of penance or a gift of gratitude to the Church often followed statements of confession.¹⁴² As one scholar summarized, “[a] dying man is less careful about the disposal of his goods than is one who has a lease of life, and it was very advantageous for a representative

¹³⁴ See generally REPPY & TOMPKINS, *supra* note 129, at 7. For a modern exploration of religious influence on testation, see Jeffrey G. Sherman, *Can Religious Influence Ever Be Undue Influence?*, 73 BROOK. L. REV. 579 (2009).

¹³⁵ Brenda Danet & Bryna Bogoch, *From Oral Literacy to Written Document: The Transitional Language of Anglo-Saxon Wills*, 12 LANGUAGE & COMM’N 95, 96 (1992) (“Initiated by the clergy as aids to remembering transfers of property in which the Church was a beneficiary, the use of [written] documents eventually extended to records of other governmental and commercial transactions as well.”). See also MICHAEL M. SHEEHAN, MARRIAGE, FAMILY, AND LAW IN MEDIEVAL EUROPE: COLLECTED STUDIES 3 (James K. Farge ed., Univ. of Toronto Press 1996).

¹³⁶ SHEEHAN, *supra* note 135, at 6.

¹³⁷ Charles Gross, *The Medieval Law of Intestacy*, 18 HARV. L. REV. 120, 120–21 (1904) (referencing the practice of prohibiting the burial of the intestate in consecrated ground). *But see* ARIES, *supra* note 88, at 189 (noting that the actual implementation of the threat remains unclear).

¹³⁸ ARIES, *supra* note 88, at 189.

¹³⁹ MICHAEL MCMAHON SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY* 120 *et seq.* (Toronto Pontifical Inst. of Mediaeval Stud. 1963). For an exploration of the pious provisions of a Will executed during the English Reformation, see John Craig & Caroline Litzenberger, *Wills as Religious Propaganda: The Testament of William Tracy*, 44 J. OF ECCLESIASTICAL HIST. 415, 423–25 (July 1993).

¹⁴⁰ Ulrich Bach, *Wills and Will-Making in 16th and 17th Century England*, in *HISTORICAL PRAGMATICS: PRAGMATIC DEVELOPMENTS IN THE HISTORY OF ENGLISH* 125, 133, 137 (Andreas H. Jackson ed., John Benjamins Publishing Co. 1995).

¹⁴¹ Eber Carle Perrow, *The Last Will and Testament as a Form of Literature*, WIS. ACAD. OF SCI., ARTS, AND LETTERS 682, 687 (1913); Gross, *supra* note 137, at 120 (“During the middle ages the last will was usually the epilogue of the last confession.”). See also Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP. TR. & EST. L.J. 505, 512 (2008) (observing that the pious provisions of Wills had all but disappeared from Wills by the mid-eighteenth century).

¹⁴² Perrow, *supra* note 141, at 688.

of the church to be near when the property was disposed of.”¹⁴³ Even when Wills were no longer under the Church’s exclusive domain and ecclesiastical courts, the Will “would remain basically the same, a permanent contribution of canon law to the legal structure of the English-speaking world.”¹⁴⁴

Statutory reforms such as the sixteenth century Statute of Wills¹⁴⁵ and twentieth century Uniform Probate Code¹⁴⁶ did not remove the imprint of the Middle Ages. Perhaps this is because the core admission in making a Will is fundamentally a product of the Middle Ages.¹⁴⁷ To make a Will “is an admission that one will die.”¹⁴⁸ This admission may have been natural in the Middle Ages when individuals were confronted daily with the perils of mortality from the plague.¹⁴⁹ Today, this admission seems less natural because of decreasing mortality rates, the development of the hospital system, and the creation of the funeral industry.¹⁵⁰

The Will is a document straddling the past and the present while reaching to the future. The Will continues to repeat document patterns of the past. Yet making a Will is not a process that everyone undertakes. Today, the ability to draft and execute a valid Will extends to almost every adult, regardless of gender, ethnicity, national origin, or religious belief.¹⁵¹ Expanding the opportunity for testation does not translate, however, into everyone having a Will.¹⁵² Financial and non-financial costs affect testation rates.¹⁵³ One of the most often cited costs for the relatively low testation rates is attributed to the reluctance to face mortality.¹⁵⁴

¹⁴³ *Id.*

¹⁴⁴ SHEEHAN, *supra* note 135, at 24.

¹⁴⁵ See generally REPPY & TOMPKINS, *supra* note 129, at 182–227 (summarizing statutes relating to Wills from the 1235 Statute of Merton to the 1925 Administration of Estates Act).

¹⁴⁶ UNIF. PROB. CODE. (2008). For a recent review of the Uniform Probate Code, see Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273 (2010).

¹⁴⁷ See *supra* Part IV.

¹⁴⁸ Nathan Roth, *The Psychiatry of Writing a Will*, 41 AM. J. PSYCHOTHERAPY 245, 246, 250 (April 1987) (“To write a will is a confession that one expects to die.”).

¹⁴⁹ See *supra* notes 87–91 and accompanying text.

¹⁵⁰ See *supra* notes 21–52 and accompanying text.

¹⁵¹ See UNIF. PROB. CODE. § 2-501 (2008) (providing that “[a]n individual 18 or more years of age who is of sound mind may make a will”).

¹⁵² For an empirical exploration of testacy and intestacy, see Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36 (2009).

¹⁵³ See, e.g., Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt-Out of Intestacy*, 53 B.C. L. REV. 877, 879 (2012).

¹⁵⁴ See, e.g., Emily E. Beach, *Nudging Testators Toward Holistic Estate Planning: Overcoming Social Squeamishness on the Subjects of Money and Morality*, 26 OHIO ST. J. ON DISP. RESOL. 701, 706 (2011).

A superstition developed that to execute a Will invites sudden death.¹⁵⁵ This reluctance to confront mortality would strike Medieval testators as extraordinary given the visibility and prevalence of death in the Middle Ages.¹⁵⁶

Reluctance to discuss personal death is seen more broadly in our modern “youth-worshipping, progress-orientated society.”¹⁵⁷ In a harsh, but accurate critique, one scholar wrote:

In a culture that encourages us to avoid dirt and grime and grease and bad breath and unpleasant odors, in a culture that encourages us to preserve appearances with clothes and cosmetics, in a culture that encourages plastic surgery, hair dyes, and Geritol to help us look and feel young, it will be difficult, if not impossible, to make people confront the stark reality of death.¹⁵⁸

Even the insurance industry, an industry dealing in death, sidesteps personal confrontation of death. In order to encourage people to obtain insurance to be paid at their death, the insurance is called “life insurance.” The focus of insurance is thus on individual’s survivors, rather than on dying itself.¹⁵⁹ Estate planning likewise incorporates similar conventions, though with different motives, to distance personal death. Trusts are becoming an integral component of estate planning and may one day eclipse Wills.¹⁶⁰ Trust agreements, including revocable trusts, are drafted using the third person, replacing “I” and “me” with “Settlor.” Not even the definite article “the” prefaces “Settlor” in many forms.¹⁶¹ This contract-like phrasing distances death from the document by removing the personal and replacing the personal with the generic.

Even popular culture projections of the Will obscure the Will’s connection to death. Such projections range from the ubiquitous Will reading in an oak-paneled, chintz-curtained room to the *deus ex machina* Will production that

¹⁵⁵ This superstition did exist even during the Middle Ages. ARIES, *supra* note 88, at 189. See also REPPY & TOMPKINS, *supra* note 129, at 8.

¹⁵⁶ See *supra* notes 87–91 and accompanying text.

¹⁵⁷ KUBLER-ROSS, *supra* note 77, at x.

¹⁵⁸ Farrell, *supra* note 46, at 120–21.

¹⁵⁹ *Id.* at 112. See also ALLAN & BURRIDGE, *supra* note 34, at 222 (“Life insurance is insurance against death; death’s antonym life is utilized to put a value on the life continued.”). See also JESSE DUKEMINIER, ROBERT H. SITKOFF, & JAMES LINDGREN, WILLS, TRUSTS AND ESTATES 418 (WoltersKluwer 2009) (noting that “[l]ife insurance is a euphemism for death insurance”).

¹⁶⁰ See generally John Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

¹⁶¹ See, e.g., JEROME IRA SOLKOFF, WEST’S LEGAL FORMS: ELDER LAW Ch. 10 (3d ed. 2013) (Medicaid P. Forms: Qualified Income Trust §10.278).

transforms a pauper with a heart of gold into a millionaire with a pile of gold.¹⁶² These projections mask an integral function of the Will: the testator's personal confrontation with "the stark reality of death."¹⁶³ The testator is "planning for one's death with property."¹⁶⁴ The Will allows the testator to directly participate in the development of a legacy by creating an after-death identity. This process may affect lifetime choices such as inspiring a pattern of planned giving to a beloved charity or mending fences with an estranged family member.¹⁶⁵ As two scholars indicated, "[w]ill making [is] an act of memory performed by the living as it involve[s] certain recollections of the past and it [is] a means by which the deceased was later remembered."¹⁶⁶ The mechanical marking of boxes on a form, unaccompanied by guided reflection, is unlikely to result in a transformative experience.¹⁶⁷ An engaged, reflective testator, however, participates in the process, producing a first person, present tense document disposing of the testator's accumulated possessions, representing a lifetime of choices, and nominating trusted individuals who will carry on the testator's legal existence.

VI. THE WILL AS A *MEMENTO MORI* EXPERIENCE

Although the specter of death hangs over the Will, the Will is not truly a document about death—it is a document about life. The Will forces remembrance

¹⁶² Inheritance plays a role in many novels, such as Charles Dickens's *Oliver Twist*, and Henry James's *The Portrait of a Lady*, and Agatha Christie's *Peril at End House*.

¹⁶³ Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 376 (1969–1970).

¹⁶⁴ *Id.* The planning of property distribution may be done with an intent to influence the future choices of the living. For a discussion of the possible influence of the dead on the living, see RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* (Yale Univ. Press, 2010).

