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I. INTRODUCTION

Should reputational protections exist for the dead in general and in artistic works in particular? Take the case of a Hollywood movie depicting the U.S.-American lawyer Thomas E. Dewey (1902–1971), best known to the American public as a 1948 presidential candidate and special prosecutor in 1930s New York. At the end of the Prohibition, Dewey pursued infamous mobster Dutch Schultz on charges of tax evasion. Schultz planned to assassinate Dewey, but was murdered in 1935 by Lucky Luciano's crime syndicate before he could realize his plan. It is therefore astonishing to see Dewey's portrayal in *Hoodlum*:[1] the 1997 film depicts Schultz's struggle for control of the numbers racket in 1930s Harlem and explicitly claims that Dewey was bribed by Mafia boss Luciano to help defeat Bumpy Johnson, who was a rival of Schultz.[2] The family of the late Dewey objected to this portrayal, but the studio argued that it had not violated any legally cognizable rights. The film was a work of fiction, and the movie magnate presented it to the public as such.[3]

This legal approach stands in contrast to German law. In its landmark ruling *Mephisto*, the German Federal Constitutional Court (*Bundesverfassungsgericht* [BVerfG]) established a right to posthumous personality protections.[4]

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1. HOODLUM (MGM Distribution Company 1997).

2. However, in the biography, MARTIN GOSCH & RICHARD HAMMER, THE LAST TESTAMENT OF LUCKY LUCIANO (1975), Dewey had already been portrayed as corrupt. Luciano claimed to have paid for Dewey's presidential campaign in return for his release from prison. But the allegations have little credibility; as Gosch and Hammer state in their introduction, Luciano was "angry, scurrilous, even defamatory."

3. PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 195 (3d ed. 2006).

4. ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 30, 173; *see* BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS—A COMPARATIVE TREATISE 397-402 (4th ed. 2002) (the case is trans. by J. A. Weir) (partially translating the judgment); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 427-430 (2d ed. 1997); *see* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 192-197 (1994).

The case concerned the Nazi era novel *Mephisto*, written by Klaus Mann (1906–1949), son of Thomas Mann (1875–1955), winner of the 1929 Nobel Prize for Literature.[5] Klaus Mann left Germany in 1933 and was one of the first writers stripped of his citizenship by the Nazis.[6] In exile in Amsterdam, he wrote a satire entitled *Mephisto—Novel of a Career*"[7] which was published there in October 1936.[8] Though Klaus Mann prefaced his book with the disclaimer "All characters in this work are types, not portraits," the novel's protagonist, Hendrik Höfgen, is an obvious portrayal—in physical appearance, manners, course of life, roles played, and appointment as General Director of the State Theatre of Prussia—of the well-known but controversial German actor and theatre director Gustaf Gründgens (1899–1963). A civil court first allowed the publication of the book in West Germany arguing it would be clearly fiction. Gründgens had just died and the claim had been filed by his heir. But on final constitutional appeal the BVerfG held that the human dignity of the deceased was of overriding constitutional value and superseded the publisher's right to freedom of speech and society's right to receive a creative work.

Thomas Dewey enjoyed no such protection in the United States, and his portrayal in *Hoodlum* illustrates the entertainment industry's approach to historical fiction. There currently seems to be a trend to "spice up" depictions of actual incidents by adding imaginary elements, or to intersperse historical facts and figures to render a fully made-up story more credible.[9] Such works become an ambiguous patchwork of fictional, biographical, and historical accounts. This approach has the potential to shift or skew the image of actual historical figures, events, and eras in the minds of viewers, listen-

5. Thomas Mann did not underestimate the "temptation" of Fascism. *See* THOMAS MANN, MARIO UND DER ZAUBERER [Mario and the Magician] (1930) (openly criticizing Italian facism). But, like his children, Mann resisted and chose to live in exile as early as 1933, later speaking publicly against the Nazi regime in nearly 60 BBC broadcasts to the "Deutsche Hörer!"; *see* Reinhard Zimmermann, *Was Heimat hieß, nun heißt es Hölle'—The emigration of lawyers from Hitler's Germany: political background, legal framework, and cultural context*, *in* JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 44, 70-71 (Jack Beatson & Reinhard Zimmermann eds., 2004).

6. Germany denationalized Klaus Mann in 1934. He acquired Czech nationality in 1937, began his military service in the U.S. Army in January 1943, and became a U.S. citizen a few months later. In 1944/45 Mann, based in Casablanca and Italy, wrote handbills and texts for radiobroadcast and loudspeakers in an effort to persuade the opposing soldiers to defect. In May/June 1945 he returned to Germany as a correspondent of the Army newspaper, STARS AND STRIPES.

7. The available English version bears no subtitle. KLAUS MANN, MEPHISTO (trans. Robin Smyth, Penguin 1995).

8. KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE (Querido-Press 1936).

9. Other examples include THE PERFECT STORM (Warner Bros. Pictures 2000), involved in a case which will be dealt with in Part IV E, as well as THE LAST SAMURAI (Warner Bros. 2003), where Tom Cruise—in a set of partially true incidents—plays a U.S. military adviser who drills local troops in hastily modernizing 1870s Japan, though no such visit occurred. *See* MARK RAVINA, THE LAST SAMURAI: SAIGÔ TAKAMORI AND THE DEMISE OF THE SAMURAI CLASS (2003). Other examples are Oliver Stone's JFK (Warner Bros. 1991) and FORREST GUMP (Paramount Pictures 1994), where Tom Hanks was digitally added to historic scenes; for example, when his character "meets" John F. Kennedy.

ers, or readers. And what would happen if such a fusion of fiction and fact took place on a large scale, changing even the perception of history?[10]

Nonetheless, this Article does not intend to evaluate the socio-psychological implications of fusing fact and fiction nor decide whether the aforementioned statements in *Hoodlum* are really accurate.[11] Rather, it seeks to examine whether, along the lines of the cases mentioned above, family heirs have legally cognizable rights against inaccurate portrayals of their deceased relatives. Toward this end, the Article compares U.S. law to the quite different German approach in the *Mephisto* decision. It challenges the assumption of Anglo-American law that the deceased or their surviving relatives generally possess no interest worthy of protection, as in "the dead don't hear." Regarding the relevant instance of violation of the personality rights, the current case falls into the category of false assertions of facts by half-fictionalization in form of a portrayal of real persons, either in disguised form or as themselves, in a work of fiction.[12] Conversely, the relevant cases do not belong to the category of defamatory expression of opinions (as opposed to facts), or unauthorized publication of "private" matters.[13]

Now is a key time to start revamping assessments of posthumous rights. The digital revolution has contributed to a convergence of media and entertain-

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10. Just think of Iran's Holocaust denial. A distant totalitarian scenario, the "Ministry of Truth" in the novel 1984 by George Orwell (1903–1950), comes to mind, where newspapers and books are falsified to bring them in line with the Big Brother regime. Orwell's vision was too limited, however, in assuming that democracy, the rule of law, and a life of dignity could be threatened only by an almighty state. Today, private entities with economic or social strength pose just as grave a threat, boldly invading the private sphere of individuals. Orwell envisioned telescreens with video cameras transmitting the activities of those within range to the Thought Police. But he could hardly have imagined current methods of processing personal information through data surveillance, for example, spyware on computers, other means of collecting information of Internet behavior, and linking data from different sources (cyberspace and real world) to create new information about creditworthiness or direct marketing consumer profiles. *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998). In the case of celebrities, there is also the paparazzi problem. *See* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA (2000).

11. The case of HOODLUM was simplified here. For the purpose of the present comparative analysis, it will be assumed that the bribery accusation is historically inaccurate—as the heirs claim.

12. This is, along with embellishment (false material added to a news feature story or, for example, to an unauthorized biography), and distortion (for example, a photo-montage), one of the general categories where recent false light claims have arisen in the U.S. Desmond Browne, et al., *Privacy Rights, in* THE LAW OF PRIVACY AND THE MEDIA—MAIN VOLUME AND FIRST CUMULATIVE UPDATING SUPPLEMENT 3.50-3.51 (Michael Tugendhat & Iain Christie eds., 2004 & Supp. I 2004).

13. *See* GEORGIOS GOUNALAKIS, PRIVACY AND THE MEDIA: A COMPARATIVE PERSPECTIVE 94-5 (2000) (supplying a comparative chart under similar headings); *see* Georgios Gounalakis, *Medienpersönlichkeitsrechte in rechtsvergleichender Sicht*, Archiv für Presserecht [AfP] 2001, 271; MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, DER ZIVILRECHTLICHE PERSÖNLICHKEITS- UND EHRENSCHUTZ IN FRANKREICH DER SCHWEIZ ENGLAND UND DEN VEREINIGTEN STAATEN VON AMERIKA 328 et seq. (HANS DÖLLE Coord., 1960); Eike v. Hippel, *Persönlichkeitsschutz und Pressefreiheit im amerikanischen und deutschen Recht*, 33 Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ] 276 (1969).

ment presentations and in particular to the global marketing of entertainment, informational, and infotainment products. This intersection creates broadened risks of exploiting personality and of infringing upon reputation, privacy, and dignity.[14] In light of ongoing internationalization, which tends to limit the reach of nationally bound constitutional rights, the strict position of common law on post-mortem personality rights results in a partial failure to protect the right to a fair description of a person's life. This is surprising because common law, with its long-winded case-to-case method, generally stresses the weight of history and importance of inherited authority, so that reputation and esteem survive death.[15] Yet exactly this adherence to the old set of rules—like the maxim of "actio personalis moritur cum persona" (personal action dies with the person)—can result in the complete deprivation of achievements and dignity after death.

II.
METHODOLOGICAL RATIONALE AND SCOPE

This Article combines comparative theory and practice in constitutional law by examining the role of the state in "taking rights seriously"[16] through tort law. Certainly, a broad analysis incorporating common and civil law could everywhere be in a more developed status and of more general relevance.[17] However, the universal trend of "denationalization" of markets, politics, and legal systems forces a new comparative effort in law schools and courts.[18] By analyz-

14. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) (distinguishing between three concepts: reputation as property, as honor, and as dignity); *see generally* Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 747 (1986) (observing that "a politics of personality is replacing a politics of reputation.").

15. *See* HERBERT SPENCER (1820–1903), ON SOCIAL EVOLUTION: SELECTED WRITINGS 221-22 (John D. Y. Peel ed., 1972). Spencer, a proponent of Social Darwinism, as early as 1876 put the words of Mephistopheles in Goethe's *Faust* ("Statutes and laws through all the ages, / Like a transmitted malady you trace; / In every generation still it rages, / And softly creeps from place to place") into sociological terms by stating that customs embody the rule of the dead over the living, like the laws into which they harden; *see also* EUGEN EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS 339 (Manfred Rehbinder ed., 4th ed. 1989).

16. To borrow from RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (8d ed. 1996).

17. Basil S. Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990) (stating the unimportance of comparative law in courts, despite the integration of the United Kingdom in the European Union); Reinhard Zimmermann, *Civil Code and Civil Law—The "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63 (1994/95); Jonathan E. Levitsky, *The Europeanization of British Legal Style*, 42 AM. J. COMP. L. 347 (1994); Lord Bingham, *"There is a world elsewhere": The Changing Perspectives of English Law*, 41 INT'L & COMP. L.Q. 513, 519 (1992). However, the smaller the legal system, the more willingness there is to look abroad. This is why comparative analysis in court decisions takes place more often in Austria and Switzerland than in Germany and France. *See* Axel Tschentscher, *Dialektische Rechtsvergleichung – Zur Methode der Komparistik im öffentlichen Recht*, Juristenzeitung [JZ] 2007, 807-08.

18. In *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8 (2003), Supreme Court Justice Ruth Bader Ginsburg

ing the complex relation of free speech and the protection of immaterial values of the person (such as reputation and the right to privacy), this Article will also demonstrate that the real or assumed boundaries between common and civil law are blurring, not unlike the distinction between the different branches of the law (private and constitutional).[19]

The basic objectives characterizing all legal systems devoted to the Enlightenment values of liberty, democracy, and equality are similar. First, the need to preserve an individual's reputation and privacy must be balanced with the right to freedom of expression and the social interest in receiving information and being entertained. A second objective is to find a common ground between the individual's interest in compensation for reputational injury and the need to shield the media from excessive defamation and privacy awards.[20] The right to personality and the freedom of expression both represent integral parts of free, democratic and autonomy-based societies.[21] On the one hand free speech is not just a right to self-definition in line with individual liberty interests and its conception as a negative right position. Rather, it is also of considerable value for maintaining a democratic discourse and society.[22] And on the other hand,

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pointed out that the Court is looking beyond America's borders for guidance in addressing human rights issues like same-sex relationships and the death penalty: "Our 'island' or 'lone ranger' mentality is beginning to change" and the Court is "becoming more open to comparative and international law perspectives." These remarks, first uttered in a speech before the American Constitution Society's first National Convention on Aug. 2, 2003, caused an outcry by conservatives, who saw it as a threat to national legal sovereignty. Evidence for change can be seen in the comparative references made in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (2003) (race preference); *Lawrence v. Texas*, 539 U.S. 558 (2003) (gay rights in Texas); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (capital punishment). For the use of the comparative method in U.S. Supreme Court decisions, *see* Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003); Janet Koven Levit, *Going Public with Transnational Law: the 2002–2003 Supreme Court Term*, 39 TUSLA L. REV. 155 (2003); Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006) (arguing with the Condorcet jury theorem).

19. Note that the distinction is more strictly followed in civil law than in Anglo-American law; *cf.* John W. F. Allison, *Cultural Divergence, the Separation of Powers and the Public/Private Divide*, 9 EUROPEAN REVIEW OF PUBLIC LAW 305 (1997); JOHN W. F. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW (2d ed. 2000) (criticizing convergence theory); Duncan Kennedy, *The Status and Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); *see* HANNES RÖSLER, EUROPÄISCHES KONSUMENTENVERTRAGSRECHT – GRUNDKONZEPTION, PRINZIPIEN UND FORTENTWICKLUNG 63 et seq., 69 (2004) (providing evidence that the distinction is also blurring on the Continent due to the influence of European Community private law).

20. *See* WEILER, *supra* note 3, at 139 (raising this question in connection with the analysis of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 34849 (1974) and the fact that actual malice is not needed for private figures in order to gain compensation for defamatory statements); *see also* Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

21. For this approach by German judges, see Ulrich Amelung, *Damage Awards for Infringement of Privacy—the German Approach*, 14 TUL. EUR. & CIV. L.F. 15, 16, 37-42 (1999).

22. *See* KOMMERS, *supra* note 4, at 695 ("In Germany, however, speech is juridically valued for its capacity to create community. The German view holds that free speech requires persons par-

reputation is not merely an individual asset, so that the right to personality and the freedom of expression complement rather than restrict one another.

But first and foremost we must inquire whether the fact that Germany has a civil law system, while the U.S. belongs to the common law world undermines a comparative reflection. As far as personality rights are concerned, there are large differences even within common law. The U.S. and English positions diverge considerably, notwithstanding their historical connections in substantive and methodological regard to the old common law of libel and slander.[23] This is evident especially where English law does not follow the U.S. rationale, put forth by Louis D. Brandeis (1856–1941) and Samuel D. Warren (1852–1910), in their 1890 article.[24]

Lord Hoffmann in *Wainwright v. Home Office* stated that deconstructing the concept of invasion of privacy, as U.S. law does, into four separate rights to sue (based on Prosser's analysis)[25]—intrusion, appropriation of a person's name or likeness, publicity, and—recognized under either common law or statute in about thirty States[26]—false light[27] which "must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case."[28] (Nonetheless, English law recently recognized a tort of misuse of private information by modifying the tort of breach of confidence to accommodate the prerequisites of the European Human Rights Convention.[29]) German general personality law, in comparison, en-

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ticipating in the forum of public discussion to speak the truth and to do so with respect for other persons' personal honor and dignity.").

23. For this distinction between a written and an oral form of defamation, see RESTATEMENT (SECOND) OF TORTS § 568 (1977), where broadcasting "by means of radio or television" is also regarded as libel. *Id.* § 568A. The outdated division causes problems in Internet law. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000); Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U.L. REV. 895 (2001).

24. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see also* WEILER, *supra* note 3, at 156-177; RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW (2d 2002) (discussing the legacy of the germinal Warren and Brandeis article and the historical development of a right to privacy).

25. William L. Prosser (1898–1972), *Privacy*, 48 CALIF. L. REV. 383 (1960).

26. Including California, but not, for example, Massachusetts (Elm Med. Lab., Inc. v. RKO Gen., Inc., 532 N.E.2d 675, 681 (Mass. 1989)); New York, Howell v. N.Y. Post Co., 612 N.E.2d 699, 704 (N.Y. 1993); *cf.* Browne, et al., *supra* note 12, at 3.46; Nat Stern, *Creating a New Tort for Wrongful Misrepresentation of Character*, 53 U. KAN. L. REV. 81, 90 (2004).

27. Defined in RESTATEMENT (SECOND) OF TORTS § 652E at 394 (1977). In Time Inc. v. Hill, 385 U.S. 374 (1967), the Supreme Court held that the First Amendment limitations in defamation actions also apply to false light claims.

28. 3 W.L.R. 1137, 1142 [2003]; *cf.* Peter Birks, *Harassment and Hubris, the Right to an Equality of Respect* (1997) 32 IRISH JURIST 1, 2-3 (arguing that Prosser's classification would lead to a "balkanisation" of the tort of privacy and that tort law should include "protection of human dignity and autonomy, of which the right to privacy was just one manifestation.").

29. McKennitt v. Ash, [2007] 3 W.L.R. 194 (CA); *see also* Angus McLean & Claire Mackey, *Is there a Law of Privacy in the United Kingdom? A Consideration of Recent Legal Developments*, 29 EUR. INTELL. PROP. REV. 389 (2007); Geoffrey Gomery, *Whose Autonomy Matters? Reconciling the Competing Claims of Privacy and Freedom of Expression*, 27 LEGAL STUD. 404 (2007).

compasses a multitude of aspects such as honor, reputation and private life.[30] Due to the influence of written constitutions and the dynamic role of constitutional courts' interpretations, U.S. and German law highly qualify for a comparison though they belong to different legal families.[31]

Other reasons for comparing the U.S. and German approaches to balancing free speech and protection against false portrayals lie in the importance of both legal systems: The U.S. Constitution, the oldest democratic one in the world, and the German Basic Law for the Federal Republic of Germany (Grundgesetz [GG])[32] have been used as models for new democracies (e.g. in Central and Eastern Europe as well as the South African Constitution of 1996).[33] From a structural perspective, the German Federal Constitutional Court is perhaps "one of the few courts in the world that rivals the U.S. Supreme Court in political significance."[34] Beyond originating from the shared cultural and ethical heritage of Western civilization,[35] both constitutional democracies show striking similarities

30. *See* Hannes Rösler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective*, forthcoming (setting forth the development of the German general personality law (*allgemeines Persönlichkeitsrecht*)); Ulrich Karpen, Nils Mölle & Simon Schwarz, *Freedom of Expression and the Administration of Justice in Germany*, 9 EUR. J. L. REFORM 63 (2007). A recommendable overview about German law is provided in INTRODUCTION TO GERMAN LAW (Joachim Zekoll & Mathias Reimann eds., 2d ed. 2005). For more on German legal thought, see William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2045 et seq. (1995).