¹⁶⁵ See generally Catherine Exley, *Testaments and Memories: Negotiating After-Death Identities*, 4 MORTALITY 249, 249 (1999) (theorizing that "planning funerals, giving mementoes or trying to create happy memories may all be seen as part of a process whereby the dying aim to leave behind fragments and cues which others can build upon in the future"). See also Paul J. Moon, *Memento Mori: Is There Room for Death in Lifelong Learning?*, 28 INT'L J. OF LIFELONG EDUC. 331 (2009) (theorizing that death is a constant theme of the human condition and can be a positive motivator in life).

¹⁶⁶ HALLAM & HOCKEY, *supra* note 104, at 160 (referencing Wills of the sixteenth century and seventeenth century).

¹⁶⁷ An automated system does have a place in modern Will making. Guided prompts and exercises could facilitate the experience. For example, the creation of a non-binding ethical Will, also called a legacy letter, has been used as exercises to prime the testator for the estate planning experience. For an exploration of the format and function of ethical Wills, see generally BARRY K. BAINES, *ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER* (2d ed. 2006), available at <http://www.ethicalwill.com/>. See also Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 ACTEC J. 154 (2007); Patricia Wilhite McCartney, *What Every Lawyer Should Know About Ethical Wills*, WYO. L. 56 (Dec. 2005); Kathleen M. Rehl, *Help Your Clients Preserve Values, Tell Life Stories and Share the "Voice of Their Hearts" Through Ethical Wills*, J. PRAC. EST. PLAN. 17 (June-July 2003); Judith A. Frank, *The Human Legacy: Using Ethical Wills To Enhance Estate Planning*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65 (2003).

of one's own mortality, reflection on life goals, assessment of life choices, and contemplation of legacies.¹⁶⁸ The function of *memento mori* is reflection, assessment, and contemplation. In summarizing the function of *memento mori*, one scholar wrote,

It is a tautological truism that death itself is the ultimate reminder of mortality. Nevertheless, an effective use of *memento mori* requires something more than the simple presentation of death [T]he appearance of death must in some way make us want to change our values [and behaviors].¹⁶⁹

The testator undergoes a reflective, contemplative, and ultimately transformative experience facilitated by language choices and cues associated with the Will.¹⁷⁰

A. *The Execution: Creating a Valid Will*

In the twenty-first century, the Will and its terminology seem anachronistic. The Will itself is an actual paper document requiring physical, as opposed to digital, signatures.¹⁷¹ The Will is not signed: the Will is executed.¹⁷² But this term is not an antiquated word.¹⁷³ Rather, the word “execution” is a deliberate language choice referencing the concept of *memento mori*.

¹⁶⁸ For a book designed to facilitate the guided reflection of clients, see SCOTT C. FITHIAN, *VALUES-BASED ESTATE PLANNING: A STEP-BY-STEP APPROACH TO WEALTH TRANSFER FOR PROFESSIONAL ADVISORS* (JoAnne Vose ed., John Wiley & Sons, Inc. 2000). See also Mark Heitner, *A Psychiatrists' Guide to Succession Planning*, 26 ABA PROB. & PROP. 52 (Sept./Oct. 2012) (noting the “planning paralysis” that business owners undergo in succession planning, which is akin to the experience of estate planning clients).

¹⁶⁹ Redwin, *supra* note 82, at 658.

¹⁷⁰ THOMAS L. SHAFFER, *DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH 1* (Dunellan 1970) (defining the Will-making experience as a “*memento mori* experience”).

¹⁷¹ See Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105 (2008) (addressing the possible development and use of electronic Wills). See also James W. Martin, *I Want to Sign an Electronic Will*, 55 PRAC. LAW. 61 (2009); Chad Michael Ross, *Probate—Taylor v. Holt: The Tennessee Court of Appeals Allows a Computer Generated Signature to Validate a Testamentary Will*, 35 U. MEM. L. REV. 603 (2004–2005) (examining the first case to determine the validity of a computer-generated signature by the testator).

¹⁷² See generally David K. Johns, *Will Execution Ceremonies: Securing a Client's Last Wishes*, 23 COLO. LAW. 47 (Jan. 1994); Gerry W. Beyer, *The Will Execution Ceremony—History, Significance and Strategies*, 29 S. TEX. L. REV. 413 (1987–1988); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331 (1978–1979).

¹⁷³ For an analysis of the traditional, and often antiquated, language of the law, see Marita Gustafsson, *The Syntactic Features of Binomial Expressions in Legal English*, 4 INTER. J. FOR THE STUDY OF DISCOURSE 123 (Nov. 2009).

The word “execute” means “the act of carrying out or putting into effect.”¹⁷⁴ This dramatic word connotes action. Execute conveys the formal action of signing and witnessing, showcasing the formal nature of the proceedings. The execution of a Will is a solemn event.¹⁷⁵ Like an oath, there is a performative aspect of the act of execution.¹⁷⁶ As an early-twentieth century treatise on Wills provides,

It is said there is a valid execution of a will where the person undertaking to make it performs certain actions with the intention of thereby executing his will, leaving nothing undone which he [or she] undertook in order to carry out that intention, and the acts so performed include everything necessary under the statute.¹⁷⁷

Strong action words in the quoted language above, like “undertaking” and “performed,” demonstrate the showmanship of the execution’s performance. This positive connotation of performing a task and creating a document, however, is mingled with the negative connotation associated with the executioner’s noose.¹⁷⁸ Far from being detrimental, association with death buttresses the *memento mori* function by using the word “execute.” After all, “[t]he estate planning process is the closest thing our society has to a rite of passage to the final stage of life.”¹⁷⁹ Continued use of the word “execute,”—even when the word provokes a wince by the testator—underscores the ritualistic, ceremonial aspect of the Will’s signing. The word prompts acknowledgment of mortality and the important nature of the document.

¹⁷⁴ Black’s Law Dictionary defines the word “execution” as follows: “The act of carrying out or putting into effect. Validation of a written instrument such as a contract or will, by fulfilling the necessary legal requirements.” BLACK’S LAW DICTIONARY 609 (9th ed. 2009). See also JOHNSON, *supra* note 71, at dccxxxii.

¹⁷⁵ HARRIS, *supra* note 133, at viii (“The moment of will-writing is a solemn one.”). See also Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139 (2012) (asserting that the formalities of the Will’s execution serves a therapeutic function).

¹⁷⁶ See David Horton, *Testation and Speech*, 101 GEORGETOWN L.J. 61, 64 (2012) (“Testation is a form of speech.”). See generally JOHN SEARLE, *SPEECH ACTS* (1969); Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389 (2003); Andrew N. Adler, *Can Formalism Convey Justice?—Oaths, “Deeds,” & Other Legal Speech Acts in Four English Renaissance Plays*, 72 ST. JOHN’S L. REV. 237 (1998); Bernard J. Hibbits, *“Coming to Our Senses”: Communication and Legal Expression in Performance Cultures*, 41 EMORY L.J. 873 (1992).

¹⁷⁷ JOHN EDMUNDSON ALEXANDER, VOL. 3 COMMENTARIES ON THE LAW OF WILLS 553 (Bender-Moss 1917).

¹⁷⁸ For an examination of executions, see JEAN KELLAWAY, *THE HISTORY OF TORTURE AND EXECUTION: FROM EARLY CIVILIZATION THROUGH MEDIEVAL TIMES TO THE PRESENT* (Lyons Press 2003).

¹⁷⁹ David Gage, John Gromala & Edward Kopf, *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 REAL PROP. PROB. & TR. J. 509, 513 (2004). See also Shaffer, *supra* note 163 (discussing the confrontation of one’s death implicit in the estate planning process and associating the confrontation with a ritual related to death).

B. Mindful of the Uncertainty of Life: Prompting Reflection in the Will's Introduction

Some document cues presenting direct *memento mori* moments have disappeared from the Will but could be re-incorporated into the document. For example, the Will's introduction used to directly reference the transience of life. To illustrate, a joint Will executed in France in 1560 poignantly begins:

Considering in their hearts that the life of every human creature is short and that they must die, but not knowing when or how, and not wishing to pass from this world into the next intestate, while sense and reason still govern their minds, [they] have made their testament in the name of the Father, the Son, and the Blessed Holy Spirit in the form and manner that follows . . .¹⁸⁰

The above example more directly references *memento mori* than most introductions, but the language demonstrates the possibility introductions afford. The introduction is a logical place to insert acknowledgment of mortality. To contemplate the Will's execution acknowledges "that the life of every human creature is short and that they must die."¹⁸¹ Similarly, the following two nineteenth century introductions reference the *memento mori* function:

IN THE NAME OF GOD, AMEN, I Bona Antry, now wife of Arthur Antry, of London, merchant, being in good health of body, and of a sound and disposing mind and memory, (blessed be God for the same) do this first day of May, in the year of our Lord 1800, make and ordain this my last will and testament in manner following . . .¹⁸²

"In the name of God Amen. I Paul Revere of Boston in the County of Suffolk & Commonwealth of Massachusetts Esquire being in good health and of sound memory, but knowing that all men must die do make & declare this to be my last

¹⁸⁰ ARIES, *supra* note 88, at 189 (quoting the sixteenth-century joint Will of a French baker and his wife).

¹⁸¹ *Id.*

¹⁸² *Will Form of Bona Antry, Feme Covert, in* EARDLEY MITFORD, THE LAW OF WILLS, CODICILS, AND REVOCATIONS WITH PLAIN AND FAMILIAR INSTRUCTIONS FOR EXECUTORS, ADMINIFRATORS, DEVIFEEES, AND LEGATEES INCLUDING GREAT VARIETY OF FORMS OF WILLS AND CODICILS (ADAPTED TO THE CIRCUMFTANCES OF PERFONS OF ALL RANKS AND SITUATIONS, WHO WOULD WIFH TO DEVIFE OR BEQUEATH THEIR PROPERTY LEGALLY AND FECURELY, AND PREENT VEXATIONS LAW SUITS AMONG THEIR FURVIVING RELATIVES AND FRIENDS. INCLUDING THE MODERN DECIFIONS AND ACTS OF PARLIAMENT ON THESE SUBJECTS, DOWN TO THE MICHAELMAS TERM, 1800. TO WHICH IS ADDED, A CLEAR AND DISTINCT ACCOUNT OF THE LAW'S DISPOSAL OF THE ESTATES OF THOSE WHO DIE INTEFTATE OR WITHOUT A WILL. CALCULATED FOR THE USE OF THE PUBLIC IN GENERAL, AS WELL AS THE PROFESSORS OF THE LAW. WITH AMPLE INFRUCTIONS FOR OBTAINING PROBATE OF WILLS, AND LETTERS OF ADMINISTRATION) 90 (W. Stratford, Crown-Court, Temple-Bar 2d ed. 1800).

will & testament.”¹⁸³ References to “being in good health of body, and of a sound and disposing mind and memory” and “knowing that all men must die” relate to the contemplation of mortality, which is critical to *memento mori*. In addition, the direct religious references incorporate *memento mori*, but are not representative of all pre-twentieth century Wills, as demonstrated in the nineteenth century introduction below.

I, A.B., of the county of _____, in the State of _____, farmer, being weak in body [*or in perfect health of body, as the case may be*] and of sound mind, memory, and understanding but, considering the uncertainty of this transitory life, do make and publish this, my last will and testament.¹⁸⁴

The *memento mori* moment is preserved with the phrase “considering the uncertainty of this transitory life.”

Direct *memento mori* moments began to disappear in the twentieth century. By the middle of the twentieth century, streamlined forms like the following appeared: “I, _____, of the _____ of _____, State of _____, do hereby make, publish and declare this to be my Last Will and Testament, and hereby revoke any and all other wills and codicils heretofore made by me.”¹⁸⁵ Banished from forms are not only the explicit religious phrase “in the name of God, Amen,” but also phrases like “being in good health of body,” “knowing that all men must die,” and “considering the uncertainty of this transitory life.” Form-endorsed introductions today continue to minimize *memento mori* moments: “I, [*name of testator*], of [*address of testator*], revoke all Wills and Codicils previously made by me, and declare this to be my Last Will and Testament.”¹⁸⁶ The disappearance is justified by the need to streamline language in a manner thought more accessible and reflective of modern testators. Additionally, the justification relates to the fact that the testator¹⁸⁷ cannot simply recite his or her capacity to

¹⁸³ *The Will of Paul Revere dated Nov. 15, 1816, First Codicil dated March 14, 1818, reproduced in THE LAST WILL AND TESTAMENT 108* (Robert A. Farmer & Assoc. Inc. 1968).

¹⁸⁴ HUGH M. SPALDING, AN ENCYCLOPEDIA OF LAW AND FORMS FOR ALL THE STATES AND CANADA WITH NOTES AND AUTHORITIES 386 (P.W. Ziegler & Co. 1882).

¹⁸⁵ RALPH R. NEUHOFF, STANDARD CLAUSES FOR WILLS 11 (Fiduciary Publishers 3d ed. 1962). As the Preface notes, the origin of this particular form book dates to the author’s 1946 article in *Trusts and Estates Magazine*. The series of articles is furthered referenced in the Report of the Committee of Standard Clauses for Wills and Trusts published in 1947. A.B.A. SEC. REAL PROP. PROB. & TR. PROC. 129 (1947).

¹⁸⁶ 20A AM. JUR. LEGAL FORMS 2D *Single Person’s Will—No Children—Bequest to Siblings* §266:77 (2013).

¹⁸⁷ See, e.g., UNIF. PROB. CODE, *supra* note 151 (Who May Make A Will).

legally establish testamentary capacity.¹⁸⁸ Attesting to testamentary capacity is the functional role of the witnesses and is conveyed in the attestation clause, typically reading as follows:

The foregoing instrument, consisting of _____ typewritten pages, including this page, was signed, published and declared by the above named testator to be his/her last will, in the presence of us; we, in his/her presence, at his/her request, and in the presence of each other, have hereunto subscribed our names as witnesses; and we declare that at the time of the execution of this instrument the testator, according to our best knowledge and belief, was of sound mind and under no constraint.¹⁸⁹

In the attestation clause, references to “sound mind” are legally operative. These references establish testamentary capacity because the witnesses are independent observers who can attest to their observations.¹⁹⁰ While legally the testator cannot attest to his or her own capacity, equating the sole use of “being of sound mind” in the introduction to establishing capacity overlooks the *memento mori* opportunity presented in introductions. References to “sound and disposing mind” and “uncertainty of life” prompt introspection, especially when used in the first provision on the first page of the document.

The language of the Will’s introduction, like language in any genre’s introduction, is intended to awaken the audience to the importance of the material to follow.¹⁹¹ The deliberately halting language of the introduction, the pairing of first person “I” with the testator’s full name, and even the stock recitation of the revocation of previous testamentary documents slows the reader down. To that end, the Will commences with a reflective pause, setting the stage for personal contemplation of mortality. For example, Albert Einstein’s Will introduction

¹⁸⁸ MARGARET TEMPLE-SMITH & DEBORAH CUPPLES, *LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS* 287 (West 2013) (cautioning student drafters that whether recitations of “sound mind” in the introduction would “have any practical use” requires state specific research).

¹⁸⁹ RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.): EXECUTION FORMALITIES § 3.1, cmt. q (1999). The following is another example of a modern attestation clause:

We [the Witnesses] sign below as witnesses in the presence of the testator and of each other, declaring that the person who is making this Will appears to be of sound mind and appears to be making this Will freely and without duress, or undue influence and that the person making this Will acknowledges that he has read, or has had it read to them, and understands the contents of this Will.

FREDERICK K. HOOPS, FREDERICK H. HOOPS III, & DANIEL S. HOOPS, 1 *FAMILY ESTATE PLANNING GUIDE: CONCLUSION AND ATTESTATION* § 17:31, (4th ed. 2013).

¹⁹⁰ RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 3.1 (2013).

¹⁹¹ See generally Thomas L. Shaffer, *The Overture in a Well-Drawn Will*, 14 *THE PRACTICAL LAWYER* 45 (Jan. 1968).

reads, “being of sound and disposing mind and memory, and mindful of the uncertainty of life and the certainty of death.”¹⁹² Essentially “mindful of the uncertainty of life and the certainty of death” translates into “remember you must die.” In other words, *memento mori*.

C. *Six Feet Under: Providing for the Payment of Memorial and Burial Expenses*

Planning for the handling of one’s remains may be the most direct way to confront mortality.¹⁹³ The drafting of a Will can encourage testators to consider both the disposition of his or her remains and the nature of the memorial celebrating his or her life. The memorial and burial instructions in a Will form the intersection of private and public matters.¹⁹⁴ Memorials, funerals, and burials are public displays of personal events. The brilliant headlights of a funeral procession slow down all in the vicinity as onlookers gaze at the procession. Guide books and travel guides present cemeteries as tourist attractions.¹⁹⁵ Clark Gable’s burial¹⁹⁶

¹⁹² The full introduction reads: “I, Albert Einstein, of Princeton, New Jersey, being of sound and disposing mind and memory, and mindful of the uncertainty of life and the certainty of death, do hereby make, publish and declare this to be my Last Will and Testament, in manner following” *The Will of Albert Einstein dated March 18, 1950, reproduced in THE LAST WILL AND TESTAMENT* 24 (Robert A. Farmer & Assoc. Inc. 1968).

¹⁹³ Arranging for the one’s own funeral is also a *memento mori* experience. An individual may arrange for his or her own funeral through the use of pre-planned funeral contracts. For an analysis of pre-planned funeral contracts, see Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L. J. 1 (1996). Relatives may find that the pre-need contracts are not honored. See, e.g., Tracy E. Smith, *Scamming the Elderly: A Look into Funeral Fraud*, 24 GPSOLO 16 (Sept. 2007) (examining the Federal Trade Commission regulations relating to funeral pricing); Ashley Hunt, *There is a New Trend of Corporate “Death Care”: Let the Buyer Beware*, 27 NOVA L. REV. 499 (2003) (surveying Florida’s consumer protection regulations of the funeral industry).

¹⁹⁴ For an analysis of the similarities between the genre of eulogies and the genre of Wills, see Michael Hancher, *Dead Letters: Wills and Poems*, 60 TEX. L. REV. 507, 517 (1982). See also Jed R. Brubaker & Gillian R. Hayes, “*We Will Never Forget You [Online]: An Empirical Investigation of Post-mortem MySpace Comments*,” CSCW 123 (2011), available at <http://dl.acm.org/citation.cfm?id=1958843>.

¹⁹⁵ See, e.g., SCOTT STANTON, *THE TOMBSTONE TOURIST: MUSICIAN* (Simon & Schuster Inc. 2003) (“a music lover’s guide to all the graves, shrines, and memorabilia of law, great legends of rock, jazz, blues, country, and R&B!”); BRYAN WOOLEY ET AL., *FINAL DESTINATIONS: A TRAVEL GUIDE FOR REMARKABLE CEMETERIES IN TEXAS, NEW MEXICO, OKLAHOMA, ARKANSAS AND LOUISIANA* (Univ. of N. Tex. Press 2000).

¹⁹⁶ FIND A GRAVE: CLARK GABLE, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=373> (last visited Nov. 21, 2013) (including photos of Clark Gable’s final resting place).

next to the third of five wives, Carole Lombard,¹⁹⁷ at Forest Lawn Cemetery¹⁹⁸ adds to the mystique of one of Hollywood's greatest romances.¹⁹⁹ The eternal flame marking JFK's burial site at Arlington National Cemetery²⁰⁰ feeds the legend of John F. Kennedy and the modern-day Camelot.²⁰¹ Planning the disposal of one's remains may be the most direct way to confront mortality. Drafting a Will encourages testators to consider both the disposition of his or her remains and the nature of the memorial celebrating his or her life.

¹⁹⁷ FIND A GRAVE: CAROLE LOMBARD, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=636> (last visited Nov. 21, 2013) (including photos of Carole Lombard Gable's final resting place). See also TOD BENOIT, *WHERE ARE THEY BURIED? HOW DID THEY DIE?: FITTING ENDS AND FINAL RESTING PLACES OF THE FAMOUS, INFAMOUS, AND NOTEWORTHY 166–69* (Black Dog & Leventhal Publishers 2009) (describing Clark Gable and Carole Lombard as the “eternal couple”).