31. *See* GEORGIOS GOUNALAKIS & HANNES RÖSLER, EHRE, MEINUNG UND CHANCENGLEICHHEIT IM KOMMUNIKATIONSPROZEß – EINE VERGLEICHENDE UNTERSUCHUNG ZUM ENGLISCHEN UND DEUTSCHEN RECHT DER EHRE, 12, 103-106 (1998) (analyzing the influence of constitutional law in connection with a comparison of the English and German tort of defamation); *see id.* at 98 (dealing with the right of privacy). It still remains unclear how far the Human Rights Act of 1998 will function as a constitutional substitute. *See* Hannes Rösler, *Großbritannien im Spannungsfeld europäischer Rechtskulturen*, 100 Zeitschrift für vergleichende Rechtswissenschaft [ZVglRWiss] 448, 449-50 (2001); BIRGIT BRÖMMEKAMP, DIE PRESSEFREIHEIT UND IHRE GRENZEN IN ENGLAND UND DER BUNDESREPUBLIK DEUTSCHLAND – EINE VERGLEICHENDE DARSTELLUNG IN VERFASSUNGSRECHTLICHER, ZIVILRECHTLICHER, STRAFRECHTLICHER UND TATSÄCHLICHER HINSICHT (1997).

32. Promulgated on May 23, 1949.

33. *See* Bruce Arnold Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (arguing that emerging democracies should take the German constrained parliamentary government as a model rather than the U.S. style of presidentialism and separation of powers). *But see* Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, *in* 18 CONST. COMMENTARY 51 (2001) (criticizing Ackerman's thesis); Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 184-87 (1998) (pointing out that some elements of the Constitution of South Africa have their origins in German and Canadian constitutional law).

34. Markus Dirk, *Dubber* (Book Review), 40 AM. J. LEGAL HIST. 107 (1996) (reviewing DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994)).

35. AS ARTHUR TAYLOR VON MEHREN, 40 THE U.S. LEGAL SYSTEM: BETWEEN THE COMMON LAW AND CIVIL LAW LEGAL TRADITIONS, Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari, 1 (2000), stresses common and civil law tradition more broadly. Tendencies of Eurocentrism are also a cause of critique. *See* Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop its Own*

in their strong emphasis on the institutional requirement of free speech in both the First Amendment and the German Constitution.

In regard to legal protection of personality, German and U.S. law also exhibit parallels. They are both still in the formative stage in nearly all sectors of this area, especially with regard to the rights of relatives. Both legal systems reject monetary damages for family heirs in the case of immaterial infringement of the reputation of the deceased.[36] As supporting evidence of the aforementioned legal convergence, the German Federal Supreme Court (*Bundesgerichtshof* [BGH])[37] ruled in its groundbreaking[38] 1999 *Marlene Dietrich* decision that in the case of commercial use of personality, specifically in terms of the name and image of a person, a right to damages exists even when the individual in question has passed away.[39] U.S.-American law, which has been quite progressive in adapting its causes of action, classifies this type of case as a right of publicity,[40]

Agenda, 46 AM. J. COMP. L. 637 (1998).

36. For Germany BGH, Neue Juristische Wochenschrift [NJW] 1974, 1371 – *Fiete Schulze*; *affirmed in* Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 143, 214 – *Marlene Dietrich*.

37. The *Bundesgerichtshof* is the highest level of the "ordinary judiciary" in civil and criminal matters. Its decisions are final unless a constitutional aspect comes in or the case has to be referred to the European Court of Justice in Luxembourg. *See* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE (2004).

38. *See* the accounts of Horst-Peter Götting, *Die Vererblichkeit der vermögenswerten Bestandteile des Persönlichkeitsrechts – ein Meilenstein in der Rechtsprechung des BGH*, NJW 2001, 585, 586; *see* Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479 (1999) (comparing U.S. law and the (former) German law); Horst-Peter Götting, PERSÖNLICHKEITSRECHTE ALS VERMÖGENSRECHTE (1995) 237-242, 273-4; Horst-Peter Götting, *Persönlichkeitsmerkmale von verstorbenen Personen der Zeitgeschichte als Marke*, 103 Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 615, 616-18 (2001); Daniel Biene, *Celebrity Culture, Individuality, and Right of Publicity as a European Legal Issue*, 35 INT'L REV. INDUS. PROP. & COPYRIGHT L. [IIC] 505 (2005); critical Haimo Schack, *Postmortale Verletzung des allgemeinen Persönlichkeitsrechts – „Marlene Dietrich"*, JZ 2000, 1060. Ansgar Staudinger & Rüdiger Schmidt, *Marlene Dietrich und der (postmortale) Schutz vermögenswerter Persönlichkeitsrechte*, Juristische Ausbildung [Jura] 2001, 241; Ingo Frommeyer, *Persönlichkeitsschutz nach dem Tode und Schadensersatz – BGHZ 143, 214 ff. („Marlene Dietrich") und BGH NJW 2000, 2201 f. („Der blaue Engel")*, Juristische Schulung [JuS] 2002, 13; Alexander Jung, *Persönlichkeitsrechtliche Befugnisse nach dem Tode des Rechtsträgers*, AfP 2005, 317 (uttering that the BGH wrote legal history with the *Marlene* decision); Rüdiger Klüber, PERSÖNLICHKEITSSCHUTZ UND KOMMERZIALISIERUNG – DIE JURISTISCH-ÖKONOMISCHEN GRUNDLAGEN DES SCHUTZES DER VERMÖGENSWERTEN BESTANDTEILE DES ALLGEMEINEN PERSÖNLICHKEITSRECHTS 62-66 (2007).

39. BGHZ 143, 214 – *Marlene Dietrich* (Here, the producer of a musical with the translated title *Where Have All the Flowers Gone*? [*Sag' mir, wo die Blumen sind*] permitted a car manufacturer to use a portrait of Marlene Dietrich and the signature "Marlene" for the special edition of a vehicle; he also permitted several merchandising products). For the parallel case, see BGH, NJW 2000, 2201 – *Der blaue Engel* (using a "blue angel" environmental logo, the defendant placed a newspaper advertisement with the headline "to adore the blue angel is not sufficient for us," in order to advertise the environmental compatibility of its products. However, the company only implicitly referred to the environmental logo, and used a photograph of a scene from the film *The Blue Angel.*); *cf.* for merchandising articles regarding a living German singer BGH, Neue Juristische Wochenschrift Rechtsreport [NJW-RR] 1987, 231 – *Nena*.

40. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (dealing with a

which is a far-reaching property right and can thus be inheritable.[41] German law, in contrast, categorizes the problem as an economic aspect of overarching personality rights.[42] Notwithstanding these differences in systemization, the basic trend in accepting post-mortem rights at least *as property* is apparent.

U.S. law takes a more stringent approach when it comes to the deceased's reputation and privacy *as dignity*.[43] Following the notion that "the dead don't hear" and thus that libel and slander are matters between the living, U.S.-American courts refuse to remedy defamation that is aimed at the deceased and affects him or her alone.[44] Yet in regard to the privacy right of protection from false light portrayal, the question is still open. The mentioned restriction of defamation law does not necessarily have to be applicable to the newer tort of false light portrayals.[45]

The issue is of more general relevance. By favoring expression and pecuniary damages[46] U.S.-American law, perhaps, seems to misconstrue the very nature of personality rights, which are primarily of immaterial quality yet significant to society, creating a problem in the choice and extent of available remedies. In German law—as will be detailed in Part IV— death does not stop the state's duty to protect individuals from assaults on human dignity.[47] Decades

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news broadcast of a 15-second human cannonball act, the Supreme Court held that the First Amendment did not permit the broadcasting of the entire performance since the commercial value of the act would be endangered). *See* HUW BEVERLEY-SMITH, THE COMMERCIAL APPROPRIATION OF PERSONALITY 145 et seq. (2002) (dealing with English, Australian, U.S., Canadian and, briefly, German law on the commercial exploitation of attributes of an individual's personality).

41. Currently this is the case in California, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Tennessee, Texas, Virginia and Washington. Edward H. Rosenthal, *Rights of Publicity and Entertainment Licensing, in* UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 235, 245 (Practising Law Institute ed. 2007) (noting a "growing trend toward the recognition of a post-mortem right of publicity"); Peter L. Felchert & Edward L. Rubint, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127 (1980) ("most forms of property are devisable, and it seems reasonable to regard a person's property right in his name or likeness to be devisable as well"); *see also infra* note 239.

42. *See supra* note 36. However, the court has sadly not made use of a comparative reference to U.S. law.

43. *See supra* note 14.

44. *See* Rose v. Daily Mirror, Inc., 31 N.E.2d 182 (N.Y. 1940) (the classic case stating that "libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation."). This article does not deal with cases where the defamation also affects living people, either because their good name is affected or because the statement contains an affront against their reputation. *See* WILLIAM H. BINDER, *PUBLICITY RIGHTS AND DEFAMATION OF THE DECEASED: RESURRECTION OR R.I.P.?*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 297, 317-322 (2002) (discussing these categories).

45. WEILER, *supra* note 3, at 195.

46. Which is nonetheless in some cases accurate and to a certain degree serves as a model to aspire to, for example, in regard to newer innovations in German law. For the *Marlene* line of thought, see *supra* notes 38, 39 and the accompanying text; for the *Caroline* approach allowing higher damages for deterrence, see BGHZ 128, 1, 16 – *Caroline von Monaco I*; confirmed in BGH, NJW 1996, 984 – *Caroline von Monaco II*; BGHZ 131, 332 – *Caroline von Monaco III*.

47 Under the constitutional "inviolability of human dignity" according to the opening Article of Ger-

after death, a posthumous personality right of the deceased (*postmortales Persönlichkeitsrecht*) may still exist. As mentioned, an *immaterial* infringement of the deceased's reputation and privacy does not lead to awards of damages. But such infringements do allow for non-material remedies, for example, a court order to take the product in question off the market.[48] This Article argues that an expansion of the limited spectrum of remedies in U.S. law would give an alternative and appropriate form of remedy, which could be used to cap high damage verdicts in libel and slander law in general.[49] The Article also addresses the discrepancies in regard to other personality rights and toward criminal law with regard to the coherence of the rule "the dead don't hear." It will also discuss whether a legislative step forward is needed, especially given the unsuccessful Uniform Defamation Act (1991).[50]

The present Article advocates further for establishing a U.S. posthumous personality right. For this, one needs to refer to the larger framework. After all, the posthumous personality right is a special case of the general protection of personality rights (applicable for living people) so the Article has to go well beyond the right to posthumous personality protection and must provide a contextual perspective on free speech. The following third part therefore details the differences and similarities regarding the balancing of freedom of speech with personality rights as well as the role of human dignity in this process. The latter is essential in Germany (being the basis for the posthumous personality rights) and the U.S. law also shows some elements of human dignity. Thus the fourth part will explain the German way of deriving posthumous rights from the human dignity of the deceased that, for example, the relatives administer for him or her. Part five then contrasts this with the U.S. law that in some limited cases has recognised the protection of the harmed feelings of relatives. Here, it is argued that a U.S. posthumous personality right is best established by uniform legislation, but it is more likely that the courts will develop this legal concept resting on the elements of human dignity. The Article would be incomplete without an analysis of the different remedies—depending on the form of violation (newspaper article, book or film), type (opinion or fact) as well as its degree (minor or severe).

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many's Basic Law (Art. 1(1) GG), BVerfGE 30, 173, 194 – *Mephisto*, with two partially dissenting options.

48. This will be further explained in Part V F.

49. *See* WEILER, *supra* note 3, at 141 (raising the question if a right of reply in press cases—and thus the statute at issue in Miami Herald v. Tornillo, 418 U.S. 241 (1974)—should be a part of the legislation to limit excessive damage awards in defamation cases).

50. The draft was not approved by the National Conference of Commissioners on Uniform State Laws. *See* Randall P. Bezanson, *The Uniform Defamation Act, in* REFORMING LIBEL LAW 323 (John Soloski & Randall P. Bezanson eds., 1992).

III.
DIFFERENCES AND COMMONALITIES

A. Ways of Cultivating Free Speech as a Fundamental Constitutional Value

Both constitutional regimes, similar in design and function, recognize the constitutive and stabilizing function[51] of free individual and public formation of opinion through a process of communication[52] as an essential prerequisite to a functioning modern democracy.[53] After all, it is now agreed nearly universally that democracy has an interest in the free flow of information. The statement of Justice William Brennan (1906–1997) in *New York Times v. Sullivan* (1964) that the First Amendment provides that "debate on public issues should be uninhibited, robust, and wide-open"[54] is closely reflected in the German position.[55]

1. Balancing Approach in the Analysis

A central aspect in Germany is the open, case-specific balancing approach the German Federal Constitutional Court employs in nearly all free expression matters, which lower courts are required to utilize in order for their decisions to be held constitutional.[56] In order to determine who has a better claim to protection, the Court has to balance competing or clashing constitutional values against each other (*Güterabwägung*), taking into account all the circumstances of the particular case.[57] The BVerfG addressed this delicate balancing procedure in its famous *Lüth* decision.[58] The Court explained that, because private law rules can count as "general laws"[59] and can legally curtail the basic right to free-

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51. *See* Art. 8(1) GG; *see also* BVerfGE 69, 315, 347 – *Brokdorf* (regarding the freedom of assembly); because of the valve function, the Court stresses the spontaneity of free speech as a prerequisite for the force and variety of public debate, permitting a harsh tone at times; BVerfGE 30, 336, 347; BVerfGE 34, 269, 283 – *Soraya* case from 1973; BVerfGE 54, 129, 139 – *Römerberg talks*.

52. *See* BVerfGE 57, 295, 319 – *third broadcasting* case.

53. *See* BVerfGE 12, 113, 125 – *Schmid-Spiegel*; before BVerfGE 5, 85, 204 – *KPD*; BVerfGE 7, 198, 208 – *Lüth* case issued in 1958.

54. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

55. BVerfGE 12, 113 – *Schmid-Spiegel* case issued in 1961; *see also* CURRIE, *supra* note 4, at 190-192.

56. This is clearly different from formal tests used by the U.S. judiciary.

57. BVerfGE 7, 198, 210-11.

58. BVerfGE 7, 198; For more detail, see *supra* note 30. Another famous case stressed the need for careful balancing. BVerfGE 93, 266 – *Soldiers are Murderers* (or *Tucholsky* case); *see also* Georgios Gounalakis, *"Soldaten sind Mörder,"* NJW 1996, 481.

59. In the sense of Article 5(2) GG. Although the historical meaning is not entirely clear, Basic Law considers general laws as those acts that do not forbid an opinion as such, but rather serve to protect a legitimate interest without regard to any particular opinion and protect a community value superior to the freedom of opinion. BVerfGE 7, 198, 209-10.

dom of expression,[60] they have to be interpreted restrictively in the light of the particular "weight" of this basic right in a democracy.[61] General laws must be read in light of the significant value qualification of Article 5 GG so that the restrictive effect of "general laws" is itself limited. This "seesaw theory of reciprocal effect" (*Wechselwirkungstheorie*)[62] leads to far more protection for freedom of expression than the mere text of Article 5 GG appears to offer.[63]

The BVerfG, citing Article 11 of the Declaration of the Rights of Man and Citizen (1789), regards the right to freedom of expression as a basic human right, as "un des droits les plus precieux de l'homme."[64] According to the Court, this right is absolutely essential to a free and democratic state since it alone enables continuous intellectual debate and the struggle of opinions.[65] The Federal Constitutional Court has clearly looked at the international and comparative scene, but often it slightly disguises its sources.[66] In German academia, in contrast, explicit positive and negative references to the U.S.-American model are quite common. Some criticize the liberal case law of the BVerfG as infringing upon the protection of honor (*Ehrenschutz*),[67] but others, like the present author, claim that the Court is right on the whole.[68] Depending on the premise, the evaluation of U.S. law also varies. Some, to no surprise, identify *New York Times v. Sullivan* as a total mistake, even as scandalous, illiberal and bad for democracy.[69] In their opinion, the protection of individual personality rights in U.S. law is a mere theoretical possibility.[70] Others rightfully stress the special

60. Article 5(1) GG.

61. BVerfGE 7, 198.

62. BVerfGE 7, 198, 209; *see also* BVerfGE 90, 241, 248 – *Holocaust denial* case of 1994.

63. CURRIE, *supra* note 4, at 180, 340. The first two paragraphs of Article 5 GG read: "(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor." All quotations of the Basic Law are taken from GERMAN BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, TEXT EDITION—STATUS: DECEMBER 2000, 2001.

64. BVerfGE 7, 198, 208.

65. BVerfGE 7, 198, 208 (referring to BVerfGE 5, 85, 205).

66. *See, e.g.*, *Lüth*: BVerfGE 7, 198, 208.

67. Rolf Stürner, *Die verlorene Ehre des Bundesbürgers – Bessere Spielregeln für die öffentliche Meinungsbildung?*, JZ 1994, 865; PETER J. TETTINGER, DIE EHRE – EIN UNGESCHÜTZTES VERFASSUNGSGUT? (1995); Fritz Ossenbühl, *Medien zwischen Macht und Recht*, JZ 1995, 633; Walter Schmitt Glaeser, *Meinungsfreiheit, Ehrenschutz und Toleranzgebot*, NJW 1996, 873; Horst Sendler, *Kann man Liberalität übertreiben?*, Zeitschrift für Rechtspolitik [ZRP] 1994, 343; RALF STARK, EHRENSCHUTZ IN DEUTSCHLAND (1996).

68. *See* Hannes Rösler, *Zur Struktur des Allgemeinen Persönlichkeitsrechts und das Recht der persönlichen Ehre in der Wertordnung des Grundgesetzes*, Juristische Schulung [JuS] 1997, 1151; GOUNALAKIS & RÖSLER, *supra* note 31, at 116 et seq. with many further references regarding the disussion.

69. Martin Kriele, *Ehrenschutz und Meinungsfreiheit*, NJW 1994, 1897 (1898, note 3).

70. AXEL BEATER, ZIVILRECHTLICHER SCHUTZ VOR DER PRESSE ALS KONKRETISIERTES

circumstances of the American setting.[71]

The historical development might also explain some of the sentiments behind the German discussion. Perhaps the protection of honor and reputation, in the eyes of some, has a more "honorable" tradition than the right to free speech,[72] although both promote the individual's self-fulfillment in modern society.[73] In favor of the ruling "liberal" position, commentators borrow arguments from the idiosyncratic U.S. nearly[74] "absolutist" free speech approach taken by the Supreme Court as proof that the intermediate position of the BVerfG[75] seems to be a sensible one.[76] The standpoint is also intermediate insofar as it acknowledges that there is no simple choice between the legitimate interests of free speech or defamation law and the protection of privacy.

VERFASSUNGSRECHT – GRUNDSTRUKTUREN IM VERGLEICH VON ENGLISCHEM, US-AMERIKANISCHEM UND DEUTSCHEM RECHT 74 (1996).

71. *See, e.g.,* JÜRGEN STOCK, MEINUNGS- UND PRESSEFREIHEIT IN DEN USA: DAS GRUNDRECHT, SEINE SCHRANKEN UND SEINE ANFORDERUNGEN AN DIE GESETZESGESTALTUNG, 1986; PETRA KRETSCHMER, STRAFRECHTLICHER EHRENSCHUTZ UND MEINUNGSFREIHEIT UND PRESSEFREIHEIT IM RECHT DER BUNDESREPUBLIK DEUTSCHLAND UND DER VEREINIGTEN STAATEN VON AMERIKA (1994); Astrid Stadler, *Persönlichkeitsrecht contra Medienfreiheit – Zivilrechtliche Aspekte der Kontroverse in den U.S.A.*, JZ 1989, 1084; Guido C. Zöllner, *Ehrenschutz in den Vereinigten Staaten von Amerika – Vorbild für Deutschland?*, Zeitschrift für Urheber- und Medienrecht [ZUM] 1997, 719, 731.