¹⁹⁸ Forest Lawn Cemetery, a chain of cemeteries in Southern California, is arguably one of the most famous cemeteries in the world. FOREST LAWN, www.forestlawn.com (last visited Nov. 21, 2013). See MICHAEL R. LEMING & GEORGE E. DICKINSON, *UNDERSTANDING DYING, DEATH, & BEREAVEMENT* 410–11 (Wadsworth Cengage Learning 7th ed. 2011) (describing Forest Lawn as “[t]he most famous of all for-profit cemeteries”). For an exploration of the development of Forest Lawn, its Builder Hubert Lewright Eaton, and the Builder's Creed, see ADELA ROGERS ST. JOHNS, *FIRST STEP UP TOWARD HEAVEN: HUBERT EATON AND FOREST LAWN* 118 (Prentice-Hall, Inc. 1959). See also Marc Trieb, *The Landscape of Loved Ones*, in *PLACES OF COMMEMORATION PLACES OF COMMEMORATION: SEARCH OF IDENTITY AND LANDSCAPE DESIGN* 83 *et seq.* (Joachim Wolschke-Bulmahn ed., Dumbarton Oaks 2001) (summarizing the creation and development of Forest Lawn). Forest Lawn even appears in *1,000 Places to See in the United States & Canada Before You Die*. PATRICIA SCHULTZ, *1,000 PLACES TO SEE IN THE UNITED STATES & CANADA BEFORE YOU DIE* 820–21 (Workman Publishing Co. 2011). Forest Lawn provided the inspiration for Evelyn's Waugh's fictional Whispering Glades and Happier Hunting Grounds in his novel *The Loved One*. EVELYN WAUGH, *THE LOVED ONE: AN ANGLO-AMERICAN TRAGEDY* (Back Bay Books 1999). See also Ann Pasternak Slater, *Introduction* to EVELYN WAUGH, *BLACK MISCHIEF, SCOOP, THE LOVED ONE, AND THE ORDEAL OF GILBERT PINFOLD* xxii–xxvii (Alfred A. Knopf 2003) (referencing the inspirational use of Forest Lawn by Evelyn Waugh). *The Loved One*, in addition to being translated into a movie starring Liberace, served as the inspiration for the famous Dr. Who episode “Tranquil Repose.” See, e.g., BRIAN J. ROBB, *TIMELESS ADVENTURES: HOW DR. WHO CONQUERED TELEVISION* (Oldcastle Books 2009). Forest Lawn has been equated with another California-creation of fantasy: Disneyland. Trieb, *supra* note 198, at 102.

¹⁹⁹ See, e.g., MEGAN GRESSOR & KERRY COOK, *AN AFFAIR TO REMEMBER: THE GREATEST LOVE STORIES OF ALL TIME* 267–273 (Fair Winds Press 2005). See also JANE ELLEN WAYNE, *CLARK GABLE: PORTRAIT OF A MISFIT* (St. Martin's Press 1993); WARREN HARRIS, *GABLE AND LOMBARD* (Simon & Schuster 1974). One telling of the famed romance (with some embroidering of the facts) is the 1976 movie “Gable and Lombard” with James Brolin starring as Clark Gable. *GABLE AND LOMBARD* (Universal Pictures 1976). Clark Gable and Carole Lombard have even been fictionally restyled as detectives. GEORGE BAXT, *THE CLARK GABLE AND CAROLE LOMBARD MURDER CASE* (Thorndike Press 1998).

²⁰⁰ See generally CYNTHIA PARZYCH, *ARLINGTON NATIONAL CEMETERY: A GUIDED TOUR THROUGH HISTORY* (Morris Book Publishing 2009); OWEN ANDRES & CAMERON DAVIDSON, *A MOMENT OF SILENCE: ARLINGTON NATIONAL CEMETERY* 48–51 (John Wiley & Sons 1994) (estimating that 175 million Americans watched the funeral on television).

²⁰¹ See, e.g., JAMES PIERSON, *CAMELOT AND THE CULTURE REVOLUTION: HOW THE ASSASSINATION OF JOHN F. KENNEDY SHATTERED AMERICAN LIBERALISM* 146, 277, 288–90 (Encounter Books 2007); Malcolm Foley & J. John Lennon, *JFK and Dark Tourism: A Fascination with Assassination*, 2 INT'L J. OF HERITAGE STUD. 198, 198, 201–11 (1996) (examining the treatment of President Kennedy at the JFK Library Museum in Boston, the Sixth Floor in Dallas, and the eternal flame in Arlington).

Memorials, funerals, and burials are personal,²⁰² in that they form part of an individual's constructed post-death identity,²⁰³ such as the space burial of Gene Rodenberry's ashes²⁰⁴ and the burial at sea of NASA astronaut and Navy veteran Neil Armstrong's ashes.²⁰⁵ A Will's cremation request forms the narrative thrust for the popular movie *The Bridges of Madison County* where survivors are forced to reconsider a loved one's identity.²⁰⁶ Including language in the Will about memorials and burials can conjure these reflections by the simple reference to the payment of expenses.²⁰⁷

²⁰² See, e.g., BESS LOVEJOY, *REST IN PIECES: THE CURIOUS FATES OF FAMOUS CORPSES* (Simon & Schuster 2013) (showing how the disposition of remains may reflect the personality and lives of an individual).

²⁰³ See generally Exley, *supra* note 165, at 249; PLACES OF COMMEMORATION: SEARCH OF IDENTITY AND LANDSCAPE DESIGN 1, 3 (Joachim Wolschke-Bulmahn ed. 2001) ("‘Commemoration’ and ‘identity’ are two terms that refer to fundamental concerns of human existence. . . . Death plays a significant role in the process of establishing identity"); David R. Unruh, *Death and Personal History: Strategies of Identity Preservation*, 30 SOC. PROBLEMS 340, 342–43, 349 (Feb. 1983). The Will of Earl Carroll, one of the early twentieth century's showmen, directed a marble monument with dancing girls gracing his grave. ST. JOHNS, *supra* note 198, at 226–29 (summarizing the controversy that accompanied Forest Lawn's implementation of the request).

²⁰⁴ LADERMAN, *supra* note 23, at 202. See also BENOIT, *supra* note 197, at 218–19 (compiling celebrity bios, causes of death, final resting places, and directions to the grave sites of 450 individuals including Laura Ingalls Wilder, Jackie Robinson, and Patsy Cline).

²⁰⁵ E.g., *Neil Armstrong, 1st Moonwalker, Buried at Sea (Photos)*, SPACE.COM (Sept. 14, 2012, 3:57 PM), <http://www.space.com/17615-neil-armstrong-1st-moonwalker-buried-at-sea-photos.html>. Active duty personnel, as well as veterans, are eligible for U.S. Navy burials at sea. Russell E. Haddleton, *What to Do with the Body?: The Trouble with Postmortem Disposition*, 20 ABA PROB. & PROP. 55, 58–59 (Nov./Dec. 2006) (highlighting the range of options for the disposition of remains, including green burials, burial at sea, and burials in space). See also Kent Hansen, *Choosing To Be Flushed Away: A National Background on Alkaline Hydrolysis and What Texas Should Know about Regulating “Liquid” Cremation*, 5 EST. PLAN. & CMTY. PROP. L.J. 145 (2012).

²⁰⁶ *THE BRIDGES OF MADISON COUNTY* (Warner Bros. 1995). See also TANYA KRZYWINSKA, *SEX AND THE CINEMA* 120–21 (Wallflower Press 2006) (referencing the movie's quoting of Francesca Johnson's Will request to be cremated with her ashes scattered from a particular covered bridge in the county). The novel on which the movie was based, the cremation instruction are placed in a letter Francesca Johnson wrote to her attorney. ROBERT JAMES WALLER, *THE BRIDGES OF MADISON COUNTY* 174 (Warner Books Inc. 1992). Waller also wrote an epilogue to his famous novel. ROBERT JAMES WALLER, *A THOUSAND COUNTY ROADS: AN EPILOGUE TO THE BRIDGES OF MADISON COUNTY* (John M. Hardy Publishing 2002).

²⁰⁷ “Corpus,” a term used to reference property of a trust, is derived from the Latin word for “body.” BLACK'S LAW DICTIONARY 369 (8th ed. 2004). The word “cadaver” has been linked to the Latin phrase *caro data vermicibus* (“flesh given to worms”). NORMAN L. CANTOR, *AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER* 75 (Georgetown Univ. Press 2010). The word “cadaver” became part of the English language at the end of the Middle Ages. Aston, *supra* note 38, at 224. For an interdisciplinary exploration of the human body and the law, see *BODY LORE AND LAWS* (Andrew Bainham, Shelley Day Slater, & Martin Richards eds., Oxford-Portland Publishing 2002). See also Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999).

Provisions referencing funerals, memorials, burials, and cremations have changed over the centuries.²⁰⁸ Based on surviving evidence, burial instructions likely held a prominent place in the Wills of Ancient Rome.²⁰⁹ Directions ranged from Democritus's request to embalm his body in honey before burial to Lycurgus's request to scatter his cremated ashes at sea.²¹⁰ Medieval Wills frequently requested the singing of Masses in remembrance.²¹¹ One of the most memorable burial provisions is the instruction in Dr. Alfred Nobel's Will. The instructions read: "Finally it is my express wish that following my death my veins shall be opened, and when this has been done and competent Doctors have confirmed clear signs of my death, my remains shall be cremated in a so-called crematorium."²¹² This macabre language, frequently appearing in eighteenth century and nineteenth century Wills, illustrates changes in medicine, burial practices, and the accepted speculation that one body in ten was buried alive.²¹³

Historically, Wills included burial language because burials were connected to the pious provisions of the Will.²¹⁴ As one scholar noted, "[t]he feeling that the soul as well as the body should be disposed of by will was a natural one. So there grew . . . [in Wills the] bequeathing the soul to God and the body to

²⁰⁸ A relatively new method for the handling of remains is cryopreservation. For an examination of cryopreservation, see Benjamin C. Carpenter, *A Chip Off the Old Ice Block: How Cryopreservation Has Changed Estate Law, Why Attempts to Address, the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347 (2011).

²⁰⁹ See generally RICHARD P. SALLER, *PATRIARCHY, PROPERTY AND DEATH IN THE ROMAN FAMILY* (Cambridge Univ. Press 1994).

²¹⁰ Richard C. Groll & Donald J. Kerwin, *The Uniform Anatomical Gift Act: Is the Right to a Decent Burial Obsolete?*, 2 LOY. U. CHI. L.J. 275, 275 (1971).

²¹¹ See, e.g., PAUL BINSKI, *MEDIAEVAL DEATH: RITUAL AND REPRESENTATION* 33–38, 115 (Cornell Univ. Press 1996). See generally Clive Burgess & Beat Kumin, *Penitential Bequests and Parish Regimes in Late Medieval England*, 44 J. ECCLESIASTICAL HIST. 610 (Oct. 1993) (surveying Medieval Churchwardens' accounts). Until Henry VIII, burial in Medieval England was overseen by the ecclesiastical courts. Groll & Kerwin, *supra* note 210, at 275–76. See also CHRISTOPHER DANIELL, *DEATH AND BURIAL IN MEDIEVAL ENGLAND 1066–1550* 31 (Routledge 1997).

²¹² *Last Will and Testament of Alfred Bernhard Nobel dated Nov. 27, 1895*, available at http://www.nobelprize.org/alfred_nobel_will/will/will-full.html. The Last Will and Testament of Eleanor Roosevelt had a similar provision. See CHARLES PANATI, *PANATI'S EXTRAORDINARY ENDING OF PRACTICALLY EVERYTHING AND EVERYBODY* 124 (MJF Books 1989).

²¹³ JAN BONDESON, *BURIED ALIVE: THE TERRIFYING HISTORY OF OUR MOST PRIMAL FEAR* 238–57 (W.W. Norton & Co., Inc. 2001) (positing that most claims of premature burial are explained by the process of decomposition). For a fictional account that reflects the fear of premature internments, see Edgar Allan Poe *The Premature Burial*, in *COMPLETE STORIES AND POEMS OF LATE EDGAR ALLAN POE* 261 (DoubleDay 2012). One of the earliest expressed written concerns of premature burial in Wills has been traced to 1662 where the Will pleaded, "[l]et my body be buried 36 hours after my decease, but not before." ARIES, *supra* note 88, at 399.

²¹⁴ For a collection of odd burial requests, including the sending of a heart from Philadelphia to the family chapel in Spain and the internment of a body in a leather trunk, see HARRIS, *supra* note 133, at 122–57.

the earth for worms.”²¹⁵ Examples in the mid-eighteenth and early-nineteenth centuries continue referencing the pious provisions: “(1) Principally, I commend my soul to God, hoping for pardon of my sins through the merits of my Blessed Redeemer and my body I commit to the earth to be buried at the discretion of my Executors;”²¹⁶ (2) “First, I will and desire that I may be decently buried in the parish church of Saint James aforesaid [in the Liberty of Westminster and County of Middlesex];”²¹⁷ (3) “First and principally I commend my soul to God who gave it, and my body I commit to the earth, to be decently interred at the discretion of my executors hereinafter named.”²¹⁸

Language relating to burials and memorials has gradually faded from Wills. As the pious provisions faded from the Will, expressed preferences for burial and memorial remained for a short time thereafter. Early twentieth-century form burial instructions often read, “I desire and direct that my body be buried in a Christian-like manner, suitable to my circumstances and condition in life.”²¹⁹ This language echoed the general request of Medieval Wills that executors pay for burial, specifically a “Christian burial.”²²⁰ The disappearance of language relating to burial and memorial thus has to do with the practical aspects of the modern disposition of remains. Burials and cremations occur soon after death, often before the Will is located.²²¹ Including specific burial instructions in a Will therefore presents the potential “danger of their being disregarded on account of

²¹⁵ Perrow, *supra* note 141, at 700.

²¹⁶ *Last Will and Testament of Euphram Johnston dated Apr. 14, 1741* in THE AMERICAN HISTORICAL REGISTER AND MONTHLY GAZETTE OF THE PATRIOTIC-HEREDITARY SOCIETIES OF THE UNITED STATES SEPT. 1894–FEB. 1895 146 (Charles H. Browning ed., Historical Register Publishing Co. 1895).

²¹⁷ *Will Form of Sarah Singleton, Will of an Unmarried Woman or Spinster*, in MITFORD, *supra* note 182, at 79 (altering spelling of f to s to reflect modern typesetting).

²¹⁸ *Will Form of James Jones, Will Form of Freehold, Copyhold, Leasehold & Personal Estate*, in MITFORD, *supra* note 182, at 87 (altering spelling of f to s to reflect modern typesetting).

²¹⁹ DANIEL H. REDFEARN, A PRACTICAL TREATISE ON THE LAW OF WILLS AND THE ADMINISTRATION OF ESTATES IN GEORGIA 751 (Harrison Co. 1923). This treatise, now commonly referred to as “Redfearn,” is currently in its Seventh Edition and has grown from the original single volume in 1923 to two volumes. MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA (7th ed. 2008).

²²⁰ See, e.g., CHARLES WORTHY, DEVONSHIRE WILLS: A COLLECTION OF ANNOTATED TESTAMENTARY ABSTRACTS 180 (Bemrose & Sons 1896) (referencing the Last Will and Testament of Peter Rucker dated Nov. 16, 1632). See also CHARLES A. KERIN, THE PRIVATION OF CHRISTIAN BURIAL: AN HISTORICAL SYNOPSIS AND COMMENTARY (Kessinger Publishing 2006) (dissertation submitted to the Faculty of Canon Law of the Catholic University of America).

²²¹ Wills are often read after the funeral whether “[t]his is a result of grief, appearances, decency, or ritual.” THOMAS L. SHAFFER, CAROL ANN MOONEY, & AMY JO BOETTCHER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 108, 206 (Foundation Press 5th ed. 2007). For a summary of early common laws in England and America regarding the conflict between the premortem wishes of a decedent and the posthumous wishes of the decedent’s family, see David A. Peters, *Protecting Autonomy in Organ Procurement Procedures: Some Overlooked Issues*, 64 MILBANK Q. 241, 243–47 (1986).

lack of information.”²²² Consequently, testators are encouraged to share specific wishes and instructions with family members while keeping references in the Will general.²²³ For instance, Advance Directives for Health Care are considered a more accessible document for burial instructions. Advance Directives are documents designed to address medical care and, unlike Wills, are often utilized during end-of-life moments.²²⁴ Forms often include directed prompts for notating burial or cremation preferences.²²⁵

Inclusion of burial instructions is encouraged when specific resistance to the testator’s wishes is anticipated.²²⁶ In that case, duplication of burial instructions in both the Advance Directive and the Will is intended to strengthen the individual’s wishes. In general, the goal of having burial and cremation instructions timely reviewed has removed the detailed language about burials and memorials from the Will.²²⁷

Notwithstanding encouragement to describe burial instructions in documents other than the Will, testators sometimes reference specific requests for a particular

²²² NEUHOFF, *supra* note 185, at 12.

²²³ *Id.* The executors of Tennessee Williams’s estate could have used additional guidance as to the place of burial. The executors interpreted the Williams’s testamentary wish to “buried in St. Louis” to bury his body in St. Louis, Missouri, a city in which he had no connection to, instead of the famous St. Louis Cemetery in New Orleans, a city dear to his heart. BENOIT, *supra* note 197, at 359. For a collection of burial and memorial sites, see DEATHSCAPES: SPACES FOR DEATH, DYING, MOURNING, AND REMEMBRANCE (Avril Maddrell & James D. Sidaway eds., Ashgate 2010).

²²⁴ The creation of an Advance Directive for Health Care is also a *memento mori* experience. For an consideration of the confrontation of mortality and the Advance Directive, see Barbara A. Noah, *In Denial: The Role of Law in Preparing for Death*, 21 ELDER L.J. 1 (2012).

²²⁵ See, e.g., AR. REV. STAT. § 36-3224 (2007) (statutory sample Health Care Power of Attorney); GA. CODE ANN. § 31-32-4 (2009) (statutory form for the Advance Directive for Health Care).

²²⁶ Because a will is a formal legal document, inclusion of funeral instructions in the document tends to lend additional weight to those instructions and gives greater assurance that they will be followed. See, e.g., ENCYCLOPEDIA OF RETIREMENT AND FINANCE 786 (Lois A. Vitt, ed., Greenwood Press 2003) (stating that generally burial instructions are expressed in separate documents, such as letters to family members, unless concern exists that a family member may object to the burial instructions). Inclusion of instructions in a Will does not prevent a fight over the disposition of remains. Consider, for example, the disposition of remains of Ted Williams. Ultimately, the head of Ted Williams resides in one nitrogen tank and his decapitated body in another tank in a Scottsdale, Arizona cryogenic facility. See, e.g., ANDREW W. MAYORAS & DANIELLE B. MAYORAS, TRIAL & HEIRS: FAMOUS FORTUNE FIGHTS! . . . AND WHAT YOU CAN LEARN FROM CELEBRITY ERRORS (Wise Circle Books 2009). See also Brian L. Josias, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Internment of Bodies*, 79 NOTRE DAME L. REV. 1141 (2004).