72. Ernst-Gottfried Mahrenholz, *Kritik an der Justiz gehört zur Sache*, DRiZ-Interview, Deutsche Richterzeitung [DRiZ] 1995, 35, 37; Peter E. Quint, *Free speech and private law in German constitutional theory*, 48 MD. L. REV. 247, 251 (note 11) (1989) similarly argues that elevated value given to personal honor in the German law of defamation could be seen as a remnant of an aristocratic tradition. For the legal development in Germany, see REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS – ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1085-94 (1996), and Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 LOY. L. REV. 349 (2004).

73. *See* AMELUNG, *supra* note 21.

74. *See* Morse v. Frederick 127 S.Ct. 2618 (2007) (regarding the rights of schools to limit student speech rights promoting illegal drug use).

75. For an English translation, *see* Ulrich Karpen, *Freedom of Expression as a Basic Right: a German View*, 37 AM. J. COMP. L. 395 (1989); FREDE CASTBERG, FREEDOM OF SPEECH IN THE WEST: A COMPARATIVE STUDY OF PUBLIC LAW IN FRANCE, THE UNITED STATES, AND GERMANY (1960); PNINA LAHAV, PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY (1985); Peter J. Tettinger, *Protection of Freedom of Expression in German Constitutional and Civil Law, in* REPORTS ON GERMAN PUBLIC LAW, 115 (Rudolf Bernhardt & Ulrich Beyerlin eds., 1991); Donald P. Kommers, *The jurisprudence of free speech in the United States and in the Federal Republic of Germany*, 53 S. CALIF. L. REV. 657 (1980); KOMMERS, *supra* note 4, at 360-442; ERIC M. BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY (1993) (dealing with radio and television law in Great Britain, France, Germany, Italy and the U.S.).

76. *See* Friedrich Kübler, *Öffentlichkeit als Tribunal? – Zum Konflikt zwischen Medienfreiheit und Ehrenschutz*, JZ 1984, 541; Friedrich Kübler, *Ehrenschutz, Selbstbestimmung und Demokratie*, NJW 1999, 1281. The then concerned (1987–1999) Federal Constitutional Court judge also defended the Court's position, *see* Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, NJW 1995, 1697; Dieter Grimm, *„Wir machen das Meinungsklima nicht", Antworten auf die Kritik an der Ehrenschutz-Rechtsprechung des BVerfG*, ZRP 1994, 276; GEORG NOLTE, BELEIDIGUNGSSCHUTZ IN DER FREIHEITLICHEN DEMOKRATIE – EINE VERGLEICHENDE UNTERSUCHUNG ZUR RECHTSLAGE IN DER BUNDESREPUBLIK DEUTSCHLAND, IN DEN VEREINIGTEN STAATEN VON AMERIKA SOWIE NACH DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION (1992).

Freedom of expression does not justify the disregard of other interests that deserve constitutional protection. After all, the latter personality rights have their public validity as well: Freedom of expression "does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation, but for each new situation."[77] So the question arises as to how public discourse can be fostered and how the participation of minorities and other groups that are disadvantaged in this regard can be encouraged to participate. Part of the answer is education, providing a good example as well as creating a positive and fair atmosphere of discourse. The latter can be partly cultivated by the law. The rights to speech and media cannot be understood in isolation from other constitutional values. In other words, according to a contextual perspective, free speech must be given certain limits.

2. "Absolutist" Free Speech Position

As to U.S. law, the requirement that Congress shall make no law abridging the freedom of the press, has—despite the absoluteness of the text—not been understood as a total barrier to state intervention. The necessary definitions of "press," "freedom," and also "abridgment" have been influenced by judicial rulings concerning the limits and purposes of freedom of speech.[78] Without doubt the First Amendment was reconceptualized or even "amended" by the U.S. Supreme Court's serious reading and enforcement in 1919.[79] Professor David Rabban, in reviewing the history of the First Amendment, observed that the "Supreme Court decisions in the generation before World War I reflected a tradition of pervasive hostility to the value of free speech."[80] The decisions often simply denied the implicated freedom of expression. The Supreme Court followed the declaratory theory regarding the Bill of Rights: "[T]he first 10 amendments to the Constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case."[81]

Further, U.S.-American academia did not recognize that emancipated freedom of communication was more than a piece of English heritage until the early

77. Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 894 (1963).

78. Frederick Schauer, *The Boundaries of the First Amendment*, 117 HARV. L. REV. 1765 (2004); RANDALL P. BEZANSON, HOW FREE CAN THE PRESS BE? (2003) (analysing nine cases).

79. Schenck v. United States, 249 U.S. 47 (1919); United States v. Debs, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).

80. David Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 542 (1981); *see also* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (discussing the ideological drift and the changed concepts of free speech).

81. *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

20th century.[82] This development of the modern First Amendment illustrates the necessity of an ever-changing constitutional understanding which enables its application to modern circumstances. Above all, there is no "compulsory" meaning of the First Amendment.[83] It depends on political and cultural context received over time. As a consequence, the nearly absolute priority of free speech has gained a sanctity that sometimes can relegate other legitimate interests, like the protection of personality rights—a development that becomes particularly evident in a comparative perspective.[84]

B. Human Dignity

1. According to German Law (and Beyond)

The constitutional "face" of the German posthumous personality right is inextricably linked to the private aspect of this right. According to the Federal Constitutional Court, human dignity contained in Article 1 of the Basic Law forces German private law judges to accept and shape such a right in detail. As the notion of human dignity is the conceptual and normative backbone of all German constitutional law, it is necessary to explain why it is so prominently located at the beginning of the Basic Law. The different premises help explain why the two legal systems approach the conceptual and normative struggle of "human dignity protection through the law of defamation and privacy" versus "free speech" in distinct manners.

In the shadow of the Holocaust, lawmakers made dignity the cornerstone of Germany's legal architecture binding all three powers. In 1949 Germany, history put not just libertarian declarations, but also a strong notion of dignity on the political and constitutional agenda. The human dignity (*Menschenwürde*) on which the German general personality right, and specifically the posthumous personality right, partly rest is "the supreme value and dominates the entire value system of Basic Rights."[85] This priority in a hierarchical order of values is systemati-

82. Notable are the works of Henry Schofield, *Freedom of the Press in the United States, in* 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 75 (1921) (originally 1914), and Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919); *see also* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 69, 75 (1992).

83. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) (in contrast to his book LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960)) (now arguing that the First Amendment, even if it was not the Framers' intention, was in practice originally more broadly interpreted by the courts). *See* David A. Anderson, *Levy vs. Levy* (Book Review), 84 MICH. L. REV. 777 (1986) (reviewing L. LEVY, EMERGENCE OF A FREE PRESS, for his change of opinion); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); LEWIS, *supra* note 82, at 51, 54-55.

84. Frederick H. Lawson, *Comparative Law as an Instrument of Legal Culture, in* 2 SELECTED ESSAYS 73 (1977).

85. BVerfGE 6, 32, 41. The German Federal Constitutional Court stresses this constantly in its dignitarian jurisprudence. *See* BVerfGE 27, 1, 6; BVerfGE 30, 173, 193.

cally sound since Article 1 states[86]—without possibility of alteration:[87]

> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
> (3) The following basic rights [including, on the one hand, Article 2(1) GG regarding the right to a free development of one's personality on which the general personality right is based in conjunction with Article 1 GG and, on the other hand, Article 5(1) GG on the freedom of communication] shall bind the legislature, the executive, and the judiciary as directly applicable law.

The transcendental quality of Article 1(1) GG, which has served as a model for nations seeking deliverance from their past through law, is clear.[88] The provision and its interpretation urging the state not just to respect human dignity but to protect it against third-party infringements[89] sets an example for national[90] and perhaps also pan-European[91] standards. Article 1 mirrors the humanistic Kantian underpinning of the individual right of human dignity.[92] But it does not

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86. Official translation by GERMAN BUNDESTAG, *supra* note 63.

87. Amendments to the principles set forth in Arts. 1 and 20 GG as well as fundamental changes affecting the division into *Länder* and their legislative participation are inadmissible according to Art. 79(3) GG.

88. *See* S. AFR. CONST. 1996, Article 10 (providing: "Everyone has the inherent dignity and the right to have their dignity respected and protected."); *see also* 1975 Syntagma (SYN) [Constitution] 2(1) (Greece) (providing: "Respect for and protection of human dignity constitute the primary obligation of the State."); translations based on Sarkin *supra* note 33 and *Ioannis K. Karakostas, Der Schutz der Privatheit (besser: Privatsphäre) von Personen des öffentlichen Lebens im griechischen Zivilrecht*, Zeitschrift für Europäisches Privatrecht [ZEuP] 2003, 114; *see also* Francois Venter, *Human dignity as a constitutional value: a South African perspective, in* RECHT, STAAT, GEMEINWOHL: FESTSCHRIFT FÜR DIETRICH RAUSCHNING (Jörn Ipsen et al. eds., 2001); Jonathan M. Burchell, *The Protection of Personality Rights, in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 639 (Reinhard Zimmermann & Daniel Visser eds., 1996).

89. BVerfGE 39 1, 41, 51–*first abortion* case from 1975.

90. *See* CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY (2003) (regarding the importation of German law).

91. *See* THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY (Council of Europe ed., 1999); Jackie Jones, *"Common constitutional traditions": Can the meaning of human dignity under German law guide the European Court of Justice?,* Public Law 167 [2004]; James Q. Whitman, *On Nazi 'Honour' and the New European 'Dignity', in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 243 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003) (regarding the aspects of the dignitary regime predating 1945).

92. *See* George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987); for the Kantian roots of the German constitutional "image of man" see George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171, 178-82 (1984); *Hans-Carl Nipperdey, Die Würde des Menschen, in* I DIE GRUNDRECHTE: HANDBUCH DER THEORIE UND PRAXIS DER GRUNDRECHTE 1 (Franz L. Neuman, Hans-Carl Nipperdey & Ulrich Scheuner eds., 1954); WILHELM WERTENBRUCH, GRUNDGESETZ UND MENSCHENWÜRDE (1958); Hasso Hofmann, *Die versprochene Menschenwürde*, 118 Archiv des öffentlichen Rechts [AöR] 353 (1993); for a new (but also provocative) comment on human dignity, *see* Matthias Herdegen, *in* GRUNDGESETZ-KOMMENTAR, Art. 1(1) (Theodor Maunz & Günter Dürig eds., 49d ed. 2007); Paul Cliteur & René van Wissen, *Human dignity as the foundation for human rights: a discussion of Kant's and*

remain in the philosophical realm; it legally commits German law to this far-reaching inviolable human right. Besides Germany, the protection of human dignity (*dignitas*) is a national principle in many European constitutional regimes with a civilian tradition, for example, France,[93] Spain,[94] Ireland,[95] Greece,[96] Portugal,[97] Sweden,[98] Finland,[99] and Hungary.[100] Human dignity is also mentioned in Article 1 of the European Union Charter of Fundamental Rights,[101] which will soon be put into force.[102]

2. Scope and Role of Human Dignity in the U.S. Constitution

After having detailed the role of human dignity as representing the most fundamental value of the German legal order, it is conceivable that an obstacle

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Schopenhauer's work with respect to the philosophical reflections on human rights, 35 Rechtstheorie 157 (2004); Carlos Ruiz Miguel, *Human Dignity: History of an Idea*, 50 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 281, 293 et seq. (2002); HERSCHEL BAKER, THE IMAGE OF MAN: A STUDY OF THE IDEA OF HUMAN DIGNITY IN CLASSICAL ANTIQUITY, THE MIDDLE AGES, AND THE RENAISSANCE (1947/1961); VOYAGE AU BOUT DE LA DIGNITÉ: RECHERCHE GÉNÉALOGIQUE SUR LE PRINCIPE JURIDIQUE DE DIGNITÉ DE LA PERSONNE HUMAINE (Centre d'Etudes et de Recherche sur l'Administration Publique, Université Paris I Panthéon-Sorbonne, Stéphanie Hennette-Vauchez et al. eds., 2004); Philippe A. Mastronardi, *Verrechtlichung der Menschenwürde: Transformation zwischen Religion, Ethik und Recht*, *in* MENSCHENWÜRDE ALS RECHTSBEGRIFF 93 (Kurt Seelmann ed. 2004, ARSP-Beiheft 101).

93. Cons. Constit. 27 juillet 1994 Décision n°94-343-344 DC REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL n°20 1er décembre 1994, 799 – Respect for Human Body Act (concluding from the opening paragraph of the preamble to the 1946 Constitution); *cf.* Benoît Jorion, *La dignité de la personne humaine ou la difficile insertion d'une règle morale dans le droit positif*, 115 REVUE DROIT PUBLIC DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER 197 (1999); VERONIQUE GIMENO-CABRERA, LE TRAITEMENT JURISPRUDENTIEL DU PRINCIPE DE DIGNITE DE LA PERSONNE HUMAINE DANS LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL FRANÇAIS ET DU TRIBUNAL CONSTITUTIONNEL ESPAGNOL (2004).

94. 1978 Constitución [C.E.] art. 10(1) (Spain); cases Tribunal Constitucional S.S.T.C. 120/1990, 150/1991, 212/1996.

95. Ir. CONST., 1937, pmbl.

96. 1975 Syntagma [SYN] [Constitution] arts. 7(2), 106(2) (Greece).

97. 1976 Constitution of the Portuguese Republic Arts. 13(1), 26(2).

98. Regeringsformen [RF] [Constitution] 1:2 (Sweden).

99. 2000 Suomen perustuslaki [Constitution] art. 1 (Finland).

100. 1949 A Magyar Köztársaság Alkotmánya [Constitution] art. 54(1), the provison was added in course of the 1989 amendment; *see supra* note 90.

101. 2000 O.J. (C 364), 1. *See also* Christophe Maubernard, *Le « droit fondamental à la dignité humaine » en droit communautaire: la brevetabilité du vivant à l'épreuve de la jurisprudence de la Cour de Justice des Communautés européennes*, 14 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 483 (2003); *see* Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, 9 EDIN. L.R. 194. 206-08 (2005) (discussing a Scottish and English perspective on dignity in connection with the *actio iniuriarum*); *see also infra* note 113.

102. It was planned that the Charter become compulsory as part of the EU Constitution (2004 O.J. (C 310) 1). Here the provision can be found as Art. II-61. Further reference to human dignity is made at its beginning in Art. I-2. Since the French and Dutch Constitution referenda failed in 2005, it is now agreed that the Charter becomes binding in 2009 with a Reform Treaty (through the drafted art. 6(1) EU Treaty).

for a U.S. posthumous personality right could be that U.S. law does not recognize this broad and at first sight somewhat vague concept. It is notable that the posthumous personality right is not specifically mentioned in the U.S. Constitution, perhaps because it is a comparatively modern legal term.[103] At closer inspection, however, the notion of human dignity lies at the origin of the U.S. Constitution and the roots of the American people. Indeed, the Pilgrims settled in Plymouth in 1620 in an attempt to live with freedom and decency. Additionally, there is a global commitment to human dignity.

That a global commitment to human dignity was documented early by the United Nations further demonstrates that both Germany and the U.S. inherently value human dignity. The preamble and the thirty articles of the United Nations' Universal Declaration of Human Rights of 1948[104] contain five references to the concept of inherent human dignity. The Declaration, drafted approximately at the same time as the Basic Law, also asks the question of how the road to further disaster can be avoided. The end of World War II saw the birth of both the international human rights movement and the United Nations, which was formed on Oct. 24, 1945.[105]

The U.N. Human Rights Declaration represents—as Mary Ann Glendon has put it—"the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today."[106] The Preamble speaks of the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [that] is the foundation of freedom, justice and peace in the world," and of the fact that "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person." The articles section commences with:

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103. Georg Nolte, *European and US Constitutionalism: Comparing Essential Elements, in* EUROPEAN AND US CONSTITUTIONALISM 3, 10 (Georg Nolte ed., 2005).

104. Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of Dec. 10, 1948. However, the European Convention on Human Rights, signed in Rome on Nov. 4, 1950, does not expressly mention human dignity. This was remedied by Art. 1 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, signed in Oviedo on April 4, 1997 (also by the Council of Europe); *see* Jens Meyer-Ladewig, *Menschenwürde und Europäische Menschenrechtskonvention*, NJW 2004, 981.

105. *See* David Kennedy, *Boundaries in the Fields of Human Rights: The International Human Rights Movement: Part of the Problem?*, EUROP. HUM. RTS. L. REV. 245 (2001) *reprinted in* 15 HARV. HUM. RTS J. 101 (2002) (asserting a critical-pragmatic, but nonetheless sympathetic account of the historical and ideological development of the international human rights movement); David Kennedy, *International Law in the Nineteenth Century: History of an Illusion*, 65 NORDIC JOURNAL OF INTERNATIONAL LAW, 385, 389-90 (1996) *reprinted in* 17 QUINNIPIAC L. REV. 1 (1998) (arguing that the nineteenth century can teach that today's international law is largely rhetorical); DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004); *see* Frederick Schauer, *The Exceptional First Amendment, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005) (regarding the methodological and substantive exceptionalism).

106. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998).

"All human beings are born free and equal in dignity and rights."[107] Article 22 proclaims: "Everyone, as a member of society [. . .] is entitled to realization [. . .] of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Furthermore, Article 23(3) speaks of "an existence worthy of human dignity."[108] The conception of the "self" linked to human dignity is degraded if one is treated as a mere object or means, rather than an inherently valuable being. This anti-instrumentalist notion—of course, influenced by the philosophy of Immanuel Kant (1724–1804)[109]—is combined with a strong communitarian ontology.[110]

Here it is interesting how the Supreme Court in *Gertz v. Robert Welch* explained why defamation law is important:[111]

> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for [. . .] the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system."[112]

Given its fundamental importance for a livable society, the laws of the judicial systems under investigation here stress the equal status of all humans and the value of human dignity, which is essential in fair social interaction.[113]

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107. Art. 1(1) GG, 1st sentence; reprinted above.

108. For which "social" image of the human person is connected with the dignity concept, *see* Glendon, *supra* note 106, at 1172.

109. *See supra* note 92; *cf.* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: METAPHYSICAL ELEMENTS OF JUSTICE, Pt. 1, 19 (John Ladd trans., Hackett Publishing Company, 2d ed. 1999) (*Grundlegung zur Metaphysik der Sitten*, 1785) ("The supreme basic principle of moral philosophy is therefore: act according to a maxim that can at the same time be valid as a universal law."); *cf.* for the object-formula BVerfGE 30, 1, 26 – *bugging*; *see* comparatively for German law, where the Kantian-communitarian perspective is prevailing, EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002).

110. Gregory S. Alexander, *Property as a fundamental constitutional right? The German example*, 88 CORNELL L. REV. 733, 744 (2003); HANS HATTENHAUER, DIE GEISTESGESCHICHTLICHEN GRUNDLAGEN DES DEUTSCHEN RECHTS: ZWISCHEN HIERARCHIE UND DEMOKRATIE (3d ed. 1983); Christian Starck, *The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions,* in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002), 179.

111. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

112. Citing Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring).

113. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964) (arguing that the U.S. law contains a dignitarian approach, emphasizing that individuality and human dignity are protected, and criticizing Dean Prosser's division of the right of privacy into four separate torts as impracticable); Edward J. Bloustein, *Group Privacy: The Right to Huddle*, 8 RUTGERS-CAM. L.J. 219, 278 (1977); Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2088, 2092-98 (2001) (part of a Georgetown symposium on ROSEN, *supra* note 10) (regarding privacy as linked to the concepts of dignity, autonomy and of knowledge creation); Alan Gewirth, *Human Dignity as the Basis of Rights, in* THE CONSTITUTION OF RIGHTS:

3. Extent of Commitment

Differences lie, nonetheless, in the details and the application of the dignitarian commitment. A classic example for the paramount importance of the dignity requirement in German personality law is the case of the then Prime Minister of Bavaria Franz Josef Strauß (1915–1988) who was shown in a magazine caricature as a pig engaged in sexual activities. The Court made clear that in this case the right to freedom of expression does not deserve a higher status than human dignity. Consequently criticism in a formally vilifying or contemptuous way (*Schmähkritik*) that is only marginally linked to any political message does not benefit from its protection.[114] According to the BVerfG, a plainly intentional derogatory attack on the dignity of the caricatured—in which the object no longer bears any human characteristics, but bestial features and is portrayed in a setting of sexual activity (notably a core of intimate life)—deprives the individual in question of personal dignity.[115] The contrast could not be starker to *Hustler Magazine v. Jerry Falwell*,[116] where the Supreme Court in 1988 unanimously decided that a public figure could not recover damages for libel and intentional infliction of emotional distress even when based on a vicious satire or parody.[117] Thus despite sharing the basic concepts, there remains a significant

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HUMAN DIGNITY AND AMERICAN VALUES 10 (Michael J. Meyer & William A. Parent eds., 1992) (arguing that human rights grow out of the notion of human dignity); (dealing with the question of how the dignitarian approach could undermine the First Amendment). *But see* RONALD DWORKIN, FREEDOM'S LAW 1-38 (1996); *infra* note 219; Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 849 (1983); David Feldman, *Human Dignity as a Legal Value*, PUBLIC LAW 682 [1999] (part 1), PUBLIC LAW 61 [2000] (part 2); of course this concept plays an important role regarding the excessiveness of capital punishment. *See* Furman v. Georgia 408 U.S. 238, 294 (1972) (Brennan, J., concurring); *see also* Carissa Byrne Hessick, *The Right of Publicity in Digitally Produced Images: How the First Amendment is Being Used to Pick Celebrities' Pockets*, 10 UCLA ENT. L. REV. 1, 6 (2002) (arguing that a digitally altered image can violate a celebrity's right to privacy because it infringes their human dignity, even to an extent not possible by a printed text or an accurate photo); for the German position on privacy law and dignity, *see* BGHZ 13, 334 – *Schacht letters* case from 1954; BVerfGE 35, 202 – *Lebach* case from 1973 (film about a famous crime case; *cf.* Cox Broadcasting v. Cohn, 420 U. S. 469 (1975)); BVerfG, NJW 2000, 1859 – *Lebach II*; BVerfGE 65, 1 – *census* (issued 1983, right to self-determination concerning personal data), and the leading German data protection lawyer Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 708 (1987); *see also* MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable."); Heinz Klug, *The Dignity Clause of the Montana Constitution*, 64 MONT. L. REV. 133 (2003).

114. BVerfGE 75, 369 – *Strauß/Hachfeld*; translation of this 1987 case in 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, FEDERAL CONSTITUTIONAL COURT, FEDERAL REPUBLIC OF GERMANY, pt. 2: Freedom of Speech (Freedom of Opinion and Artistic Expression, broadcasting Freedom and Communication Freedom of the Press, Freedom of Assembly) 1958–1995, 420 (Bundesverfassungsgericht ed., 1998).

115. BVerfGE 75, 369, 379-80.

116. In a parody of a Campari magazine advertisement, the pornographic magazine Hustler described a drunk Falwell having an incestuous encounter with his mother in an outhouse. Falwell, a nationally known minister and commentator on politics and public affairs, sued Larry Flynt, the magazine owner, alleging libel and intentional infliction of emotional distress.

117. Hustler Magazine, Inc. et al. v. Jerry Falwell, 485 U.S. 46 (1988); *see also* Georgios Gounalakis, *Freiräume und Grenzen politischer Karikatur und Satire*, NJW 1995, 809 (comparing

difference as to the extent of the protection.

In sum, the development of a posthumous personality right in the U.S. does not inevitably require a strong concept of human dignity like in Germany. But a stronger dignitarian notion,[118] in addition to the libertarian one,[119] could be fruitful since it would influence the balancing process in a way that at times would be more favorable to personality rights and also fill the current gaps regarding the protection of public figures and minorities. This would also imply acceptance of the humanistic linkage between a community-based free discourse and the necessity for limits to that right in order to protect the dignity of the opinion's target.[120]

IV.
RIGHT OF SUCCESSORS IN GERMANY

Having recapitulated the basics of German free speech and general personality law, the next step is to sketch the specific rights granted to portrayals of the deceased—an area of German personality law that is still developing.

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the two cases); Georg Nolte, *Falwell vs. Strauß: Die rechtlichen Grenzen politischer Satire in den USA und in der Bundesrepublik*, 14 Europäische Grundrechtezeitschrift [EuGRZ] 253 (1988); Hannes Rösler, *Caricatures and Satires in Art Law: The German Approach in Comparison with the U.S., England and the Human Rights Convention*, forthcoming; GESA SIMON, PERSÖNLICHKEITSSCHUTZ GEGEN HERABSETZENDE KARIKATUREN IN DEUTSCHLAND UND FRANKREICH (1995); UWE WOLF, SPÖTTER VOR GERICHT – EINE RECHTSVERGLEICHENDE STUDIE ZUR BEHANDLUNG VON SATIRE UND KARIKATUR IM RECHT DER BUNDESREPUBLIK, FRANKREICHS, ENGLANDS UND DER USA (1996); Christian Hillgruber & Franz Schemmer, *Darf Satire wirklich alles?*, JZ 1992, 946; Dieter Meurer, *Kunst und Recht im Konflikt, in* WAS KOSTET DER SPAß?: WIE STAAT UND BÜRGER DIE SATIRE BEKÄMPFEN, 84 (Nils Folckers & Wilhelm Solms eds., 1997).

118. Of course freedom of expression in the democratic society also has strong dignitarian roots. *See* Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 903-12 (1995) (analyzing the dignitarian and instrumental paradigm).

119. Mary Ann Glendon distinguishes between the dignitarian rights language of Europe and the (more U.S.) libertarian tradition. *See* Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 NOTRE DAME L. REV. 1191, 1196-97 (1998); Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27 (2003); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004). James Q. Whitman, *"Human dignity" in Europe and the United States: The Social Foundations*, 25 HUMAN RIGHTS LAW JOURNAL 17, 22 (2004) (Whitman, correctly urging for guidance by historical sociology, argues that sensibilities differ on either side of the Atlantic and that Continental law follows a Princess-Caroline-of-Monaco sensibility); Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 104, at 85.

120. Trakman writes: "It is necessary to preserve the dignity of the target of speech. It is a central means towards communal discourse within a democracy. In ignoring this relationship [already implicit in natural law] between the right to speak and the responsibility for it, the traditional doctrine applied to free speech denies its own roots. In insisting that speech preserves the dignity of the speaker, it ignores the indignity that racist speech inflicts upon its victims. In subscribing to a marketplace in hate, it threatens to undermine the free marketplace in ideas." Trakman, *supra* note 118, at 938.

A. Mephisto Decision

The principle of human dignity—more than even the idea of autonomous communicative development—laid the basis for a specific way of understanding the core purpose of personality rights. To understand how this principle influenced the creation of a post-mortem personality right (*postmortales Persönlichkeitsrecht*), one must analyze the BVerfG's landmark *Mephisto* case mentioned in Part I. This famous German decision, adjudicating posthumous personality representations in literature, illustrates two things. First, it reflects the problem of using artistic creations to further totalitarian political power. Second, it demonstrates the difficulty of the courts in dealing with a mixture of fictional freedom, real-world inspiration of art, and the reference to actual personages who have passed away.

Written by Klaus Mann, *Mephisto* is an obvious portrayal of Gustaf Gründgens. Before the Nazi's rise to power, Mann was close friends with Gründgens and, from 1926–1929, the latter was even married to the author's sister, Erika Mann. In the novel, Mann exaggerated the ambitiousness of his former brother-in-law who had become wealthy and famous through his collaboration with the Nazis. Mann observed this with high interest from abroad—knowing that Gründgens was nonetheless always endangered due to his homosexual tendencies.[121] The character of Höfgen—based on Gründgens—is drawn as a ruthless intellectual, a narcissistic and hysteric cynic who prostitutes his talents and sells out his higher ideals to advance his career in the Nazi regime. When the NSDAP comes to power, the character renounces his wife and his mistress, a black dancer with whom he had a masochistic relationship. The protagonist's apex of success is playing the role of "Mephisto," the devil's assistant in Johann Wolfgang von Goethe's (1749–1832) tragedy "Faust."[122] But, in the end, Höf-

121. *See* Micheal Töteberg, *Nachwort, in* KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE 392 (10th ed. 2005) (explaining that the idea to take Gründens' life as the basis for the novel was given to Klaus Mann, who at that time searched for the right topic for a "Zeitroman," by an also exiled writer and friend Hermann Kesten (1900–1996) in November 1935 (p. 392-93)). Klaus Mann first hesitated—though he had a strong and irreversible love-hate relationship towards Gründgens and had used his character before in the 1932 exile novel, "Treffpunkt im Unendlichen" (p. 394, 402). By the way, Klaus Mann and Gründgens died from an overdose of sleeping pills, adding to the numerous parallels between the two closely linked antagonists: their homosexuality, intense struggle for acceptance, interest for the opposition between power and intellect, and love for morphine and traveling. *See* EBERHARD SPANGENBERG, KARRIERE EINES ROMANS: MEPHISTO, KLAUS MANN UND GUSTAF GRÜNDGENS: EIN DOKUMENTARISCHER BERICHT AUS DEUTSCHLAND UND DEM EXIL 1925-1981 (1982); Lutz Winckler...*ein richtig gemeines Buch, voll von Tücken*", *Klaus Manns Roman Mephisto, in* KLAUS MANN – WERK UND WIRKUNG 46 (Rudolf Wolff ed., 1984) (citing Klaus Mann's remark towards his mother that the book is a really mean one, filled with perfidies); KLAUS MANN, THE TURNING POINT: THIRTY-FIVE YEARS OF THIS CENTURY—THE AUTOBIOGRAPHY OF KLAUS MANN (1984) (with a new introduction by Shelley L. Frisch) (originally 1942); BVerfGE 30, 173, 175-76, 214 also uses this work to explain Klaus Mann's relationship towards Gründgens); UWE NAUMANN, „RUHE GIBT ES NICHT, BIS ZUM SCHLUß" – KLAUS MANN (1906-1949) (1999); PETER MICHALZIK, GUSTAF GRÜNDGENS: DER SCHAUSPIELER UND DIE MACHT (1999).

122. Gründgens was well-known to the public, his most famous role and theater production was "documented" in 1960 on film—after 30 years of dealing with the figure of Mephistopheles on stage

gen—who is described as the "most depraved of the depraved," as "evil—a blackmailer of the first order" having "a horrible leer"[123]—has to pay the price for his Faustian pact with the Nazi regime. His self-betrayal and loss of sincerity lead to his defeat as an artist and human being, having turned him into "the monkey of power, a clown to entertain murderers."[124] The book epitomizes this through his inability to perform on-stage as Shakespeare's Hamlet.[125]

Nine days after he had received a letter stating that the publication of *Mephisto* would be impossible, Klaus Mann committed suicide. Seven years later, Mann's book was published in East Berlin by the *Aufbau-Verlag*[126] in a first edition of 50,000 copies.[127] The West German publishing houses, which had also been approached by his sister and literary executor Erika Mann, had declined to publish the novel due to the risk of litigation.[128] But, for publication of the 1956 *Aufbau* edition, which appeared twenty years after the initial edition in Amsterdam,[129] the East German censors required only one adjustment. Problematic for them was not the figure modeled after the real-life actor Gründgens, but the one modeled after a theater critic. Since he worked for the East German socialist regime after the war, his name had to be altered for that edition.[130] When, in 1963, the *Nymphenburger Verlagshandlung*, a publishing house based in Munich, announced its intention to print the novel as part of a complete edition of Klaus Mann's works, the adopted son and sole heir of Gründgens filed an injunction. Gründgens had just died while traveling in Manila.

After the court of first instance refused to grant the injunction,[131] the Munich press published the book in September 1965.[132] Gründgens's heir tried to stop further distribution with an interlocutory injunction of the court of second instance.[133] It was declined, though the court ordered that, until its final judgment, a note had to be added to the book to explain that the figures of the book

(Faust, director Peter Gorski, 1960). Peter Gorski was the adopted son of Gründgens, who filed the constitutional complaint.

123. MANN, *supra* note 7, at 136 et seq.

124. MANN, *supra* note 7, at 254.

125. *See* Marc-André Bouchard, *Mephisto against Hamlet: The Internal Tyranny and Seduction of Primitive Idealization*, 10 CANADIAN J. PSYCHOANALYSIS/REVUE CANADIENNE DE PSYCHANALYSE 91 (2002) (on the basis of the *Mephisto* film).

126. KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE (1956).

127. Töteberg, *supra* note 121, at 410.

128. *Id.*

129. *See supra* note 8.

130. Dr. Ihrig (referring to Herbert Ihering) was changed to Dr. Radig. *See* Töteberg, *supra* note 121, at 410. It was possible to buy the edition in West Germany. In an attempt to stop the book's dissemination, Gründgens's lawyer bought all the copies at the central station book shop of Frankfurt on the Main. Töteberg, *supra* note 121, at 411.

131. LG Hamburg, Aug. 25, 1965, docket number 15 O 81/64; *reprinted in* Archiv für Urheber- und Medienrecht [UFITA] 51 (1969), 352.

132. Töteberg, *supra* note 121, at 411.

133. OLG Hamburg, March 10, 1966, docket number 3 U 372/1965; *reprinted in* RECHTSPRECHUNG ZUM URHEBERRECHT, Vol. VI, OLGZ 64 (Erich Schulze ed., 1979).

were figments of Klaus Mann's artistic imagination. In the final ruling of the court of second instance Gründgens's heir obtained the desired injunction prohibiting the publication of the book. This "duel of the dead," as a famous literary critic put it,[134] then went to the Federal Supreme Court as the highest private law court. It upheld the decision in 1968.[135] But the publisher brought a constitutional complaint claiming that the court order infringed both his rights to freedom of speech (Article 5(1) GG)[136] and to narrative artistic freedom (Article 5(3) GG).[137]

In 1971, the constitutional review affirmed the prior ruling granting the injunction. The BVerfG held that the decision did not unconstitutionally influence the publisher's right to freedom of expression, since the human dignity of the deceased was of overriding constitutional value. At the beginning of its reasoning, the Federal Constitutional Court stressed the breadth of the right to individual freedom (*individuelles Freiheitsrecht*) of artistic expression as guaranteeing both the creative work produced and the impact it has on others. As the Court put it, the freedom of art covers not just the "sphere of creation" (*Werkbereich*)—the artist's independence to choose and treat a topic, free from attempts by the state to encroach upon his or her aesthetic judgment—but also the necessary and thus inseparable "sphere of effect" of the artistic work (*Wirkbereich*), like publication and dissemination.[138] Since the latter must be interpreted comprehensively, Article 5(3) GG also protects intermediaries, such as publishers and distributors. The Court then addressed the special problem of the freedom of art, guaranteed in Article 5(3) GG:

> Yet there are limits to this freedom. The freedom incorporated in Article 5(3), 1 GG, like all basic rights, is rooted in the Constitution's conception of man as a responsible person free to develop within society.[139] The absolute nature of the guarantee of artistic freedom means that its limits are to be found only within the Constitution itself. The freedom of art is not subject to mere statute, it cannot be qualified by the general legal system or be at the mercy of any vague clause about essential interests of state and society which lacks constitutional basis and is uncontained by the rule of law. If the guarantee of artistic freedom gives rise to any conflict, it must be resolved by construction in terms of the order of values enshrined in the Basic Law and in line with the unitary system of values which underlies it.[140]

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134. Marcel Reich-Ranicki, *Das Duell der Toten – Gegen das Verbot des Romans "Mephisto" von Klaus Mann*, DIE ZEIT, March 18, 1966, at 18.

135. BGHZ 50, 133 arguing with the protection of the right to a fair description of a person's life (*Lebensbild*), not unlike the doctrine of false light of some U.S. states; *see* Arno Buschmann, *Zur Fortwirkung des Persönlichkeitsrechts nach dem Tode*, NJW 1970, 2081.

136. *See supra* note 63.

137. Article 5(3) GG reads: "Art and scholarship, research, and teaching shall be free."

138. BVerfGE 30, 173, 189.

139. The Court refers to BVerfGE 4, 7, 15-6; BVerfGE 7, 198, 205; BVerfGE 24, 119, 144; BVerfGE 27, 1, 7.

140. BVerfGE 30, 173, 193; translation taken from MARKESINIS & UNBERATH, *supra* note 4, at 400-01 (J. A. Weir trans.).

Subsequently, the Court explained the inevitability of creating harmony between the freedom of art and human dignity, the latter being the highest constitutional principle.[141] Given the effect an artistic, but exaggerated portrayal can have on an interpersonal and societal level, it can infringe on an individual's claim to societal esteem and value.[142]

Having explained this inner-constitutional limit to art, the Court next looked at the decisions of the inferior courts. Agreeing with the lower courts, the Constitutional Court ruled it would be incompatible with the constitutional command of the inviolability of human dignity, if individuals could be freely disparaged after death. Hence death does not terminate the duty of the state to protect individuals from assaults on dignity.[143] In contrast to the BGH,[144] the Court held that the personality right does not even exist with limited force—as the lower court had ruled—but expires entirely on demise. Thus, Article 2(1) GG on which the general personality right is based can only be invoked for living people and "potential" or future persons (i.e. the unborn).[145] However, since according to German law it is inconsistent with human dignity to permit an individual to be degraded or humiliated after death, the wider scope of Article 1 GG urges for an acceptance of a posthumous personality right in the case of deceased persons.

In addressing the strong tension between the conflicting rights and interests, the Court stresses that the individual's right to social respect and esteem is not *per se* superior to the freedom of art. Conversely, even though art's specific characteristics have to be taken into account, it may not disregard the rights of others. That is why the degree of artistic alteration or creative alienation of the person used as inspiration for the narrative figure is decisive. The Court elaborates on the necessary considerations in the balancing process:[146]

> Only by weighing all the circumstances of the given case can one decide whether the publication of a work which artistically deploys true details about an actual person poses a serious threat of encroachment on the protected area of his person-

141. *See also* BVerfGE 45, 187, 223 – *life imprisonment* case.

142. *See* Diana Zacharias, *Zur Abgrenzung von Menschenwürde und allgemeinem Persönlichkeitsrecht*, NJW 2001, 2950; Bernhard v. Becker, *Überlegungen zum Verhältnis von Kunstfreiheit und Persönlichkeitsrecht*, AfP 2001, 466; Ulrich Karpen & Bianca Nohe, *Die Kunstfreiheit in der Rechtsprechung seit 1992*, JZ 2001, 801.

143. BVerfGE 30, 173, 194.

144. BGHZ 50, 133, 136, 139. By 1913, the predecessor, the Reichgericht, already had explained that a corpse is not ownerless, and the personality rights of the person can extend after death. RG Warneyer 1913 nr. 303 (363); Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 100, 171, 173 (1920) (regarding the case of the last resting place). In 1954, the BGH followed in BGHZ 15, 249 regarding the memories of Cosima Wagner (1837–1930), widow of Richard Wagner (1813–1883) and Director of the Bayreuth Festival from his death to 1908. However, already KANT approved of "the claim to a good name after death." *Supra* note 110, at 96.

145. BVerfGE 30, 173, 194.

146. BVerfGE 30, 173, 195; translation once again taken from MARKESINIS & UNBERATH, *supra* note 4, at 401-02 (J. A. Weir trans.).

> ality. One consideration must be whether and how far the artistic treatment of the material and its incorporation into the work as an organic whole have made the "copy" [*Abbild*] independent of the "original" [*Urbild*] by rendering objective, symbolical, and figurative what was individualized, personal, and intimate. If such an aesthetic appraisal reveals that the artist has indeed produced, or even intended to produce, a "portrait" of the "original", the outcome will depend on the extent of the artistic alienation and how seriously the "falsification" damages the reputation or memory of the subject.