²²⁷ In an effort to ensure accessibility of advance directives, the state of Nevada provides free electronic storage for advance directives. NEV. REV. STAT. § 449.920 (2007) (authorizing the creation of an electronic registry of Advance Directives for Health Care on the Nevada Secretary of State’s website); see *Living Will Lockbox*, NEV. SEC’Y OF ST. (2010), <http://www.nvsos.gov/index.aspx?page=214> (last visited Nov. 26, 2013). See also Ross Miller, *The Living Will Lockbox: An Essential Tool for Estate Planners*, 21 NEV. LAW. 24 (May 2013).

memorial, funeral, or burial in their Wills. For example, the Last Will and Testament of Cecil Rhodes provides:

I admire the grandeur and loneliness of the Matoppos in Rhodesia and therefore I desire to be buried in the Matoppos on the hill which I used to visit and which I called the “View of the World” in a square to be cut in the rock on the top of the hill covered with a plain brass plate with these words thereon—“Here lies the remains of Cecil John Rhodes” and accordingly I direct my Executors at the expense of my estate to take all steps and do all things necessary or proper to give effect to this my desire and afterwards to keep my grave in order at the expense of the Matoppos and Bulawayo Fund hereinafter mentioned.²²⁸

Celebrities may seek to preserve after-death privacy through burial instructions and often place such instructions in Wills.²²⁹ For example, Charles Dickens’s Will directed that he be

buried in an inexpensive, unostentatious, and strictly private manner; that no public announcement be made of the time or place of my burial; that at the utmost not more than three plain mourning coaches be employed; and that those who attend my funeral wear no scarf, cloak, black bow, long hatband, or other such revolting absurdity. I direct that my name be inscribed in plain English letters on my tomb, without the addition of “Mr.” or “Esquire.” I conjure my friends on no account to make me the subject of any monument, memorial, or testimonial whatever, I rest my claims to the remembrance of my country upon my published works, and to the remembrance of my friends upon their experiences of me in addition thereto.²³⁰

²²⁸ THE LAST WILL AND TESTAMENT OF CECIL JOHN RHODES WITH ELUCIDATORY NOTES TO WHICH ARE ADDED SOME CHAPTERS DESCRIBING THE POLITICAL AND RELIGIOUS IDEAS OF THE TESTATOR 3–4 (W. T. Stead ed., William Clowes and Sons, Ltd. 1902).

²²⁹ See, e.g., HERBERT E. NASS, WILLS OF THE RICH AND FAMOUS 69–70 (Gramercy Books 2000) (referencing the wishes expressed in Gloria Swanson’s 1981 Will that there be “no public funeral or display of any sort”). See also STEPHEN MICHAEL SHEARER, GLORIA SWANSON: THE ULTIMATE STAR 402 (Thomas Dunne Books 2013). But see Vicki Lensing, *Grief Support: The Role of Funeral Service*, 6 J. OF LOSS & TRAUMA 45 (2001) (presenting the supportive and cathartic function of a funeral).

²³⁰ John Forster, *The Life of Charles Dickens – Appendix: The Will of Charles Dickens*, MITSU MATSUOKA, NAGOYA UNIV. (May 7, 1998), <http://www.lang.nagoya-u.ac.jp/~matsuoka/CD-Forster-13.html> (last visited Nov. 26, 2013) (a copy of Charles Dickens’s Will dated May 12, 1869). His expressed wishes were not respected and his funeral became a national event. For a description of the funeral and the funeral sermon, see R. SHELTON MACKENZIE, LIFE OF CHARLES DICKENS 319–34 (Forgotten Books).

In a similar view to the low-key affair envisioned by Charles Dickens,²³¹ Doris Duke's Will began with the following direction: "I direct that there be no funeral service or memorial service of any kind for me and that I be buried at sea."²³² The instruction expresses a wish for privacy, something Doris Duke, known as the "Richest Little Girl in America," had little of during her life.²³³ The instruction also expresses a personal belief that she was a fish in a previous life, and thus her body should be returned to the sea, certainly a reflection of identity.²³⁴

Even when burial references in a Will are not as detailed as the instructions found in Cecil Rhodes's, Charles Dickens's, or Doris Duke's Wills, a burial instruction invokes the spectral image of the grave. That image-creating language primes the testator to embrace the *memento mori* function of the Will.²³⁵ In most forms today, references to burial are restricted to language such as "I direct [*name of personal representative*] to pay first my legal debts duly proven, the expenses of my last illness, funeral and burial expenses, and administration expenses,"²³⁶ and "I direct that a suitable memorial be erected by my executor on the site of my grave I ask that my gravestone be inscribed "[*text of inscription*]."²³⁷

Although it is sound advice to encourage burial instructions outside the Will, retaining some references to burial promotes the Will's reflective function. The following language builds upon the direction to the executor but more directly incorporates the *memento mori* experience:

²³¹ President Franklin Delano Roosevelt had also wished for a simple funeral and ended up with a ceremony full of pomp and circumstances. His Will, written one month before the bombing of Pearl Harbor, requested burial in the garden of his New York Hyde Park home. For a complete copy of President Roosevelt's Will, see LAST WILL AND TESTAMENT 140–41 (Robert Farmers & Assoc. 1968). See also PANATI, *supra* note 212, at 123. After his funeral procession and burial, his wife found a private letter expressing his wish not to have his body and embalmed and to have no Washington procession. See generally DORIS KEARNS GODWIN, NO ORDINARY TIME: FRANKLIN & ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II 612–15 (Simon & Schuster 1994).

²³² *Last Will and Testament of Doris Duke dated April 5, 1993, available at* <http://www.doyourownwill.com/famous-will-of/doris-duke.html>. See also GORDON BROWN & SCOTT MYERS, ADMINISTRATION OF WILLS, TRUSTS, AND ESTATES 447–54 (Centage Learning 2009) (reproducing the Will of Doris Duke).

²³³ For a biography about Doris Duke, see TED SCHWARZ & TOM RYBAK, TRUST NO ONE: THE GLAMOROUS LIFE AND BIZARRE DEATH OF DORIS DUKE 100 (St. Martin's Press 1997) (quoting newspaper articles about her life, including her twenty-first birthday party).

²³⁴ *Id.* at 121 (referencing Doris Duke's belief in reincarnation and that "she had once been a fish who still needed to return to the water in order to be complete").

²³⁵ For a cross-cultural and inter-disciplinary examination of burial practices, see EFFIE BENDANN, DEATH CUSTOMS: AN ANALYTICAL STUDY OF BURIAL RITES (Kessinger Publishing 2003).

²³⁶ 11A ILL. FORMS LEGAL & BUS. *Married Persons—With Children—Specific Bequests and Devises to Named Individuals* § 35:117 Art. 2 (2013).

²³⁷ 20B AM. JUR. LEGAL FORMS 2d *Monument or Gravestone—With Inscription* § 266:257.50 (2013).

We direct that we be buried in a [*Christian-like*/[*other statement of manner of burial*]] manner, suitable to our circumstances and conditions in life, and that our executor or executrix, as the case may be, shall pay all of our just debts, including expenses of our last sickness and funeral expense, all state inheritance and federal estate taxes and all other taxes; and that a suitable marker be purchased for our graves [*OPTIONAL: and that all of such be paid for out of the personal property of our estate*] and that such be paid as soon as practical, but without the necessity of making undue sacrifice of the assets of our estate.²³⁸

Even a generic statement referencing “burial expenses” or “memorial” prompts reflection for the testator. Specifically, a generic statement referencing burial expenses causes the testator to think of burial, specifically his or her final resting place. Along these lines, Article 2 of Princess Diana’s Will simply states, “I WISH to be buried.”²³⁹ This language is not as graphic as the gory images projected by Dr. Nobel’s Will—“my veins shall be opened.”²⁴⁰ Nonetheless, a testator’s use of the simple statement, “I wish to be buried,” presents a stark five word sentence conjuring the image of one’s personal remains. The image encourages reflection, assessment, and contemplation.

Referencing burial images is part of the history of *memento mori*.²⁴¹ For example, *The Danse Macabre* originated from actual funerary practices of mourning and celebrating a person’s life.²⁴² Today, grave and burial images were used in the HBO award-winning television show *Six Feet Under*.²⁴³ The selection of the title *Six Feet Under* is a startlingly descriptive and thought-provoking lens through which

²³⁸ 9B NICHOLS CYCL. LEGAL FORMS *Provisions in Will Generally: Payment of Debts, Taxes, Last Sicknesses and Funeral Expenses* § 228:373 (2013).

²³⁹ NASS, *supra* note 229, at 27 (quoting the LWT of Diana, Princess of Wales dated June 1, 1993). See also *Last Will and Testament of Princess Diana*, available at <http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-princess-diana.html>. For an interdisciplinary exploration of the effect of the death of, grief for, and mourning of Princess Diana, see MOURNING DIANA: NATION, CULTURE AND THE PERFORMANCE OF GRIEF (Adrian Kear & Deborah Lynn Steinberg eds., Routledge 1999). Public mourning for celebrities has become a global phenomenon. For a case study analyzing the online reactions to the death of NASCAR celebrity Dale Earnhardt Sr., see Scott K. Radford, *Grief, Commiseration, and Consumption following the Death of a Celebrity*, 12 J. OF CONSUMER CULTURE 137 (July 2012).

²⁴⁰ *Last Will and Testament*, *supra* note 212.

²⁴¹ See *supra* Part IV.

²⁴² See *supra* notes 95–98 and accompanying text.

²⁴³ Created by Alan Ball, the television series ran from 2001 to 2005 on HBO. For additional information about the television show, see *Six Feet Under*, IMDB (2013), <http://www.imdb.com/title/tt0248654/> (last visited Nov. 26, 2013).

to view the lives of the fictional Fisher Family.²⁴⁴ The title references the work of Fisher and Sons Funeral Home, the fleeting and unpredictable nature of life, and its inevitable conclusion. Despite dark topics, television viewers are rewarded with the positive message about the possibilities of life.²⁴⁵ This is a similar experience to the reading of the sentence “I wish to be buried.”