In other words, the protection of the deceased depends on the apparentness of the portrayal and on the serious violation of the posthumous personality rights caused by the falsification. All in all, the *Mephisto* decision stands for two separate concepts. On the one hand it deals with the proper scope of the freedom of art, while on the other it represents the fundamental decision "blessing" the development of a post-mortem personality right.[147] In its ruling, the Court was faithful to Article 1 of the Basic Law, but it also established an inner-constitutional limit to the otherwise unlimited artistic freedom (*verfassungsimmanente Schranke*),[148] since the dignity clause provides the principal justification for allowing limitations of the freedom of art.

B. Further Development

With regard to the current status of Gründgens's rights, the BVerfG's ruling has been "reversed" by reality. Eighteen years after Gründgens's death, the novel was surprisingly published in West Germany—with great success—by the *Rowohlt Verlag*.[149] The release was planned with utmost secrecy and the printed copies were transported across the German border to Denmark in order to avoid injunctions.[150] The book climbed to No. 1 on the best-sellers list and sold over 300,000 copies during the first three months.[151] The Hungarian, West German and Austrian co-produced film *Mephisto* was also released in 1981 (omitting the sexual aspects of the figure Höfgen) and received two prizes in Cannes and the

147. For the further development, see Heinz-Joachim Pabst, *Der postmortale Persönlichkeitsschutz in der neueren Rechtsprechung des BVerfG*, NJW 2002, 999; Fedor Seifert, *Postmortaler Schutz des Persönlichkeitsrechts und Schadensersatz – Zugleich ein Streifzug durch die Geschichte des allgemeinen Persönlichkeitsrechts*, NJW 1999, 1889; MARION BASTON-VOGT, DER SACHLICHE SCHUTZBEREICH DES ZIVILRECHTLICHEN ALLGEMEINEN PERSÖNLICHKEITSRECHTS (1997); Albrecht W. Bender, *Das postmortale allgemeine Persönlichkeitsrecht: Dogmatik und Schutzbereich*, Versicherungsrecht [VersR] 2001, 815 (dealing with photos of the dead politician Barschel lying in a tub, where he had committed suicide); Axel Stein, *Der Schutz von Ansehen und Geheimsphäre Verstorbener – Zugleich eine Stellungnahme zu jüngeren höchstrichterlichen Entscheidungen*, Zeitschrift für das gesamte Familienrecht [FamRZ] 1986, 7.

148. Article 5(3) GG.

149. KLAUS MANN, MEPHISTO – ROMAN EINER KARRIERE (1981).

150. Translated versions of the work had been previously published in 1975, by a French publisher, and in 1977 in the United States.

151. Klaus Kastner, *Freiheit der Literatur und Persönlichkeitsrecht*, NJW 1982, 601; RAFAELA BOCKSLAFF, DIE BEHANDLUNG DES „MEPHISTO-FALLES" ALS BEISPIEL FÜR DIE PROBLEMATIK DER VOLLSTRECKUNG VON BUNDESVERFASSUNGSGERICHTLICHEN ENTSCHEIDUNGEN (1987); Töteberg, *supra* note 121, at 413-14.

Oscar for the Best Foreign Language Film.[152] This time the feared litigation by Gründgens's adopted son did not arise.

Both artistic works and an audiobook are currently available in Germany, and the novel has not lost its attraction. Even a play called *Mephisto* modeled after Klaus Mann's novel opened in 2005 at the Schauspielhaus Hamburg—a better venue could not have been chosen, since the director of the theatre from 1955 to 1963 was Gründgens himself. The Hamburg Court of Appeal (*Oberlandesgericht*, the last instance entitled to find facts) determined[153] in 1966 that Gründgens was a so-called person of contemporary history[154] (*Person der Zeitgeschichte*) and that his memory was still vivid in the social sphere.[155] Therefore, the duty to respect the deceased person's rights still existed at the time of BVerfG's ruling. But the need and, in turn, the obligation of the state to protect the defunct against image falsification diminishes as an individual's public memory fades.[156]

C. Following Cases

In sum, the general requirement for respect and for acceptance of human standards survives death so that the image people have of someone else (*Lebensbild*), even if he or she has passed away, is protected from serious injuries. A court of appeal validated such a serious injury in the case of a physician who died in 1965.[157] The case involved a scathing review of a work of the late German writer Heinrich Böll (1917–1985), who had received the Nobel Prize for Literature in 1972; the Federal Constitutional Court confirmed the protection of the dead.[158] The Federal Supreme Court also found an infringement of the posthumous personality right when the signature of Emil Nolde (1867–1956) was misused on a faked painting.[159] A court of appeal affirmed a violation in the imitation of the characteristic voice of a deceased comedian for a radio advertisement.[160] But, no doubt, the last two cases also raise copyright as well as trade

152. With an ingenious Klaus-Maria Brandauer as Höfgen (director István Szabó).

153. The BVerfG is not empowered to substitute its own evaluation of the case facts or legal merits under laws ranked below the Basic Law for that of the authorized court.

154. *See* Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479, 507 et seq. (1999) (allowing for less protection in this categfory than in other cases).

155. *Supra* note 133.

156. BVerfGE 30, 173, 196.

157. OLG München, NJW-RR 1994, 925. It was claimed that the physician performed sadistic, forced abortions during the Third Reich.

158. BVerfG, NJW 1993, 1462; for a summary of this decision, see KOMMERS, *supra* note 4, at 430.

159. BGHZ 107, 384; for an English translation of this 1989 decision, see 22 IIC 273 (1991).

160. OLG Hamburg, NJW 1990, 1995 – *Heinz Erhardt*. Similarly BGH, GRUR 1984, 907, *also reprinted in* Wettbewerb in Recht und Praxis [WRP] 1984, 681 (advertisement for fresh cell cosmetics by a scientist who had died 13 years before); for an English translation, see 16 IIC 426 (1986).

mark issues and what U.S. lawyers would classify as the right of publicity protecting the commercial exploitation of attributes of an individual's personality. An infringement was, however, denied when a right-wing party claimed that the famous politician Wilhelm Kaisen (1887–1979) from Bremen would have voted for them. Here the court argued[161] that this statement, uttered by a legal political party,[162] was a statement of opinion (not fact) and is thus especially protected by the Constitution.

As discussed in Part II, a major shift in German posthumous law—making it necessary to differentiate more clearly between protection of the reputation and privacy as dignity or as similar to property—was prompted by the 1999 *Marlene Dietrich* decision.[163] For the first time, the Federal Supreme Court allowed damages (instead of an injunction against publication) to be recovered by heirs for a posthumous infringement of the general personality right based on a commercial exploitation of the decedent's personality, like the use of her name, voice, or image. In *Marlene* this happened as part of the marketing strategy for a musical about Marlene Dietrich (1901–1992), with corresponding merchandise products—bags, t-shirts, watches, calling cards, pins, a special edition automobile, the "Lancia Marlene" by Fiat, and advertisements for cosmetics by Ellen Betrix with the heading "Marlene-Look" —all without consent of the only daughter and sole heir of the actress. The decision, which was later in substance affirmed by the BVerfG,[164] makes clear that the right of personality according to Article 1 and 2 GG does not just protect non-material interests, but also commercial aspects, for example, the asset-like advertising capability of a person—living or dead.[165]

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161. OLG Bremen, NJW-RR 1995, 84.

162. According to Art. 21(2) GG, in Germany there is the possibility of banning political parties by the BVerfG, but only when their aims or the actions of their adherents infringe upon the Constitution; *see* BVerfGE 5, 85 – *KPD* (prohibition) and BVerfGE 107, 339 – *NPD* (2003) (no prohibition); *see* Raymond Youngs, *Freedom of Speech and the Protection of Democracy: German Approach*, [1996] PUBLIC LAW 225, 226-27. *Contra* Healy v. James, 408 U.S. 169 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Noto v. United States, 367 U.S. 290 (1961).

163. BGHZ 143, 214; *see supra* note 39 and the accompanying text.

164. BVerfG, NJW 2006, 3409; for an English translation see 38 IIC 226 (2007).

165. BGHZ 143, 214 and BGH, NJW 2000, 2201; VOLKER BEUTHIEN, *Schützt das allgemeine Persönlichkeitsrecht auch kommerzielle Interessen der Person?: Kritik an den Marlene-Dietrich-Entscheidungen des BGH, in* PERSÖNLICHKEITSGÜTERSCHUTZ VOR UND NACH DEM TODE 75 (2002); ANNA GREGORITZA, DIE KOMMERZIALISIERUNG VON PERSÖNLICHKEITSRECHTEN VERSTORBENER: EINE UNTERSUCHUNG DER RECHTSFORTBILDUNG DURCH DEN BUNDESGERICHTSHOF IN DEN MARLENE-DIETRICH-URTEILEN VOM 1. DEZEMBER 1999 82 et seq. (2003); SABINE CLAUS, POSTMORTALER PERSÖNLICHKEITSSCHUTZ IM ZEICHEN ALLGEMEINER KOMMERZIALISIERUNG 37 et seq. (2004); for international private law aspects see Jan Kropholler & Jan v. Hein, *Der postmortale Persönlichkeitsschutz im geltenden und künftigen Internationalen Privatrecht, in* FESTSCHRIFT FÜR ANDREAS HELDRICH 793 (Stephan Lorenz et al. eds., 2005); Hans-Jürgen Ahrens, *Vermögensrechtliche Elemente postmortaler Persönlichkeitsrechte* im *Internationalen Privatrecht, in* FESTSCHRIFT FÜR WILLI ERDMANN 3 (Hans-Jürgen Ahrens et al. eds., 2002); JÜRGEN GLEICHAUF, DAS POSTMORTALE PERSÖNLICHKEITSRECHT IM INTERNATIONALEN PRIVATRECHT: UNTER BESONDERER BERÜCKSICHTIGUNG DES FRANZÖSISCHEN RECHTS (1999); more generally ROLF DANCKWERTS, PERSÖNLICHKEITSRECHTSVERLETZUNGEN IM DEUTSCHEN, SCHWEIZERISCHEN UND US-

There are clear signs of an inevitable commercialization of the German personality right (and of the private sphere), because the infringement standard is lower. Thus, the commercialization is also foreseeable considering the remedies, since, in contrast to the cases where compensatory damages for non-pecuniary harms are requested, the claimant in commercial cases does not have to show that the infringement is extremely intense.[166] Up to now this has not led to a "gold-digging" mentality in Germany. But it remains something of an open question for U.S. lawyers whether non-monetary remedies are available, such as the retraction of false statements[167] or injunctive orders preventing the publication of whole books.[168]

D. Time Span

Though the German posthumous personality right is by no means restricted to well-known people, but instead extends to people the public is interested in to a lesser degree,[169] the protection period is contingent upon the particularities of the case, particularly the importance of the issue, the renown of the person in question, and the intensity of the infringement.[170] Thus even though the post-mortem protection of personality rights does not last forever and becomes more limited as time passes, it also has no fixed expiration date. Protection loses its significance only when the image and memory of the deceased fades.[171] For example, the protection period of a very famous artist, like expressionist painter Emil Nolde (1867–1956), can extend for more than 30 years after death.[172] The 1967/68 draft of a law to restructure the protection of the rights of personality and reputation proposed a time limit of 30 years after death for all claims related to these rights, out of an effort to account for the progressive decline in worthi-

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AMERIKANISCHEN INTERNATIONALEN PRIVATRECHT: EIN PLÄDOYER FÜR DAS PERSONALSTATUT (1999).

166. BGHZ 143, 214; BGH, NJW 2000, 2201. *See* Artur-Axel Wandtke, *Zur Kommerzialisierung des Persönlichkeitsrechts*, Kunstrecht und Urheberrecht [KUR] 2003, 144; *see* Gerhard Wagner, *Geldersatz für Persönlichkeitsverletzungen*, ZEuP 2000, 200; *futhermore* KEVIN V. HOLLEBEN, GELDERSATZ BEI PERSÖNLICHKEITSVERLETZUNGEN DURCH DIE MEDIEN (1999); Amelung, *supra* note 21; Tilman Hoppe, *Profit from Violation of Privacy Through the European Tabloid Press*, 6 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 75 (1999); NORMANN WITZLEB, GELDANSPRÜCHE BEI PERSÖNLICHKEITSVERLETZUNGEN DURCH MEDIEN (2002).

167. BGH, NJW 1974, 1371 – *Fiete Schulze.*

168. Of course injunctive remedies are presently rare in the U.S.; for discussion of prior restraint, see Part V F 2.

169. OLG München, NJW-RR 1994, 925, 925-26.

170. BGHZ 107, 384, 392.

171. OLG München, NJW-RR 1994, 925. The exhibition of remains of a Neanderthal man is not an infringement of "his" personality, as is bizarrely pointed out in the Swiss book THOMAS GEISER, DIE PERSÖNLICHKEITSVERLETZUNG INSBESONDERE DURCH KUNSTWERKE 89 (1990).

172. BGHZ 107, 384 (393); *see* OLG Köln, NJW 1999, 1969 – *Konrad Adenauer* (regarding a case involving the first Chancellor of West Germany (from 1949–1963)) (*see infra* note 188).

ness of protection, but this expiration date was not made into law.[173] Ultimately the act failed due to insufficient political support regarding other matters.

However, that the rights expire after a certain time (more or less parallel to the limitation period),[174] makes sense, not just because everything on earth is transitory, but also because the public memory in the social sphere diminishes over the years.[175] Balancing free speech with the posthumous dignity in order to find the right time span can be, of course, difficult. Parallel to the ten-year rule of § 22 of the Artistic Creations Act of 1907 (Kunsturhebergesetz [KUG]), dealing with the unauthorized publications of pictures, the BGH has recently limited the heritable *financial* elements of the personality rights to ten years after death.[176]

E. Point of Reference and Right to Sue

Linked to the present and future extent of the counter-rights against publications is the matter of who really holds the posthumous personality right. In other words, since the right can only be realized through the heirs, the question arises if the rights belong to the deceased or to the heirs. According to German law one has to make a clear distinction between the bearer of the right violated and the person or entity entitled to sue. So the deceased's rights and not the family's are at stake. The deceased's rights to be taken care of, as should be noted here, can be of diverse kind. The German posthumous personality right has also been dealt with in connection with the right to "custody" of the dead, the validity of fire funerals, organ transplantations,[177] physician confidentiality,[178] pictures of a post-mortem examination,[179] a commemorative coin series picturing

173. § 12(2), sentence 2 of a failed reform proposal for the BGB: Entwurf eines Gesetzes zur Neuordnung des zivilrechtlichen Persönlichkeits- und Ehrenschutzes, BT-Drucks. III nr. 1237 (1959); *see also* Heldrich, *Der Persönlichkeitsschutz Verstorbener, in* RECHTSBEWAHRUNG UND RECHTSENTWICKLUNG – FESTSCHRIFT FÜR HEINRICH LANGE, 163, 173 (Kurt Kuchinke ed., 1970) (criticizing this inflexible limitation).

174. *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 197(1) (regarding the thirty years limitation period). Before 2002 this was the standard limitation period, § 195 BGB old version.

175. BVerfGE 30, 173, 196.

176. BGHZ 169, 193 – *kinski-klaus.de* (reacting to the BVerfG's statement in NJW 2006, 2409 that the Constitution does not recognize a posthumous protection of personality against a commercial exploitation that does not involve an infringement of human dignity, but that it also does not oppose it. Of course, under the perspective of intellectual property law there might be a different outcome). *See* Nikolaus Reber, *Die Schutzdauer des postmortalen Persönlichkeitsrechts in Deutschland und den USA (von Marlene Dietrich über Klaus Kinski zu Marilyn Monroe): ein Irrweg des Bundesgerichtshofs?*, Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil [GRUR Int.] 2007, 492.

177. ADAMANTIA KALOUDI, PRESSEFREIHEIT UND PERSÖNLICHKEITSSCHUTZ – EIN TYPISCHER GRUNDRECHTSKONFLIKT IM VERGLEICH DER DEUTSCHEN, DER US-AMERIKANISCHEN UND DER GRIECHISCHEN RECHTSORDNUNG 141 (2000).

178. Andreas Spickhoff, *Postmortaler Persönlichkeitsschutz und ärztliche Schweigepflicht*, NJW 2005, 1982 (insurance law).

179. BGHZ 165, 203 – *Mordkommission Köln*.

former German Chancellor Willy Brandt (1913–1992)[180] and the use of a philosopher's name by an association.[181]

Since the action is based on the serious distortions of the reputation and the image[182] of the deceased, according to German law, the heirs act for the defunct to protect serious infringements of his or her dignity. A financial compensation, as stated,[183] is not possible for non-material, i.e. dignitarian infringements, since damages for pain and suffering serve to satisfy the injured living person. Only the commercial components of a right of personality can be passed on to the heirs (like to the daughter of Marlene Dietrich), but not the non-material aspects of the right of personality.[184] This non-inheritability of the non-material aspects of the general personality right and the exclusion of damages demonstrates, according to the German courts, that the relatives have not suffered any harm in this regard. This opinion is persuasive since issues that could be acceptable to relatives, could impugn the public memory of a deceased (e.g. regarding political, religious, or sexual orientation).[185] Therefore, suffering experienced by family members is categorically distinct from the intrinsic dignity of the deceased.

The judiciary and the majority of legal scholars are thus rightly of the opinion that the immaterial posthumous personality right still refers to the dead, not to his or her relatives.[186] But the right to sue against defamatory statements lies with those who are close relatives (not necessarily heirs), confidantes, and those who were asked to sue by the deceased. Others with active legitimization to sue are meritorious organizations (e.g. trusts) that have the task of protecting the heritage of the defunct.[187] Representation by one of them or a "combined" action of those eligible is admissible.[188]

180. BGH, NJW 1996, 593.

181. OLG München, NJW-RR 2001, 42 – *Wolfgang-Harich-Gesellschaft e.V.*

182. *See* OLG Köln, NJW 1999, 1969, 1970 – *Konrad Adenauer.*

183. *See supra* Part II.

184. BGHZ 143, 214; BGH NJW 2000, 2197.

185. *See* Heldrich, *supra* note 173, at 171.

186. ANNETTE FISCHER, DIE ENTWICKLUNG DES POSTMORTALEN PERSÖNLICHKEITSSCHUTZES: VON BISMARCK BIS MARLENE DIETRICH 68 (2004). *But see* Peter Westermann, *Das allgemeine Persönlichkeitsrecht nach dem Tode seines Trägers*, FamRZ 1969, 561, 566; *but cf.* Knut Müller, POSTMORTALER RECHTSSCHUTZ: ÜBERLEGUNGEN ZUR RECHTSSUBJEKTIVITÄT VERSTORBENER (1996) (regarding the problems associated with this).

187. BGHZ 107, 384, 389 – *Emil Nolde.*

188. *See* OLG Köln, NJW 1999, 1969 (describing an example in which a radical party in an election advertisement stated that Konrad Adenauer (1876–1967) would have voted for the party).

V.
DEVELOPING A COMMON LAW POSTHUMOUS PERSONALITY RIGHT

A. Strict Common Law Position

All over the globe, the common law position on posthumous personality rights is quite strict. Because the reputation is considered personal, it follows the English tort law rule of "actio personalis moritur cum persona" (personal action dies with the person).[189] This implies that according to Roman law the dead had no personality rights,[190] allowing the heirs to sue only for disparaging the memory of the deceased.[191] Claims for libel and slander as strictly personal causes of action are precluded when a statement is made about a defunct. According to the common law, he or she does not have any surviving rights which could be violated. A person's estate, descendants, or relatives have no opportunity to bring an action if the offending statement does not also indirectly affect a member of the family or estate.[192] To successfully make a case for libel, according to U.S. law, the plaintiff must show that (1) the defendant published (2) a defamatory, i.e. a reputation lowering, statement (3) concerning the *plaintiff*.[193] Regarding

189. JOHN G. FLEMING, LAW OF TORTS 741 (9th ed. 1998); R. M. Williamson, *Actio Personalis moritur cum Persona in the Law of Scotland*, 10 L. Q. REV. 182 (1894).