The potential transformative experience surrounding burial images is demonstrated by Charles Dickens in *A Christmas Carol*.²⁴⁶ From the beginning of the story, with the debate about whether the “deadest piece of ironmongery” is a door-nail or coffin-nail, to the end of the story, with Scrooge’s graveside transformative experiences with the Ghost of Christmas future, the work functions as a *memento mori* experience.²⁴⁷ The stark confrontation with the reality of a grave serves as the lasting catalyst on Scrooge’s transformation and promise to “honor Christmas in [his] heart, and try to keep it all the year.”²⁴⁸

The Will’s references to burials, cremations, funerals, and memorials have a lingering personal effect on the testator. Perhaps more than any provision in the Will, these provisions foreshadow the end of life, while simultaneously encouraging reflection, assessment, and contemplation. The inclusion of just two words—burial expenses—can buttress the Will’s *memento mori* function. Although detailed descriptions of burials, cremations, funerals, and memorials no longer have a practical value in a modern Will, even the slightest reference to future disposition of remains and celebrations of life support the Will’s *memento mori* function.

²⁴⁴ ALAN BALL, *SIX FEET UNDER: BETTER LIVING THROUGH DEATH* (Pocket Books 2003). See also READING *SIX FEET UNDER: TV TO DIE FOR* (Kim Akass & Janet McCabe eds., I.B. Tauris 2005) (Part I of book titled “Memento Mori: Spectacle, the Specular and Observing the Dead”).

²⁴⁵ For a study of the impact of *Six Feet Under*, see Edward Schiappa, Peter B. Gregg, & Dean E. Hewes, *Can a Television Series Change Attitudes about Death? A Study of College Students and Six Feet Under*, 28 *DEATH STUD.* 459 (2004). See also Avi Shoshana & Elly Teman, *Coming Out of the Coffin: Life-Self and Death-Self in Six Feet Under*, 29 *SYMBOLIC INTERACTION* 557 (FALL 2006).

²⁴⁶ CHARLES DICKENS, *A CHRISTMAS CAROL* (Cricket House Books 2009). See also Charles P. Flynn, *Death and the Primacy of Love in Works of Dickens, Hugo, and Wilder*, 4 *ANABIOSIS: THE J. OF NEAR-DEATH STUD.* 125–141 (1984) (“Love and immortality, the mystic vision, the compassionate imperative, and a transforming life review are discussed in Dickens’ ‘A Christmas Carol,’ ‘The Old Curiosity Shop’ and ‘Nicholas Nickleby,’ Hugo’s ‘Les Misérables,’ and Thornton Wilder’s ‘Our Town.’”).

²⁴⁷ DICKENS, *supra* note 246, at 1, 72. See also Andrew H. Miller, *The Specters of Dickens’s Study*, 5 *NARRATIVE* 322, 331–32 (Oct. 1997) (exploring Scrooge’s reflections and noting that the novel “invites readers to experience death not as a final event, but as a condition tempering our everyday lives”); Barbara Hardy, *The Change of Heart in Dickens’ Novels*, 5 *VICTORIAN STUD.* 49, 51 (Sept. 1961).

²⁴⁸ DICKENS, *supra* note 246, at 105–07. *A Christmas Carol* is frequently adapted to plays and movies. Michael Cain, Patrick Stewart, Scrooge McDuck, Grumpy Smurf, and Mr. Magoo have all channeled Ebenezer Scrooge in adaptations of *A Christmas Carol*. Bill Murray starred in a reimaging of *A Christmas Carol* in the movie *Scrooged*. (Paramount Pictures 1988).

D. Last Words: Conceptualizing the Will in an Accessible Manner

When the execution of the Will is completed, the signed and attested document faces the testator with the title page reading “Last Will and Testament.” This title evokes the tradition of “last words” and supports the *memento mori* function of the Will.

Use of the word “last” in the document’s title is not a legally accurate description. The determination of which document is “last” can only be made after the testator’s death.²⁴⁹ Notwithstanding the lack of legal accuracy, the word “last” reminds the testator of the document’s function. The Will becomes, in many respects, a testator’s last words to the ears of his or her beneficiaries, family, and friends.²⁵⁰ The words will become memorable. “Last” promotes reflection and urges caution. As one scholar wrote, “[f]inality commands attention; last words, unlike all others, cannot be taken back.”²⁵¹

Popular culture reinforces the tradition of last words. Often ranked as one of the greatest movies of all time,²⁵² *Citizen Kane* focuses on unraveling the mystery of Charles Foster Kane’s enigmatic last word: “Rosebud.”²⁵³ Similarly, “[w]hy didn’t they ask Evans” are the baffling last words of a mysterious murder victim in Agatha’s Christie novel titled *Why Didn’t They Ask Evans?*²⁵⁴ Mark Twain ridiculed the obsession with last words in his short story “Last Words of Great Men.”²⁵⁵ Nevertheless, obituary writers²⁵⁶ and biographers²⁵⁷ regularly start their

²⁴⁹ See, e.g., KEVIN D. MILLARD, DRAFTING WILLS, TRUSTS, AND OTHER ESTATE PLANNING DOCUMENTS: A STYLE MANUAL 60 (2006) (“The ‘last’ in ‘Last Will and Testament’ is a prediction that may or may not prove true.”).

²⁵⁰ See, e.g., ROBERT A. ESPERTI & RENNO L. PETERSON, LOVE, MONEY, CONTROL: REINVENTING ESTATE PLANNING 8 (2004) (“Estate planning also lets people have one last ‘conversation’ with the ones they love.”).

²⁵¹ GUTHKE, LAST WORDS, *supra* note 15, at 9.

²⁵² See generally *The Greatest Films Poll: Sight and Sound*, BRITISH FILM INSTITUTE (2012), <http://explore.bfi.org.uk/sightandsoundpolls/2012>.

²⁵³ See generally Robert L. Carringer, *Rosebud, Dead or Alive: Narrative and Symbolic Structure in Citizen Kane*, 91 PMLA 185, 185, 192 (Mar. 1976) (suggesting a broader meaning to “rosebud” than the name of a childhood sled).

²⁵⁴ AGATHA CHRISTIE, *WHY DIDN’T THEY ASK EVANS?* (HarperCollins Publisher 2012).

²⁵⁵ Mark Twain, *Last Words of Great Men*, in PUNCH, BROTHERS, PUNCH: THE COMIC MARK TWAIN READER 382–85 (Charles Neider ed., Doubleday & Co. 1977). As Twain mocked:

A distinguished man should be as particular about his last words as he is about his last breath. He should write them out on a slip of paper and take the judgment of his friends on them. He should never leave such a thing to the last hour of his life, and trust to an intellectual spirit at the last moment to enable him to say something smart with his latest gasp and launch into eternity with grandeur. No—a man is apt to be too much fagged and exhausted, both in body and mind, at such a time, to be reliable; and maybe the very thing he wants to say, he cannot think of to save him; and besides there are his weeping friends bothering around; and worse than all as likely as not he may have to deliver his last gaps before he is expecting to. A man cannot always expect

work with last words. Last words, such as those of Queen Elizabeth I—“all my possessions for one moment of time”²⁵⁸—reveal an individual’s humanity. Last words fascinate, even though last words are frequently subject to embellishment.²⁵⁹ One example of last words’ rise to mythical proportions is the famous quote attributed to Notre Dame halfback George Gipp: “[t]ell them to go out and win one for the Gipper.”²⁶⁰ Evidence reveals that Notre Dame Coach Knute Rockne’s manipulated George Gipp’s last words eight years after George’s death to craft an inspiring quote that would spur his team to victory.²⁶¹ The resulting dramatic win catapulted the quote to fame, despite its lack of foundation in the truth.²⁶²

to think of a natty thing to say under such circumstances, and so it is pure egotistic ostentation to put it off. There is hardly a case on record where a man came to his last moment unprepared and said a good thing—hardly a case where a man trusted to that last moment and did not make a solemn botch of it and go out of the world feeling absurd.

Id. at 382.

²⁵⁶ For compilations of obituaries, see IAN BRUSKILL, *THE TIMES GREAT VICTORIAN LIVES: AN ERA IN OBITUARIES* (HarperCollins 2008); KEITH COLQUHOUN & ANN WROE, *THE ECONOMIST BOOK OF OBITUARIES* (Bloomberg Press 2008); ROBERT MCG. THOMAS & CHRIS CALHOUS, *52 MCG.S: THE BEST OBITUARIES FROM LEGENDARY NEW YORK TIMES REPORTER ROBERT MCG. THOMAS* (Scribner 2008); IAN BRUSKILL, *THE TIMES GREAT LIVES: A CENTURY OF OBITUARIES* (HarperCollins 2007); *THE LAST WORD: THE NEW YORK TIMES BOOK OF OBITUARIES AND FAREWELLS: A CELEBRATION OF UNUSUAL LIVES* (Marvin Siegel ed., William Morrow & Co. 1997).

²⁵⁷ See, e.g., M. WILLIAM PHELPS, *NATHAN HALE: THE LIFE AND DEATH OF AMERICA’S FIRST SPY ix* (Thomas Dunne Books 2008) (beginning the forward with the oft-quoted with the purported last words of Nathan Hale: “I only regret that I have but one life to lose for my country”).

²⁵⁸ See, e.g., HERBERT LOCKYER, *LAST WORDS OF SAINTS AND SINNERS: 700 FINAL QUOTES FROM THE FAMOUS, THE INFAMOUS, AND THE INSPIRING FIGURES OF HISTORY* 24, 36, 86, 108, 117 (Kregel Publications 1969) (relaying the last words from a variety of individuals of note, including George Eliot, Edgar Allen Poe, Ludwig von Beethoven, William Wordsworth).

²⁵⁹ E.g., KATHLEEN E. MILLER, *LAST LAUGHS: FUNNY TOMBSTONE QUOTES AND FAMOUS LAST WORDS* (Sterling Publishing Co. 2006); LAURA WARD, *FAMOUS LAST WORDS: THE ULTIMATE COLLECTION OF FINALES AND FAREWELLS* (PRC Publishing Ltd. 2004); RAY ROBINSON, *FAMOUS LAST WORDS, FOUND FAREWELLS, DEATHBED DIATRIBES AND EXCLAMATIONS UPON EXPIRATION* (Workman Publishing 2003); WALTER RAIMEE EGBERT, *LAST WORDS OF FAMOUS MEN AND WOMEN* (Herald Printing & Binding Rooms 1898).

²⁶⁰ ROBINSON, *supra* note 259, at x. PAUL F. BOLLER JR. & JOHN GEORGE, *THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, AND MISLEADING ATTRIBUTIONS* 35 (Oxford Univ. Press 1989). Ludwig van Beethoven’s last words are similarly the subject of myth. According to various sources, his last words were “I shall hear in Heaven,” “Too bad, too bad!”, or “Friends applaud, the comedy is over.” GYLES BRANDRETH, *FAMOUS LAST WORDS & TOMBSTONE HUMOR* 5 (Sterling Publishing Co., Inc. 1989).

²⁶¹ BOLLER & GEORGE, *supra* note 260, at 35 (noting the absence of any evidence that George Gipp was ever even called “the Gipper” during his lifetime).

²⁶² *Id.* For an examination of Notre Dame football, see JACK CAVANAUGH, *GEORGE GIPP, KNUTE ROCKNE, AND THE DRAMATIC RISE OF NOTRE DAME FOOTBALL* (Skyhorse Publishing 2010). Ronald Reagan played the role of George Gipp in the 1940 movie *Knute Rockne—All American*. KNUTE ROCKNE—ALL AMERICAN (Warner Bros. 1940). Ronald Reagan became known as “the Gipper” in his political life. See generally J. DAVID WOODARD, *RONALD REAGAN: A BIOGRAPHY* 24–25, 84–96 (ABC-CLIO, LLC 2012).

Despite their potential unreliability, the law accords a measure of weight to last words, as demonstrated by the dying declarations evidentiary rule.²⁶³ The Federal Rules of Evidence 804(b)(2) continue to provide a hearsay exception for “Imminent Death,” commonly referred to as dying declarations. The declaration must be made “while believing the declarant’s death [was] imminent,” and the statement must be about the cause or circumstances of the impending death.²⁶⁴ The justification for allowing dying declaration is based upon the concept that a dying person would not want to die with a lie on their lips when about to meet his or her maker²⁶⁵ and has been recognized since the Renaissance.²⁶⁶ Today the hearsay exception is limited to civil actions and homicide prosecutions²⁶⁷—perhaps recognizing the potential unreliability of such statements. Nevertheless, according any weight at all demonstrates the importance bestowed on last words.

The Will taps into the tradition of last words, reinforcing legacy formulation.²⁶⁸ This prompts reflection and urges caution. To shield one’s eyes from death is more than sidestepping the topic of death. It is, as Heidegger observed, “a self-evasion.”²⁶⁹ The end product of confronting mortality is summarized in a workbook entitled “Encountering Death: Structured Activities for Death Awareness”:

The outcome of a successful encounter with an understanding of
one’s own death is the ability
to plan the future;
to make a will;

²⁶³ For classroom strategies to engage students in the examination of dying declarations, see Lenora Ledwon, *Guilt, Greed, and Furniture: Using Mel Brooks’s The Twelve Chairs to Teach Dying Declarations*, 3 CAL. L. REV. CIR. 72 (2012).

²⁶⁴ FED. R. EVID. 804(b)(2). See generally Sarah R. Gitomer, *Testimonial Statements: The Death of Dying Declarations? Supreme Court of New York Appellate Division, Second Department*, 28 Touro L. REV. 953 (2012); Peter Nicolas, “I’m Dying to Tell You What Happened”: *The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487 (2010); Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411; Brian A. Liang & Anita C. Liang, *Dying Declarations, Western Legal Bias, and Unreliability as Reported Speech*, 5 L. TEXT CULTURE 113 (2000–2001); Bryan A. Liang, *Shortcuts to Truth: The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229 (1997–1998).

²⁶⁵ See, e.g., FAUST, *supra* note 48, at 10 (noting that dying declarations are part of the *ars moriendi* tradition).

²⁶⁶ See generally Harriet C. Frazier, “*Like a Liar Gone to Burning Hell*”: *Shakespeare and Dying Declarations*, 19 COMP. DRAMA 166, 168 (Summer 1985) (quoting Renaissance proverbs); Harry C. Bauer, *Shakespeare’s Last Words*, 24 LIBR. REV. 255, 255 (1974) (noting that at least three of Shakespeare’s plays reference the credibility bestowed to last words).

²⁶⁷ FED. R. EVID., *supra* note 264.

²⁶⁸ Last moments similarly fascinate. See generally GEORGIA BRAGG & KEVIN O’MALLEY, *HOW THEY CROAKED: THE AWFUL ENDS OF THE AWFULLY FAMOUS* (Bloomsbury Publishing 2011). For an exploration of the last day of assassinated presidents, see SARAH VOWEL, *ASSASSINATION VACATION* (Simon & Schuster 2006).

²⁶⁹ William May, *The Metaphysical Plight of the Family*, in *DEATH INSIDE OUT*, *supra* note 19, at 53 (referencing Heidegger).

to make decisions about the disposition of one's body;
 to make decisions about organ donation;
 to provide for the future of one's spouse and children;
 to reflect upon the values by which one actually wishes to live
 one's life; and
 other concerns of life that come to mind only after one faces the
 fears, doubts, and questions of death.²⁷⁰

In other words, “[w]ithout an explicit awareness of death, life would be far less interesting and structured. Facing death—thinking hard and straight and long about it—charges our lives with intensity and authenticity.”²⁷¹ Thus, confronting death becomes part of the transformative experience channeling present-day choices and decisions while promoting active construction of a post-death identity and lasting legacy. Viewing the Will through the lens of last words reminds the testator how memorable the terms of the Will become for beneficiaries, family, and friends.

The Will is both a formulaic document steeped in tradition and a unique experience for each testator. The moment of execution is preceded by the contemplation of terms, review of drafts, and conversations with an attorney. At the moment of execution, pen in hand, hovering over the signature line, the testator glances into the eyes of two or more witnesses. When this dramatic action is completed, the signed Will becomes the testator's last words. The Will is more than a document that transfers probate property upon death. The Will is a document that forces confrontation of mortality, assessment of life choices, and contemplation of legacy. Maintaining language choices and document cues promotes this function. The Will embodies the *memento mori* experience from the contemplation of terms, including the payment of funeral expenses, to the execution of the “Last Will and Testament.” Reflection, assessment, and contemplation: “remember you must die.”

²⁷⁰ IRA DAVID WELCH, RICHARD F. ZAWISTOSKI, & DAVID W. SMART, ENCOUNTERING DEATH: STRUCTURED ACTIVITIES FOR DEATH AWARENESS 10 (Accelerated Development Inc. 1991). *See also* Daniel Eckstein, *Reflections Relative to Death, Dying and Grieving Workshops*, 61 THE PERSONNEL AND GUIDANCE J. 138, 138 (Nov. 1982).

The paradox is that a course on dying is actually a seminar on living, for facing and accepting death gives meaning to life, the reality of death should generate increased social interest, because, despite personal differences, rank, and status, *all* people are ‘terminal passengers’ on this earth, making the probably ‘one out of one’ that each individual will die.

Id.

²⁷¹ F. DAVID MARTIN, FACING DEATH: THEME AND VARIATIONS 17 (Rosemont Publishing & Printing Corp. 2006). *See also* Shaffer, *supra* note 163, at 377 (“People who are able to go through their upsetting experiences in the company of a competent, comfortable, accepting professional, however, come out more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop.”).

VII. CONCLUSION

“Death by chocolate” desserts are “simply to die for.” A person is stopped “dead in his or her tracks” by a “drop dead gorgeous” individual. Someone is “dead certain” he is right—unless he is “dead wrong.” And at the end of a hard day at work when someone is “dead on her feet,” she thinks that work will be the “death” of her. The Grim Reaper has become a comic relief device on the cartoon show “Family Guy.”²⁷² These glib references to death in popular culture obscure the personal confrontation of our own mortality. Death is a taboo subject.²⁷³ a subject not to dwell on.²⁷⁴ Yet, reflection and contemplation of mortality produce positive, lifetime actions. The Will is more than a document that transmits property upon death. The Will is a document that promotes the reflection and contemplation necessary for a life well-lived. For the modern testator, this is a *memento mori* experience. The Last Will and Testament is the legal document that forces reflection and contemplation of mortality. The document must retain language choices and document cues of a Medieval society focused on issues of life and death. Embracing the language choices and documents cues promotes the estate planning process for modern testators.

“Remembering you must die”—the literal translation of *memento mori*—breathes life into the estate planning process. References to the “execution,” “uncertainty of life” and “burial expenses” help the testator view the Will as part of his or her last words. These last words resonate with the testator’s beneficiaries, family, and friends to create the testator’s legacy. For that reason, the testator should glimpse the wisp of smoke, the creeping shadow, the overturned cup, the iridescent bubble, and the curling petals with each review of the Will.²⁷⁵ The Will-making experience is a modern *memento mori* experience that requires reflection, assessment, and contemplation. After all, the Will is a document of the past, written in the present, for the future. “*Memento mori*” may translate into “remember you must die,” but the remembrance turns the estate planning process into a positive, transformative experience for modern testators.

²⁷² See generally Alison Crawford, “Oh Yeah!”: *Family Guy* as *Magical Realism*?, 61 J. FILM & VIDEO (Summer 2009). See also Charles H. Hackney, *The Effect of Mortality Salience in the Evaluation of Humorous Material*, 151:1 J. SOC. PSYCH. 51 (2011) (noting examples of death-related humor, including the “death as loser” portrayal of the Grim Reaper in “Family Guy”).

²⁷³ “Death has become the great taboo subject.” ALLAN & BURRIDGE, *supra* note 34, at 223. See also CORR ET AL., *supra* note 22, at 84–87 (noting the wide range of death euphemisms).

²⁷⁴ Geoffrey Gorer, *The Pornography of Death*, in GEOFFREY GORER, DEATH, GRIEF AND MOURNING IN CONTEMPORARY BRITAIN 169–75 (Cresset Press 1965) (asserting that death has become “disgusting” to the mid-twentieth century population as sex was to the Victorian population). See also KUBLER-ROSS, *supra* note 59, at 4 (“[T]he fear of death is a universal fear . . .”).

²⁷⁵ See *supra* notes 107–14 and accompanying text for the iconography of vanitas paintings.