190. Of course, this has also influenced civil law regimes. For example, compare Swiss law with its Art. 31(1) Schweizerisches Zivilgesetzbuch [ZGB], stating that the personality begins with life after completed birth and ends with death; *see* Bundesgerichtsentscheidungen [BGE] 109 II, 353 – *Paul Irmiger* (1983) and BGE 104 II 225 – *Witwe Holder* (1978). Relatives can sue for violation of their own rights. *See* Marie-Theres Frick, PERSÖNLICHKEITSRECHTE – RECHTSVERGLEICHENDE STUDIE ÜBER DEN STAND DES PERSÖNLICHKEITSSCHUTZES IN ÖSTERREICH, DEUTSCHLAND, DER SCHWEIZ UND LIECHTENSTEIN 35 (1991); *see also* Esther Knellwolf, POSTMORTALER PERSÖNLICHKEITSSCHUTZ: ANDENKENSCHUTZ DER HINTERBLIEBENEN (1991) (Swiss perspective); Esther Knellwolf, *Postmortaler Persönlichkeitsschutz: neuere Tendenzen der Rechtsprechung*, Zeitschrift für Urheber- und Medienrecht [ZUM] 1997, 783 (Swiss perspective); Iris Eisenberger, *Postmortaler Grundrechtsschutz am Beispiel des Persönlichkeitsschutzes, in* NORM UND NORMVORSTELLUNG – FESTSCHRIFT FÜR BERND-CHRISTIAN FUNK, 175 (Iris Eisenberger et al. eds., 2003) (Austrian focus).

191. *See* ERNST RABEL (1874–1955), GRUNDZÜGE DES RÖMISCHEN PRIVATRECHTS 35 (2d ed. 1955). As is commonly known, Rabel is the founder of modern (German) comparative law; *see* Hannes Rösler, *Siebzig Jahre Recht des Warenkaufs von Ernst Rabel – Werk- und Wirkgeschichte*, 70 RabelsZ 793 (2006).

192. *Cf.* The Queen v. Ensor, 3 TIMES LAW REPORTS [T.L.R.] 366, 367 [1887] (regarding the "of and concerning" requirement); *see also* Lisa Brown, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525 n.2 (1989). For the Bath Club case, defaming the deceased English Prime Minister Gladstone, see Götz Böttner, *Protection of the Honour of Deceased Persons—A Comparison between the German and the Australian Legal Situations*, 13 BOND L. REV. 109, 116-17 (2001) (explaining the legal situation according to Australia's different States and Territories); Alberto Bernabe-Riefkohl, *Que descanse en paz: la causa de acción por difamación de personas fallecidas*, 70 REV. JUR. U.P.R. 917 (2001) (translated: May it rest in peace: the cause of action by defamation of dead persons).

193. *See* William Prosser & W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 778-784 (5th ed. 1984).

the limitation of defamation claims to the lifetime of the individual, the Restatement (Second) of Torts is also unmistakably clear: "One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives."[194]

B. Chances for a Family Discourse

Can one simply "transplant"[195] the German posthumous personality right? The answer is probably not. When one examines the influences of U.S.-American constitutionalism upon foreign constitutional development[196] it becomes clear that not simple one-to-one copying, but coherent and redrafted constitutional borrowings are the road to success. The conceptual and cultural embedding is decisive. Comparative law can provide the chance to self-reflect and to re-evaluate norms and basic legal assumptions.[197] As depicted, there is a principally similar conception of human nature which underlies both German and U.S.-American constitutional regimes. Admittedly, in its struggle to leave the National Socialist past behind and due to the deep rift left by the war in German lives and the German consciousness, German adopted a very explicit and specific body of laws. For example, while the United States tends to omit responsibility for speech, German law contains many specifics about the illegality of hate speech.[198]

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194. RESTATEMENT (SECOND) OF TORTS, § 560 (1977); the Reporter's notes in support of the Section refer to the Massachusetts case Hughes v. New England Newspaper Publishing Co., 43 N.E.2d 657, 658 (1942); *see also* Kelly v. Johnson Pub. Co., 325 P.2d 659 (1958); Insull v. New York World-Telegram Corp., 172 F.Supp. 615 (N.D. Ill. 1959), *aff'd*, 273 F.2d 166 (C.A.7), *cert. denied*, 362 U.S. 942; Bradt v. New Nonpareil Co., 79 N.W. 122 (1899); *Rose*, 31 N.E.2d 182, *reargument denied*, 33 N.E.2d 548; Turner v. Crime Detective, 34 F.Supp. 8 (N.D. Okl. 1940); Benton v. Knoxville News-Sentinel Co., 174 Tenn. 661, 130 S.W.2d 106 (1939). *But see* CAL. CIV. CODE § 3344.1 (West 2003) (granting publicity rights to "deceased personalities.").

195. *See* ALAN WATSON, LEGAL TRANSPLANTS (1974); ALAN WATSON, LAW OUT OF CONTEXT (2000); *but see* Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW [MJ] 111 (1997); Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262 (1995).

196. *See* Rösler, *supra* note 30 (referencing further materials).

197. Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) (arguing that neutral comparison is impossible); *cf.* Alexander, *supra* note 111, at 778 (arguing that "[t]he point of the comparative enterprise is not to find models to mimic, but to remove our interpretive blinders and enhance our expressive transparency. We cannot morph other constitutions, but we can still learn from them."); David Kennedy, *The Methods and Politics of Comparative Law, in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 345 (Pierre Legrand and Roderick Munday eds., 2003) (stressing how strikingly little is known about the politics of comparative law); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Hannes Rösler, *Rechtsvergleichung als Erkenntnisinstrument in Wissenschaft, Praxis und Ausbildung*, JuS 1999, 1084 (part 1) and 1999, 1186 (part 2).

198. *See* Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335 (1998); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000); Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1 (2002); Michel Rosenfeld, *Hate Speech in Comparative Perspective: A Comparative Analysis*,

But this by no means renders a mutual inspiration process undesirable or even unattainable. As stressed in Part II, the argument that implication of the First Amendment precludes international legal comparisons is unpersuasive. After all, the Founders were influenced by European ideas and (counter-)models when creating the Constitution, and did not intend to stop looking abroad after they had finished their highly progressive work.[199] In today's converging world, blossoming foreign jurisprudence on freedom of expression opens the door for an international community of liberal constitutions.[200] Common and civil law blend and overlap in particular regarding constitutional law and the constitutionally influenced private law. This offers exceptional learning opportunities on all sides.[201] It is also interesting to note that German law, due to the constitutional resemblances to American law, is more frequently cited in U.S. Supreme Court decisions than other civil law jurisdictions.[202] Therefore, the German posthumous personality right has some potential to inspire a common law equivalent.

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24 CARDOZO L. REV. 1523 (2003).

199. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 575-76 (2001) ("The Founders wanted comparativism to be as much a part of constitutional interpretation as it was of constitutional creation. Comparative insights had undeniable influence on the Founders, and nowhere did they indicate that these insights would be restricted just to 1787. Rather, their acceptance of certain universalist intellectual ideas and their interest in the experiential lessons of political science seem to indicate that they wanted comparative materials to always be used.").

200. See Chief Justice William H. Rehnquist, *Constitutional Courts—Comparative Remarks, in* GERMANY AND ITS BASIC LAW: PAST PRESENT AND FUTURE 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993), who similarly, but surprisingly wrote: "For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." In *Atkins v. Virginia*, 306 U.S. 304, 321 (2002) (Rehnquist, C.J., dissenting) he drew attention to the "defects in the Court's decision to place weight on foreign laws." *See also* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003), at 1514-5 n.114 (proving in detail that nearly every member of the current Court has referred to foreign or international law or practice to explain interpretations of the American Constitution). *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Justice Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000). *See also supra* note 18; Juliane Kokott, *From Reception to Transplantation to Convergence of Constitutional Models in the Age of Globalization – With Particular Reference to the German Basic Law, in* CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS 71 (Christian Starck ed. 1999).

201. *See* Rebecca Lefler, *A Comparison of Comparison: Use of the Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165 (2001) (stating that the dialogue today is often just one-way, with the Supreme Court denying the participation).

202. *See* Harding, *supra* note 18, at 420 n.69; *cf.* David S. Clark, *The Use of Comparative Law by American Courts*, 42 AM. J. COMP. L. 23 (Supp. 1994) (noting that "there is scant legal literature on the use of foreign and comparative law in United States courts because courts rarely cite foreign law." He found, nonetheless, the exception of the two new areas of international civil procedure and of international criminal law; David S. Clark, *The Use of Comparative Law by American Courts, in* THE USE OF COMPARATIVE LAW BY COURTS 297 (Ulrich Drobnig & Sjef van Erp eds., 1999).

C. Possible Features of Integration

Currently there are some gaps regarding the protection of the deceased, not only having to do with the English "the dead don't hear" rule, but rather having to do with the status free speech enjoys in the U.S. With the actual-malice rule established by *Sullivan*, U.S. law has considerably overturned the common-law position of a strict punishment for the dissemination of false negative speech—in order to cultivate political speech by not chilling true negative speech.[203] Since the inception of this new understanding of the First Amendment, entirely driven by the concern about self-censorship of speech, the First Amendment has been used in an openly metaphorical way. Defending free speech has somehow become a central part of the U.S.-American socio-legal culture[204] and occupies the political and rhetorical high ground.[205] This common attitude, however, seems to block the central question of the purpose of free speech. Open societies[206] have to encourage optimal speech conditions. Yet notably, repression of free speech cannot occur solely through active measures of the state, but also must omit effective legal protection.[207] Regarding the abstract status of rights, it thus does not make much difference whether the endangerment results from state actions or from another source.

Protecting certain counter-values to free speech can actually defend and foster freedom of speech. Exercising First Amendment rights exposes the speaker to certain risks; risk of public attention, and risk that, after death, his or her personality and achievements will be adulterated by misrepresentations. These risks can unintentionally chill speech by deterring the speaker from participating in the first place. It may be difficult to die in peace and dignity if one knows that one's reputation in the public memory and one's life-time achieve-

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203. Michael Passaportis, *A Law and Norms Critique of the Constitutional Law of Defamation*, 90 VA. L. REV. 1985, 2038 (2004). Passaportis also points out that *Sullivan* was decided at the time of the zenith of the civil rights movement and that harsh Southern state defamation laws were used to deter commentaries on the racial situation in the South. *Id.* at 2040.

204. *See* David A. Anderson, *Metaphorical Scholarship*, 79 CALIF. L. REV. 1205, 1219 (1991) (reviewing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990)). Some advance a dissent-based theory of free speech as a core value of the U.S.A. STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); for different speech and media theories, see LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS (John C. Nerone ed., 1995) (dealing with the classic FRED S. SIEBERT, THEODORE PETERSON & WILBUR SCHRAMM, FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY, AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO (1956/1978)).

205. For the overuse of the First Amendment, see Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174 (Lee Bollinger & Geoffrey Stone eds., 2002).

206. *See* KARL RAIMUND POPPER, OPEN SOCIETY AND ITS ENEMIES, Vol. 1: THE SPELL OF PLATO, 2. Vol.: THE HIGH TIDE OF PROPHECY: HEGEL, MARX AND THE AFTERMATH (5th ed. 1971).

207. OWEN M. FISS, THE IRONY OF FREE SPEECH 5-26 (1996) (dealing with silencing effect of speech and arguing that state intervention enhances freedom by broadening the terms of public debate and integrates those under-funded, underrepresented or disadvantaged voices who are often overwhelmed or intimidated, like victims of hate speech and pornography).

ments can be destroyed without the possibility of defense. Of course, blanket protection cannot be extended to the reputation of the dead. However, the existence of a narrower posthumous dignitary right could encourage free speech; for example, through the participation in the public discourse or the publication of personal matters.

It is thus not in all instances enough to leave the discovery of the truth to the marketplace of ideas. Many American scholars of the First Amendment who vehemently defend a laissez-faire approach overlook current market failures[208] by overemphasizing the uniqueness of speech. The failure of the marketplace of ideas highlights the need for corrective regulation,[209] especially in regard to defenseless minorities and the deceased. Courts are obligated to intervene because the dead are speechless and because quite often the relatives do not have the same access and presentation capability to the process of communication as the deceased did. There is thus a public interest associated with the protection against defamatory statements, similar to what the English Judge Lord Nicholls stated in *Reynolds v. Times Newspapers Ltd.* about the value of reputation: "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being [. . .]. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."[210]

To ensure this acceptance with regard to the deceased, the U.S. would have to incorporate a posthumous personality right into its own fabric of constitutional values and tort laws. It would need to find an American analogue to the foreign version presented here. Helpful for integrating the posthumous personality right into U.S. law could be an equal chances dimension:[211] A structure and

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208. For a different criticism of the "market theology" and a suggestion for a reform, see CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, 241-252 (1995) (preferring a Madisonian "deliberative democracy" model); *cf.* Alain Sheer & Asghar Zardkoohi, *An Analysis of the Economic Efficiency of the Law of Defamation*, 80 NW. U. L. REV., 364 (1985) (dealing with the optimal degree of self-censorship and the rules that have replaced the common law strict liability as economic problems); Paul C. Weiler, *Defamation, Enterprise Liability, and Freedom of Speech*, 17 U. TORONTO L.J. 278, 306, 309, 333-43 (1967); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 802-03 (1986) (doubting that the situation was improved by the adoption of the actual malice rule); John L. Diamond, *Rethinking Media Liability for Defamation of Public Figures*, 5 CORNELL J.L. & POL'Y 289 (1996).

209. For the reasons why media markets need regulation, see C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 7 (2002) (stressing the special nature of media products: they are "not toasters.").

210. Reynolds v. Times Newspapers Ltd., [2001] 2 AC 127, 201.

211. The author has developed this in regard to English and German law. GOUNALAKIS & RÖSLER, *supra* note 31, at 127 et seq.; Hannes Rösler, *Das Verhältnis von Parlament, Gerichtsbarkeit und Privilegierung im Ehrenschutz, oder: London, a Town Named Sue – Entscheidung des House of Lords vom 23. März 2000 mit Anmerkung*, ZEuP 2003, 155, 172 (on the occasion of *Hamilton* v. *Al Fayed* [2000] 2 All E.R. 224 et seq.); *see* Friedrich Kübler, *Ehrenschutz, Selbstbestimmung und Demokratie*, *supra* note 76, at 1284; Joachim Scherer, *Pressefreiheit zwischen Wahrheitspflicht und Wahrheitsfindung – Schutz der Massenmedien vor den Rechtsfolgen unwahrer*

climate that encourages free expression within a frame of equal chances in the communication process installs the state in a protective role for disadvantaged minorities and the speechless, which encompasses the deceased as they can no longer speak. Free speech in order to criticize the Government is one thing; free speech disadvantaging the speechless is another matter.[212]

The concept of equal chances in the process of communication would add to the free-market-of-ideas concept without inhibiting the free flow of information and opinions since proportionality concerning state intervention in speech acts is one of its core elements. Also, generally there is no societal interest in false communication when there is no sufficient counterbalance by the *forum publicum*. Here the publication of information is not likely to be a gain in the net-knowledge of society. In addition, the public does not always realize the falseness of facts and it does not counterbalance them sufficiently when the targeted person is speechless. Thus, the constitutionalization of U.S. defamation law led to an underestimation of the social costs of wrong statements.

The German example illustrates that the classical common law argument against a posthumous personality right, which is that the boundaries of such an action would be too difficult to establish, does not have to be correct. In addition, it does not have to disproportionately limit freedom of expression in the general sense or have to deter creative rights in particular. A posthumous personality right should only be of predominant importance in cases of severe infringements. This is above all true for creative works which depend on the use of real-life inspirations. But in cases of severe infringements of personality rights, freedom of speech has to step back.[213] Even in such cases, however, blocking publication is a last resort and can be rendered unnecessary by modifying fictional works to make them increasingly abstract or by correcting the wrong statements in non-fictional works clearly referring to personality aspects of the living or deceased person. If this obligation is construed narrowly enough, freedom of speech is not chilled to a relevant extent.

Furthermore, the argument that a posthumous personality right could deter valuable historical research[214] is not necessarily correct. Since truth is commonly a defense to libel charges, such a right will give historians the incentive to publish accurate, factually-based statements. A further hurdle to overcome is the classic common law rule, still active in England,[215] which stipulates that a com-

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Tatsachenbehauptungen im amerikanischen und deutschen Recht, EuGRZ 1980, 49, 53-54.; *see also* BVerfGE 25, 256 – *Blinkfüer* case issued 1969.

212. Basil S. Markesinis, *The Right to be Let Alone versus Freedom of Speech, in* FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS 382, 396 (1997) (asserting that much can be learned from the fine art of balancing interests undertaken by German judges).

213. BVerfG, docket numer 1 BvR 1783/05, June 13, 2007, currently only reported at juris online/Entscheidungen – *Esra*.

214. Rex the King v. Topham, 100 Eng. Rep. 931, 933 (1791) (K.B.).

215. *See* Duncan Lamont, *Speaking Ill of the Dead*, The Guardian, Aug. 11, 2003 (criticizing English Law regarding a defamatory statement about the dead British Ministry of Defence and Iraq weapons expert David Kelly, who committed suicide in July 2003).

menced action must end with the death of the claimant and cannot be continued by his or her heirs.[216] U.S. law on this topic is a bit more complicated. According to survival statutes in some states, a claim can be passed on, but defamation actions are commonly excluded from their coverage.[217] For instance, according to Massachusetts law, libel actions cannot survive the death of the plaintiff.[218]

A clearer acceptance of the human dignity aspect of the U.S. privacy and defamation law, where these institutions would also afford protection to the affected individual's human dignity interest, would pave the way for a better understanding of the purpose of defamation and privacy laws as well as an element of rights expansion.[219] As Justice Potter Stewart (1915–1985) observed, the reason reputation enjoys protection from unjustified invasion and wrongful hurt is to safeguard the dignity and worth of every human being.[220] Recognition of the underlying dignitarian notion and of its great importance for the individual's sense of identity, integrity, and self-worth[221] could lead to the acceptance of the concept that one is entitled to a rightful reputation, extending physical existence by virtue of one's own life and contributions to society.

As discussed, German law derives the posthumous right of personality from human dignity. Opponents of the proposal to further integrate human dignity in U.S. law can make a slippery slope argument[222] that accepting dignity as a key element of U.S. law would have a far-reaching impact not limited to just the posthumous right of personality, but leading to a reversal of all First Amendment precedents. But this argument misreads the constructive meaning and positive implications of the human dignity concept in civic republican

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216. *Cf.* Broom v. Ritchie 6 F 942 (1904) (a somewhat more favorable, therefore exceptional judgment from Scotland (being in general more influenced from the Continent)); *see* Böttner, *supra* note 192, at 116-17; *see* Decisions, 40 COLUM. L. REV. 1267, 1268 n.5 (1940).

217. PROSSER & KEETON, *supra* note 193, § 126, at 943; *see* Canino v. New York News, Inc., 96 N.J. 189, 475 A.2d 528 (1984) (stating that an action for libel survives the death of the defamed); *see also* Grégoire Loiseau, *Des droits patrimoniaux de la personnalité en droit français*, 42 MCGILL L.J. 319 (1997) (supplying many comparative references).

218. Jonathan M. Albano, *Defamation, in* I MASSACHUSETTS TORT LAW MANUAL § 7.3.2 (2002).

219. According to German law, human dignity protects both sides; that is, the speaker and the audience of his communication. Stressing, however, just the theoretical nexus between human dignity and speech, and advocating for a broad protection of free speech by utilizing dignity and equality as independent doctrinal justification. *See* DWORKIN, *supra* note 16. *But see* Frederick Schauer, *Speaking of Dignity, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178 (Michael J. Meyer & William A. Parent eds., 1992) (recognizing that dignity could also be used to restrict free speech); Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 960, 986 (2007).

220. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966), *cited in* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

221. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 616-17 (1990).

222. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

thought (going beyond classical individualism, also incorporating social connections).[223] As mentioned in Part III B, notions of dignity have implicit constitutional rank, since the moral and political natural law philosophy of dignity attributing intrinsic value to humans lies at the source of the whole project of the American nation and its constitutional regime. This dignity is the supreme value controlling the entire system of basic rights; that the human dignity of a person endures after death, however, is, admittedly, a more dominant idea in Germany.

But the general feasibility of fitting these ideas into a common law framework is illustrated by the Australian Law Reform Commission, which not only suggested a national defamation law for the Commonwealth of Australia,[224] but also the possibility for relatives to obtain a correction order, declaration, or three-year injunction with respect to a defamatory statement. A recovery for compensatory damages was not planned under this regime.[225] Similarly, in 1995 the Community Law Reform Committee of the Australian Capital Territory suggested that the Attorney General change the common law rules so that the personal representative of the defamed decedent could sue on behalf of the estate if the defamatory statement was made within twelve months after the demise.[226] Excluding the recovery of damages, as it was proposed in Australia and as practiced in Germany,[227] seems appropriate since the defamed cannot be compensated and it makes sense to avoid rewarding "gold-digging" relatives. However, allowance for other remedies is imperative. As indicated, there is a legitimate interest in communicating the truth to the public, while there is no necessity to protect obviously false or defamatory statements. When some wrong statements are corrected, there is a societal win, as the truth can be discerned.

D. High Value of Artistic Expressions as a Special Issue

It should be stressed that this article is about post-mortem personality rights in general, but the issue gets particularly sensitive when the depiction takes place in artistic works. This happened in the Dewey and *Mephisto* cases men-

223. Alexander, *supra* note 110, at 743, 744: "To American ears, 'human dignity' strongly resonates of the individualist outlook associated with classical liberalism, making the constitutional right negative rather than positive in character. [...] [R]ather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value." Schauer, *supra* note 219, at 184. For the U.S., some claim that "arguments from dignity seem much more plausibly to generate arguments for restricting various kinds of speech than for protecting it." Carmi, *supra* note 219.

224. Australian Law Reform Commission, Report No 11, *Unfair Publication: Defamation and Privacy*, 42-47 (1979).

225. *Id.* at 100, 102; Böttner, *supra* note 192, at 119-20.

226. Australian Capital Territory Community Law Reform Committee, *Report No 10 Defamation* (1995); Böttner, *supra* note 194, at 120, 133 (favoring a more flexible solution like in Germany).

227. *Supra* Part II.

tioned in the introduction. Artistic expressions are highly valued.[228] They require special legal attention because, on balance, artistic works tend to be progressive, and are often met with resistance by the general public. But the society might, in the long run, recognize that creative works can turn out to be highly valuable. Indeed, as is demonstrated by the German law, art needs clear and strong constitutional protection.

Also U.S.-American commentators make use of the special protection requirements of "art." They argue that fiction should be protected from libel claims because fiction cannot severely damage one's reputation. It is claimed that, "[g]iven fiction's limited potential for actually injuring an individual's reputation, libel should be kept on a particularly short leash when it goes prowling after fiction. The absence of truth as a defense makes it all the more necessary that courts provide maximum protection for works of fiction."[229] But even fiction can transport a core of truth for the audience, despite the fact that the creator does not claim to say the truth. It is correct that people do not necessarily have to misinterpret fiction for fact. Most readers, viewers etc. are aware that works they consume are fictional, since they never pretend to be otherwise. Although there is a difference between history and fiction, in certain instances, for example, popular semi-documentary features, the distinction between fact and fiction can be blurred. These creative works are an example of a broader fusion of fiction and fact described in the introduction. Such pieces can incite film audiences or book readers to assume at least a "core of truth" in the depiction. After all, artistic works often use the reality background as an incentive to watch or buy the piece in question.

Thus the proposed concept is not one of aesthetic control leading to the ban of artwork which is realistic and derogatory and to overregulation with the risk of uneven application in practice by governments likely to single out political enemies; rather it is tailored to the narrow line of cases where a posthumous personality right is seriously infringed and where close relatives sue. Dignity, just like freedom of expression, does not trump in every case; it is all about the balance. As such, creators of fiction would still enjoy broad rights of expression and there would still be the right to take some "creative license". But in clear depictions of the Dewey and *Mephisto* variety, the central question is one of alienation of the persona used for inspiration.[230] The solution suggested here requires a high degree of awareness so that, for example, a book does not get

228. This issue cannot be dealt with sufficiently in the confines of this Article. *See* Rösler, *supra* note 117.

229. Martin Garbus & Richard Kurnit, *Libel Claims Based on Fiction Should Be Lightly Dismissed*, 51 BROOK. L. REV. 401, 421 (1985). *See also* David A. Anderson, *Avoiding Defamation Problems in Fiction*, 51 BROOK L. REV. 383, 392 (1984) (discussing era of "faction" and "docudrama"); Paul A. LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOK. L. REV. 281, 348, 349 (1985); Diane Leenheer Zimmerman, *Real people in fiction: cautionary words about troublesome old torts poured into new jugs*, 51 BROOK. L. REV. 355, 369 (1985) (all from a symposium on defamation in fiction).

230. *See supra* note 146 and the accompanying text.

banned as a result of the manipulation of ulterior motives. Therefore, the approach advocated here requires clear guidelines and liberal case law that limits the application of the concept to really severe cases.

It should be noted that the *Hoodlum* film is mainly used as an example for the fiction-fact trend. Its theatrical poster vividly illustrates a technique used to give the appearance of authenticity.[231] The background is covered with a collage of signatures, stamps of historic dates and reprints of police and court documents making it look highly official. Of course, this can be seen just as "historical fiction", as an artistic genre. But this method contributes to the viewers' assumption that the piece is based on (at least some) historic facts. In addition, digitalization makes it easy to import historical figures into new settings and portray these figures as acting and behaving in ways that the facts do not support. Yet, what we see is habitually what we believe.[232] Movies and books often address this issue by including disclaimers. This is a sensible thing to do and in many cases sufficient. But in certain, severe types of violations these notices can easily become a fig leaf. For example, someone writes a book describing his or her former lover and everyone knows or assumes that the details must be true since other general facts fit in with reality.[233] Where books are concerned however, the argument, with regard to television, that people who channel surf could simply pass over the disclaimer carries less weight.

E. Achieving Coherence by the Courts or by the Legislators?

Ideally, a balanced legal order should not only protect against the described encroachments of personality rights when there is an economic value linked to this protection, for example, through the publicity rights as a form of property, treating fame as a commodity and as a fourth branch of privacy.[234] U.S. law protecting the deceased's reputation and privacy as *property*[235] merely applies to celebrities, and lacks the protection of *dignity*, which would apply to other individuals as well.[236] The question arises whether the judiciary or the legislature is

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231. *See* Wikipedia, http://en.wikipedia.org/wiki/Hoodlum_(film).

232. *See generally* ARTHUR BERGER, SEEING IS BELIEVING: AN INTRODUCTION TO VISUAL COMMUNICATION (3d ed. 2007).

233. This is the case regarding the *Esra* book, which will be dealt with shortly. *See infra* note 264.

234. WEILER, *supra* note 3, at 215; *cf.* Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999) (persuasively arguing for a federal right of publicity); *supra* note 41.

235. Post, *supra* note 14.

236. Due to the lack of law of privacy, in Great Britain this is not only true in the case of deceased; *see* Martin Soames, *Are you worth it?*, The Guardian, Oct. 20, 2003 ("The moral of this story is, if you want to protect your private life make sure your image has commercial value"); James M. Left, *Not For Just Another Pretty Face: Providing Full Protection Under the Right of Publicity*, 11 U. MIAMI ENT. & SPORTS L. REV. 321 (1994) (dealing with whether an estate is protected after death); for German law, see. Gerhard Wagner, *Prominente und Normalbürger im Recht der Persönlichkeitsverletzungen*, VersR 2000, 1305.

the best locus for establishing a post-mortem personality right. Currently, there are some U.S.-American statutory precedents through the extension of the rights of publicity. At present the right to publicity of living people is recognized in about twenty-five U.S. States, by statute[237] or the common law, of which seventeen[238] also acknowledge the transmissibility of this right upon death.[239] Thus here U.S. law already recognizes post-mortem rights.

But concerning the non-commercial personality aspects, U.S. courts regard the violated rights as those of the families, not those of the deceased. This is one of the major constructive differences between the two approaches. In *The Perfect Storm* lawsuit, examing a major Hollywood movie's use of the unlicensed likeness of two seamen who drowned in a fishing vessel, the District Court of Florida ruled that neither its production nor its marketing violated Florida's right of publicity statute.[240] However, the Court of Appeals for the Eleventh Circuit later gave the remaining family members a right to recover damages for invasion of the families' relational privacy rights, because of humiliation and wounded

237. However, the 1994 Indiana law should not apply retroactively to establish rights of publicity that Marilyn Monroe (1926–1962) did not have at the time of her death; Shaw Family Archives Ltd. v. CMG Worldwide Inc., 434 F. Supp. 2d 203 (S.D.N.Y. 2006); Daniel Biene, 38 IIC 2007, 859 (case comment).

238. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, 6.3, 6.8 (2d ed. 2001); J. Thomas McCarthy, *The Human Persona as Commercial Property: the Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 132 (1995); Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1324 (2002); Brent W. Stricker, *In Memory of Lost Heroes: Protecting the Persona Rights of Deceased Celebrities*, 31 MCGEORGE L. REV. 611 (2000); *see also* B. St. Michael Hylton & Peter Goldson, *The New Tort of Appropriation of Personality: Protecting Bob Marley's Face*, 55 CAMBRIDGE L.J. 56 (1996) (dealing with the Jamaican Supreme Court's recognition of a patrimonial property right of personality).

239. *See supra* note 41. For example, the Supreme Court of Georgia argues similar to the BGH in its *Marlene Dietrich* decision (*see supra* note 167 and accompanying text) regarding descendibility: Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 250 Ga. 135, 145, 296 S.E.2d 697, 705 (1982) ("If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of commercial use."); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978) (arguing that Elvis Presley's property rights must survive his death because otherwise there would be "a windfall in the form of profits from the use of Presley's name and likeness"); Elvis Presley Enters., Inc. v. Elvisly Yours Inc., 936 F.2d 889 (6th Cir. 1991). For other parallels, see Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L. REV. 479 (1999). *Cf.* F. Jay Dougherty, *The Right of Publicity: Towards a Comparative and International Perspective*, 18 LOY. L.A. ENT. L. REV. 421 (1998); F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test For Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of Artworks*, 27 COLUM.-VLA J.L. & ARTS 1 (dealing with the problem of the chilling effect on speech in the conflict between property rights and free speech rights of visual artists who depict real people); Alana-Seanne M. Fassiotto, *Fred Astaire Dances Again: California Passes the Astaire Celebrity Image Protection Act*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 497 (2000).

240. Tyne v. Time Warner Entm't Co., LP, 204 F. Supp. 2d 1338, 1341 (M.D. Fla. 2002) *construing* Loft v. Fuller, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981) (involving the book and movie *The Ghost of Flight 401*).

feelings caused by the disclosure of pictures of a deceased body.[241] This position, that only the living can actually suffer, is a much more common form of protection. U.S. courts are thus generally more concerned about family members than about deceased. Here it becomes obvious that U.S. law could directly connect to the rights of the harmed relatives without having to develop a post-mortem personality right from the human dignity of the deceased as German law does.

Due to the strict position of the common law, a possible way to establish a corrective new cause of action for the tortious infringement of a deceased person is by means of statute,[242] as was proposed in Australia.[243] But obviously, the courts in the U.S. and Germany are also empowered to make far-reaching constitutional decisions on what should be allowed and what should be prohibited in an egalitarian society. This is why the judiciary can be quicker than the legislative branch in responding to the exploitation and misuse of personality. As a result, parliaments are increasingly unwilling to fundamentally reform the current legal situation or even to demystify the gray areas where freedom of expression collides with other rights and interests. There can be no serious doubt about the truth that courts in a democracy, governed by the imperfect rule of the majority, have—generally speaking—a special role in protecting minorities[244] and, therefore, will be continuously embroiled in the controversy over how to establish an appropriate equilibrium between competing private interests.

It should be noted that the mentioned post-mortem right of publicity in some U.S. States has been recognized under common law, but more often by explicit statute.[245] So ideally the shortcomings of the current media-friendly U.S. law should urge the legislator to establish a more effective and conceptually coherent legislation on false light portrayal and defamation law. This would allow the media enough of the vital "breathing space" necessary to remain open and largely unrestricted.[246] Especially when one considers that desecration of the memory of the dead can constitute a crime,[247] it becomes obvious that, according to current U.S. law, already today some non-commercial aspects of the per-

241. Tyne v. Time Warner Entm't Co., L.P., 336 F.3d 1286 (11th Cir. 2003); *see also* Jordan Tabach-Bank, *Missing The Right of Publicity Boat: How* Tyne v. Time Warner Entertainment Co. *Threatens to "Sink" The First Amendment*, 24 LOY. L.A. ENT. L. REV. 247 (2004).

242. Böttner, *supra* note 192, at 131 (arguing that only a statute has a chance).

243. *See supra* notes 226 and 228 (Australian reform proposals).

244. Hannes Rösler, *Grundrechte als Minderheitenschutz*, JuS 1999, 309.

245. But then, the proposed Uniform Defamation Act failed; *cf.* the accompanying text to *supra* note 50; David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

246. Expression, as a variation of the "chilling effect" argument, taken from New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

247. *See* Raymond Iryami, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083 (1999). In Germany, the disparagement of the memory of deceased persons is also punishable. According to § 189 StGB, the one who disparages the memory of a deceased person can be punished with a fine or with imprisonment for not more than two years.

sona deserve protection. Thus, a new cause of action could also help to harmonize the inconsistent value decisions of tort and criminal law. Also, what of the borderline cases where a person is rendered unconscious for an extended period? Hoffmann LJ makes a persuasive statement on this point, writing: "It is demeaning to the human spirit to say that, being unconscious, he can have no interest in his privacy and dignity, in how he lives or dies."[248] Finally, in the "dead hand control" of trust law—a distinct Anglo-American legal institution—the deceased donor's wishes and interests are strongly protected by the State courts.[249]

However, to anticipate rapid fundamental reforms is overenthusiastic, desirable as they may be in the abstract. Taking all this into account, not just the legislature but also courageous courts could develop an up-to-date reputational posthumous personality right, first for (the U.S. tort law of) false light portrayal and then for defamation law more generally.[250] This would be similar to how the U.S. courts acted with enhanced creativity in the establishment of the right of privacy. It would also follow the post-1949 German courts which have been bold and active institutions in enunciating and working out the parameters of a liability for infringing upon posthumous personality rights.

F. In Addition: Broadening the Palette of Available Remedies

As regards the limited variety of remedies available in Anglo-American media and entertainment law, a further shortcoming must be addressed.

1. Right of Reply

More than thirty years after the U.S. Supreme Court's ruling in *Miami Herald v. Tornillo*,[251] U.S. courts are still neglecting alternatives to exorbitant damage awards. For example, a right of reply—the historical roots of this concept are found geographically in France and functionally in press law[252]—is viewed with skepticism in the Anglo-American countries, but is taken for granted on the European Continent[253] and elsewhere in the world.[254] In *Miami Herald v. Torn-*

248. Airedale NHS Trust v. Bland, [1993] AC 789, 829. In a complaint by the Tolkien family, the British Press Complaints Commission (PCC) decided that it was not possible to invade the privacy of someone who was dead (26 January 2003, Report 62). *See supra* note 12, at 37, First Cumulative Updating Supplement, 4.55.

249. In the U.S. the orphans' courts are in charge. Orphans' courts are a mechanism for dealing with wills and estates in some jurisdictions on the East Coast. It appears that probate courts serve a similar function in other states.

250. Stern, *supra* note 26 (avering that false light invasion of privacy, "defamation's half-sibling", has caused much criticism due to overlap and duplication, thus proposing a supplementary new tort of wrongful misrepresentation of living characters).

251. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

252. Hannes Rösler, *Pressegegendarstellungen gegen Meinungen – das europäische Erwiderungsrecht als Maßstab?*, ZRP 1999, 507 note 1 and 2.

253. *See* the Council of Europe's Recommendation Rec (2004) 16 of the Committee of Ministers to member states on the right of reply in the new media environment adopted by on Dec. 15,

illo, the Court ruled that the right of reply statutes passed by some States, requiring newspapers that had criticized political candidates to give them space to respond, infringed the First Amendment. In contrast to the general concept of the special responsibility of the media in Europe, the Supreme Court claimed that press responsibility was a desirable goal, but could not be ordained by law, as there is no corresponding mandate in the Constitution.[255] The government could not force a newspaper to publish information. In broadcasting, though, the equal opportunities requirement of the Federal Communications Commission based on Section 315 of the Communications Act requires equal air time for all major candidates competing for political office. However, the preceding broader fairness doctrine, which was the model for the mentioned States' press rules and which required radio and television broadcasters to air contrasting views on controversial public issues, was abolished in 1987 (though it had been held to be constitutional in 1969).[256]

In contrast to the United States, the broadcasting laws of the European Continent allow rights of reply for everyone sufficiently affected; that is, not just for candidates. In Germany the *Gegendarstellung* is limited to factual statements, whereas the French *droit de réponse* can also be invoked against opinions, but the costs have to be partly borne by the responding party.[257]

A right of reply in the U.S. would be especially easy to put into practice on the Internet, as it offers comparatively cheap and effective methods of replying

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2004.

254. *See* JESSICA ANNABELL EBERT, DIE GEGENDARSTELLUNG IN DEUTSCHLAND UND DEN USA – DAS GEGENDARSTELLUNGSRECHT ALS BEITRAG ZUR GEWÄHRLEISTUNG VON PERSÖNLICHKEITSSCHUTZ UND MEINUNGSVIELFALT IN DEN MASSENMEDIEN, 1997; KATERINA KOCIAN ELMALEH, GEGENDARSTELLUNGSRECHT, DROIT DE RÉPONSE: EINE RECHTSVERGLEICHENDE STUDIE ZUM MEDIENRECHT VON DEUTSCHLAND, FRANKREICH UND DER SCHWEIZ, 1993; BIRTE TIMM, TATSACHENBEHAUPTUNGEN UND MEINUNGSÄUßERUNGEN – EINE VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND DES US-AMERIKANISCHEN RECHTS DER HAFTUNG FÜR EHRVERLETZENDE ÄUßERUNGEN (1996); Rösler, *supra* note 252; *see also.* Alexander Bruns, *Persönlichkeitsschutz und Pressefreiheit auf dem Marktplatz der Ideen*, JZ 2005, 428 (commending—with comparative perspective—the French system of legal remedies).

255. *Miami Herald*, 418 U.S. at 256. In U.S. law, a great deal of preferential treatment is given to the press, but mostly not arising from constitutional sources. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 528 (2002).

256. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (due to scarcity of the broadcasting spectrum). This physical scarcity argument is not persuasive any longer. *See also* Hugh Carter Donahue, THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT? 76-78 (1989); Guy E. Carmi, *Comparative Notions of Fairness: Comparative Perspectives on the Fairness Doctrine with Special Emphasis on Israel and the United States*, 4 VA. SPORTS & ENT. L.J. 275, 291-92 (2005).

257. Rösler, *supra* note 254 (with further references). For more on the German right of reply, see Friedrich Kübler, *Gegendarstellung und Grundgesetz*, AfP 1995, 629; Rolf Groß, *Die Gegendarstellung im Spiegel von Literatur und Rechtsprechung*, AfP 2003, 497; Walter Seitz, German Schmidt, & Alexander Schoener, DER GEGENDARSTELLUNGSANSPRUCH – PRESSE, FILM, FUNK UND FERNSEHEN (3d ed. 1998); Benjamin Korte, DAS RECHT AUF GEGENDARSTELLUNG IM WANDEL DER MEDIEN (2002).

that save on print, paper and high distribution costs.[258] Many printed newspapers offer freely accessible online-versions (e.g. the content of the New York Times is offered mainly without charge). Where implemented, there could be a section or link after the press text offering or leading to the reply. This concept is long-sighted since media content on the Internet is growing dramatically and this is putting the traditional publishing companies under pressure to publish online. Moreover, in the age of the Internet the physical scarcity doctrine of the electromagnetic spectrum (whereby the limited nature of cable slots on telephone poles etc. constitutes a "natural monopoly") used by the Supreme Court to justify a hands off approach to the press, is of only limited persuasiveness.[259]

These suggestions would be incomplete without exploring the consequences of a new right of reply.[260] This novel instrument would undoubtedly shift U.S. law in three respects: first, in lieu of monetary compensation it would permit an immaterial form of remedy that could be used to put a cap on high damage verdicts in defamation law;[261] second, it would partly mitigate the difficulty presented by the actual-malice standard; and, finally, it would add an equal chances dimension to the free market of ideas.

2. Publication Ban and other Reliefs

The obligation to remove a work from the market is a very problematic infringement. German courts are very careful with decisions in that direction.[262]

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258. *See* David R. Johnson & David Post, *Law and Borders—The Rise of the Law in Cyberspace*, 48 STAN. L. REV. 1367, 1381-82 (1996) (favoring this proposition). However, the cost aspect is not everything as the Supreme Court stressed in *Miami Herald*, 418 U.S. at 258: "Even if a newspaper would face no additional costs to comply with a compulsory access law [...] the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." However, the Court found: "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

259. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

260. However, it is unclear if a posthumous "Gegendarstellungsrecht" exists so that relatives could, for example, enforce the right to publish a reply that was still written by the deceased. In cases of infringement of the dimity, there exists a posthumous right of reply. *See* Roland Rixecker, *Anhang zu § 12 Das Allgemeine Persönlichkeitsrecht, in* MÜNCHENER KOMMENTAR ZUM BGB 245 (5th ed. 2006); *see also* Matthias Prinz & Butz Peters, MEDIENRECHT – DIE ZIVILRECHTLICHEN ANSPRÜCHE 134 (1999).

261. WEILER, *supra* note 3, at 141, and *supra* note 49.

262. *See* BverfG, Aug. 29, 2007, docket numers 1 BvR 1223/07 to 1 BvR 1226/07, currently only reported at juris online/Entscheidungen. (The decision allows the broadcast of the TV drama "Contergan—A Single Tablet" in November 2007. The film is about the historical backgrounds of a pharmaceuticals scandal involving the sleeping pill "Contergan" that was on the market from 1957 to 1961. The taking of such a tablet during pregnancy led to about 10,000 to 12,000 disabled children worldwide. The pharmaceuticals company Grünenthal had complained about gross historical

Nonetheless, in the summer of 2007, after years of litigation[263] and for only the second time after the *Mephisto* case, the German Federal Constitutional Court ruled in favour of an injunction prohibiting the publication of a book.[264] The case concerned the highly biographical novel *Esra*, by Maxim Biller, who is known for his viperish and polemic attitude. The book had been published in 2003 and tells the unsuccessful love story of Esra and the first person narrator. The Court ruled that the book infringes upon the privacy of Biller's former (but alive) girlfriend, because she was unambiguously personified by Esra and the novel graphically narrates the most intimate details of the sexual relationship between the literary character and the first person narrator.

It was held that the artistic freedom "in the case of a literary work in the form of a novel is to be qualified in a way specific to art."[265] Therefore a novel has to be examined differently from a biography or a specialized book. As a basic principle it was laid down that an "assumption of the fictionality of a literary text exists",[266] even in a case where real life persons are recognizable. The right to utilize models from reality is part of the artistic freedom. For that reason, the mother of Biller's former girlfriend was not awarded with an injunction herself, although she was portrayed as a dominant, manipulative and mentally disordered alcoholic. A prohibition requires more than mere recognizability.

But the proximity of personal privacy and human dignity leads to the necessity of the "absolute and inviolable protection of a core area of private life."[267] This includes "in particular the expression of sexuality," so that the artistic freedom has to give way.[268] The Court writes in this regard:

> A direct correlation exists between the degree to which the author creates an aesthetic reality on the one hand and the intensity of the infringement of privacy on the other hand. The more model and image correspond, the more the privacy is infringed. The more the artistic reproduction touches on particularly protected dimensions of privacy, the higher the degree of fictionalization has to be to prevent an infringement of privacy.[269]

The German Federal Constitutional Court found fault with the "detailed narration of the most intimate details of a woman, who was evidently identifi-

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inaccuracies, for example, regarding the reluctance to compensate victims.) *See* Bernd Rüthers & Michael Berghaus, *Der ungerechte Zorn des Dichters – oder: Literaturgeschichte contra Persönlichkeitsschutz? Zur Veröffentlichung ehrverletzender Falschbehauptungen in Schriftstellerbriefen*, JZ 1987, 1093.

263. *See* LG München, ZUM 2004, 234; OLG München, Apr. 6, 2004, docket number 18 U 4890/03; BGH, NJW 2005, 2844; *cf.* Karl-Heinz Ladeur & Tobias Gostomzyk, *Mephisto reloaded – Zu den Bücherverboten der Jahre 2003/2004 und der Notwendigkeit, die Kunstfreiheit auf eine Risikobetrachtung umzustellen*, NJW 2005, 566.

264. BVerfG, June 13, 2007, docket number 1 BvR 1783/05, currently only reported at juris online/Entscheidungen.

265. *Id.* at headnote 2.

266. *Id.*

267. *Id.* ¶ 88.

268. *Id.*

269. *Id.* at headnote 4.

able as the intimate partner of the author."[270] The Court criticized too little artistic modification and too much exhibitionistic realism, which led to the easy recognizability of Esra, especially as her real-life model had been awarded with the German film prize.[271] Again it has to be stressed that such prohibitions are exceptions under German law. The case of *Esra* is particularly exceptional in that the author is seen as consciously instigating the recognizability of concrete persons and the depiction of intimate details. For this reason reality superseded artistic fiction. Nonetheless, it is certainly regrettable that even an amended reprint covering the reproaches did not stand a chance.

A U.S.-American prohibition to publish a defamatory work would collide with the doctrine barring prior restraint,[272] historically seen as the sole purpose of the First Amendment[273] and now regarded as one of its core guarantees.[274] The constitutional doctrine that, apart from a few narrow exceptions, the government cannot prohibit a publication beforehand, even though the communication is clearly assailable after publication in criminal or other proceeding, is quite firm. So here the idea of court orders to take the product in question from the market[275] or not to publish it at all is of very limited persuasiveness. But the U.S. discussion could be enriched by focusing on the expansion of the range of alternatives to monetary damages,[276] such as the mentioned right of reply, but

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270. *Id.* ¶ 102.

271. In the novel this was changed into Fritz-Lang-prize (referring to Fritz Lang (1890–1976) who created the 1927 silent science fiction movie *Metropolis*).

272. *Cf.* Christina E. Wells, *Bringing structure to the law of injunctions against expression*, 51 CASE W. RES. L. REV. 1 (2000) (arguing that the Supreme Court's jurisprudence heavily disfavoring injunctions against expression is in disarray); Helmut Steinberger, *Freedom of the Press and of Broadcasting and Prior Restraints, in* VÖLKERRECHT ALS RECHTSORDNUNG, INTERNATIONALE GERICHTSBARKEIT, MENSCHENRECHTE, FESTSCHRIFT FÜR HERMANN MOSLER 909 (Rudolf Bernhardt et al. eds., 1983); for recent developments in English law, see A. T. H. Smith, *Freedom of the Press and Prior Restraint*, 64 CAMBR. L.J. (2005), 4.

273. Especially based on the influential COMMENTARIES ON THE LAWS OF ENGLAND by William Blackstone (1723–1780), published from 1765–1769; *see* Lewis, *supra* note 83, at 54, 60.

274. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (holding that a state statute allowing injunctions against periodicals would be a prior restraint and is thus invalid under the First Amendment).

275. *See generally,* Marian Paschke & David-Alexander Busch, *Hinter den Kulissen des medienrechtlichen Rückrufanspruchs*, NJW 2004, 2620; Josef Franz Lindner, *Der Rückrufanspruch als verfassungsrechtlich notwendige Kategorie des Medienprivatrechts*, ZUM 2005 203; MALTE MATTHIAS KLINGE, POSTMORTALER PERSÖNLICHKEITSSCHUTZ GEGEN BUCHVERÖFFENTLICHUNGEN IM SYSTEM DES FRANZÖSISCHEN DELIKTSRECHTS: EINE RECHTSVERGLEICHENDE ANALYSE ANHAND KASSATIONSGERICHTLICHER URTEILE, 2006.

276. *See* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 856 (1985); Joseph H. King, Jr., *Pain And Suffering, Noneconomic Damages, And The Goals Of Tort Law*, 57 SMU L. REV. 163 (2004); Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231 (2003); John Hayes, *The Right to Reply: a Conflict of Fundamental Rights*, 37 COLUM. J.L. & SOC. PROBS. 551, 569-575, 583, n.140 (2004) (dealing with English, German, French and European law and arguing that many restrictions present in the Uniform Correction or Clarification of Defamation Act 1994 could also be transferred just as effectively to a U.S. right to reply); Gyong Ho Kim & Anna R. Pad-

also the withdrawal, correction or clarification of factually false statements.[277]

3. Uniform Correction or Clarification of Defamation Act

Such alternative models are not unthinkable under U.S. law as proven by the 1994 Uniform Correction or Clarification of Defamation Act (UCCDA), proposed by the National Conference of Commissioners on Uniform State Laws, which provides for retractions. It creates a significant incentive to publish prompt corrections or clarifications of false statements in print, electronic, and Internet media that tend to injure an individual's reputation. A defamed person can only maintain an action for defamation if he or she makes a timely request for a correction or clarification. In libel lawsuits where a correction or clarification has been made in a way to reach the segment of the population at large, the UCCDA limits the types of damages that can be recovered. Monetary damages can only be awarded for actual economic loss, not for loss of reputation or punitive damages. But, however sensible this approach appears, the UCCDA is presently only adopted by North Dakota. The UCCDA could substitute for the patchwork of state retraction and correction statutes and should be passed by more states since a quickly-restored reputation is a better remedy than awarding enormous damages that promote a gold-digging mentality. It also prevents big publishing houses from gaming the system by printing defamatory material and taking the risk that they will not be brought to court or that the book will be a bestseller and is worth the cost of damages.

VI.
CONCLUDING REMARKS

Perhaps this Article's focus on the German constitutional and tort law on the one hand and the sometimes markedly different common law practice on the other hand[278] can only provide food for thought. This might be true in regard to the proper scope of freedom of expression, the reform of remedies in media and

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don, *Uniform Correction or Clarification of Defamation Act: An Alternative to Libel Suits*, 20 COMM. AND THE LAW 53 (1998); Charles Danziger, *The Right of Reply in the United States and Europe*, 19 N.Y.U. J. INT'L. L. & POL. 171 (1986); Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 WTR COMM. LAW 24 (2002) (considering England, the Netherlands, France, Germany, Spain, and Italy); *see also* Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986).

277. Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. OF COMP. & INT'L L. 283, 285-291 (2000); RENATE DAMM & KLAUS REHBOCK, WIDERRUF, UNTERLASSUNG UND SCHADENSERSATZ IN DEN MEDIEN (3d ed. 2007).

278. But not on the criminal law, which is generally of declining importance in this matter. *See* Friedrich Kübler, *Rechtsvergleichendes Generalreferat, in* DIE HAFTUNG DER MASSENMEDIEN, INSBESONDERE DER PRESSE, BEI EINGRIFFEN IN PERSÖNLICHE ODER GEWERBLICHE RECHTSPOSITIONEN 123, 130-31 (Gerald Dworkin et al. eds., 1972); *cf.* JOACHIM WOLF, DER STRAFRECHTLICHE SCHUTZ DER PERSÖNLICHKEIT GEGEN UNBEFUGTE KOMMERZIALISIERUNG: UNTER BERÜCKSICHTIGUNG DES SCHUTZES DURCH DAS ZIVILRECHT 194 (1999); *contra supra* note 247.

entertainment law (and the role of courts more generally) and the sanctity of "the dead don't hear" rule. In summary, the traditional common law position is that the publication of defamatory material about a deceased person does not give rise to a cause of action by relatives or an organization having the task of protecting the deceased's reputation, and that even a commenced action often has no survivability. This approach is contrasted with the wide-ranging protection for deceased persons in Germany, which is only—quite flexibly—limited by the passage of time.

Regarding *Hoodlum*'s portrayal of Dewey, mentioned above, there is at least a theoretical basis for relatives to file a claim under German law. There are some parallels to the *Mephisto* case concerning the a priori value of artistic works. Indeed, there were even more reasons in favor of publishing Klaus Mann's novel. Written in the difficult times of exile, his book pursued the noble ambition of criticizing a totalitarian regime, of warning the German nation, and of revealing the individuals (especially artists)[279] striving for success and social advancement in a dictatorship. Klaus Mann did not primarily write for financial gain or entertainment. In contrast, he was driven by the seriousness of the matter and the torment of seeing his own blindfolded nation heading down the road to disaster.[280]

While Klaus Mann artistically exaggerated his figure, modeled after Gründgens but bearing a different name, the makers of the *Hoodlum* film expressly named Dewey and showed him in a clear historical setting performing acts that the average viewer would believe to be accurate, even though he might not have been involved in them at all.[281] It is therefore quite likely that the film makers knew of the falsity or acted with reckless disregard of the truth.[282] In either case there is an aspect of defamation in the fiction. Thus the question is one of alienation of the persona used for inspiration. But as the film makers did not attempt such alienation of persona, and as the bribery of Dewey is just a historic lie, this artistic depiction does not deserve extensive protection. After all, it would have been an easy and legally proportional interference of artistic freedom for the film makers to have used a more abstracted depiction of Dewey.

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279. Another Nazi affiliated artist was Leni Riefenstahl (1902–2003), who shot the 1934 film "Triumph des Willens" about the "Reichsparteitag" in Nürnberg, and a documentary about the 1936 Olympic games in Berlin.

280. Many regard the result of the case (that is, the printing ban on Klaus Mann's *Mephisto*) as judicial error. *See, e.g.*, KARL LARENZ & CLAUS-WILHELM CANARIS, 2/2 LEHRBUCH DES SCHULDRECHTS 529 (13th ed. 1994). *Cf.* Reinhard Zimmermann, *Gesellschaft, Tod und medizinische Erkenntnis – Zulässigkeit von klinischen Sektionen*, NJW 1979, 569, 573.

281. In contrast to the undeniable involvement of Gründgens in the Nazi regime, *see* Töteberg *supra* note 123; *see also* WEILER, *supra* note 3, at 196 (regarding *Hoodlum*).

282. The proof of such actual malice is commonly required for false light claims. *Cf.* Time Inc. v. Hill, 385 U.S. 374, 388 (1967) (holding that the First Amendment precluded recovery for "false reports of matters of public interest in the absence of proof that the material was published with knowledge of falsity or in reckless disregard of the truth."); Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974).

In order to avoid a gap in legal protection that can have the unintended affect of chilling freedom of speech, courts must step in on behalf of the deceased, because the dead are speechless. Only then can courts achieve the principle of equal chances, necessary to finding a balance between freedom and equality, discussed here. This concept can also be used to explain why politicians and people with easy access to the public should be less protected than others: they can defend themselves. But after death this opportunity has passed for them like for everybody else. This Article has also highlighted the lack of coherence between "the dead don't hear" rule on the one hand, and the defamation law and the criminal libel statutes on the other hand, in order to support the development of a posthumous personality right.

In addition, the trends of digitalization and internationalization speak in favor of developing dignitarian posthumous personality rights in the United States. Taking the practice of the entertainment business into account, the perils of falsifications will gain in significance by further technological progress allowing for the rendition of dead persons as virtual characters nearly indistinguishable from their deceased model as part of films, "documentations," music clips, advertisements, or—with even more freedom for the viewer—video games and progressed interactive amusements.[283] In addition, the interpenetrations of worldwide collecting, marketing and distribution of information and entertainment products also increase the necessity for transregional standards of protection eliminating borders of national private law,[284] as well as for clear (and forum-shopping limiting) rules of tortious adjudicatory authority and applicable private international law.[285] Thus, the extended sphere of mass communication urges for an adjustment of the existing regime to balance freedom of expression and personality rights.

But even when one bears in mind—as stressed above—the different indigenous social conditions and legal settings, the question remains whether German practice and scholarly arguments could incite a rethinking process in U.S. law that is still imbued by constitutional and cultural exceptionalism due to the rigid and formal understanding of the First Amendment. Taking into account the path-dependency of U.S. First Amendment jurisprudence,[286] reform will

283. Though in a "History v. Hollywood" situation—in other words in a Marilyn-Monroe-type, or James-Dean-type case—this would often have a strong economic or publicity impact. *See* Matthias Lausen, *Der Schauspieler und sein Replikant*, ZUM 1997, 86; Holger Gauß, *Oliver Kahn, Celebrity Deathmatch und das Right of Publicity – Die Verwertung Prominenter in Computer- und Videospielen in Deutschland und den USA*, GRUR Int. 2004, 558.

284. *See* Hannes Rösler, *Eliminating of National Private Law—Potentials Analysis of EU Private Law, the CISG and the Principles*, 3 THE EUROPEAN LEGAL FORUM – FORUM IURIS COMMUNIS EUROPAE [EuLF] – English edition 205 (2003).

285. For the place of publication of Internet material as well as jurisdictional issues of cyberlibel, *see* High Court of Australia opinion in *Dow Jones & Co. v. Gutnik*, (2002) 210 C.L.R. 575 (Austl.). The decision has attracted global interest, since it ruled that an article on the Internet is considered to be published at the place it is read, rather than the place it once originated.

286. *See* Frank I. Michelman, *Integrity-Anxiety? in* AMERICAN EXCEPTIONALISM AND HUMAN

likely involve some shift from speaker-focused values toward community-oriented values and toward imbedding the First Amendment in a larger constitutional and philosophical setting which includes dignity as a basic underlying value. Indeed, U.S. personality and free speech law, based on the concept of liberty and especially protective against government intrusions,[287] already possesses a potential countervailing dignitarian approach. Protection of a posthumous personality right as a broader expression of a fair social interaction could ultimately contribute to the establishment of a system of greater fair speech.[288]

RIGHTS, *supra* note 105, at 241.

287. Whitman, *supra* note 119, 113 YALE L.J. 1151, 1161 (2004) (contrasting this at 1211 with the Continental traditions of dignity, respect, and personal honor, where in other words a kind of socially based personhood gives everybody the right to a respectable public face).

288. *See generally* 1 and 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press, Boston 1987) (for the communicative concept of an "ideal speech situation").