

LEGAL CASES ON POSTHUMOUS REPUTATION AND POSTHUMOUS PRIVACY: HISTORY CENSORSHIP, LAW, POLITICS AND CULTURE

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“One’s good name determines the manner in which one perceives oneself and how one’s peers and society relate to one. In effect, the only asset of many people, both public servants and those working in the private sector, is their reputation, which they cherish as life itself. This applies to both the living and the dead. We must protect the dignity of the deceased and their good name.”¹

“The dead have no rights, and they suffer no wrongs.”²

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1. HCJ 6126/94 *Szenes v. Broadcasting Authority* 53(3) PD 817 [1999] (Isr.).
2. James Stephen, *Libels on the Dead*, in 11 VA. L.J. 260, 261 (James C. Lamb ed., vol. 11 1887).

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ABSTRACT

It is a well-established doctrine in common law countries that law does not protect the reputation and privacy of the deceased. However, many countries, including Western European democracies, protect them

to various extents by confining free expression and exchange of information and ideas regarding the dead and the past. Such an instrumental use of defamation law and privacy law can provide censorship of history with justifiable legal grounds. Based on an analysis of representative legal cases on posthumous reputation and posthumous privacy collected across the world, this article tries to offer *a thorough analysis* of the phenomenon of how legal protection of posthumous reputation and privacy can be used to carry out censorship of history.

After a brief introduction, Section II will explain the concepts of posthumous reputation and posthumous privacy and their relationship with history censorship in theory, so that it is clear why history censorship can be achieved via protection of the two posthumous interests. Section III will briefly discuss the related legal apparatuses that can be used to protect the deceased's reputation and privacy in different jurisdictions, whose abuse or misuse may lead to history censorship. Section IV will classify the collected legal cases on posthumous reputation and privacy into eight categories and discuss the circumstances of history censorship in each category. Section V will deepen the case analysis by illustrating the international criteria of free speech right protection, defining the icons of history censorship, explaining the dilemma between historical truth and judicial truth confronted by judges, and clarifying the negative impacts on law itself. Section VI will further explore the interactions among law, politics and culture, which may account for the differentiated legal treatments of the two posthumous interests in different jurisdictions. The article concludes with an invitation to re-consider the law's role in resolving posthumous defamation and privacy controversies when historical narratives are involved, and proposes how to achieve better decisions in future cases.

I. INTRODUCTION

In *Responsible History*, Antoon De Baets drew a vivid scenario of how history censorship can be achieved in three effective ways. They are control of history archives, censorship of school history textbooks, and legal protection of the dead's reputation and privacy.³ According to

3. See ANTOON DE BAETS, *RESPONSIBLE HISTORY* 14 (2008) (explaining censorship of history is a category of abuse of history, which in more abstract sense, according to De Baets, is "the use of history with intent to deceive"); MARGARET MACMILLAN, *THE USES AND ABUSES OF HISTORY* xiii (Profile Books Ltd. 2010)(2008) (explaining that the abuse of

the author, defamation law functions, in particular, "as disguised instruments of censorship,"⁴ creating "a chilling effect on the expression and exchange of historical information and ideas."⁵ This is well observed in the author's detailed analysis of twenty-two legal cases on posthumous defamation and privacy invasion collected from eight Western European countries from 1965 to 2000.⁶

Beyond these legal cases and across the world, posthumous reputation and posthumous privacy under many circumstances are never simple or trivial issues, as they seem to be at first sight. To regard the two in such a way is *both naive and a blind denial of the complexity of communal life*. In reality, they involve too many other important issues beyond merely the dignity and respect of the deceased, ranging from collective memory, family repute and honor, monetary interests, group honor, national identity, religious dignity, diplomatic controversies, posthumous justice of war crime victims, biography writing, history controversies, free expression rights, euthanasia, etc. They do matter, especially for many communities where legal cases on reputation and privacy of the deceased have been brought before courts for resolution on the following grounds.

First, families of the deceased usually care not only about the dead's reputation and privacy, but also more about their own reputation or honor and privacy affiliated with the dead's, not even mentioning the economic interests in connection with the deceased's names, which is particularly true in the case of dead public celebrities. Family members thus are the most strongly motivated protectors of the deceased's reputation and privacy. Second, people like close friends, colleagues or even unknown strangers who enjoyed benevolence and friendship of the deceased, admired their past achievements, or shared similar beliefs and memories with the deceased, or those who once participated in and supported joint projects, may all defend the deceased's reputation and honor to various extents against destruction of such goodness that they cherish in life. Furthermore, when leading politicians, national heroes (or heroines), military or religious martyrs, and public celebrities are affiliated with collective honor or reputation of a social, religious or political group, their reputations will not be only a personal or family issue, but rather a constituent of group honor and identity. Their

history is defined as for the purposes of "creating one-sided or false histories to justify treating others badly, seizing their land, for example, or killing them.")

4. See DE BAETS, *supra* note 4, at 3.

5. See *id.* at 90.

6. See *id.* at 3.

reputation will be under close monitoring and protection of the social group, or even political state.

Lastly and most importantly, the protection of posthumous reputation and privacy depends eventually on how a society treats the deceased in general. If a society treats them seriously with considerable respect, dignity, and authority, and the society is willing to follow the traditions and conventions well established in communal life, it will have stronger protection of posthumous interests, including reputation and privacy of the dead. In general, a society with an individualist nature prefers less protection of the dead than one of communal nature.

Moreover, moving from morality to legality, while common law countries in general firmly deny protection of posthumous reputation and privacy, this is not the case in other countries. For instance, in Germany, France, Malta, China, Israel, Taiwan, and Spain, the deceased's reputation and privacy are protected under the fundamental right to human dignity, or under more general rules protecting leaders of political state, or under memory laws, etc. Other countries, like Thailand and Turkey, even have specific regulations forbidding defamation of dead monarchs and political leaders. Albeit being taken as fundamental to democracy, free speech does not always win the battle against reputation and privacy – including those of the dead – even in democracies such as Germany and France. While protection is the case, how such laws balance the two posthumous interests with the right of free speech, and what make up the boundaries of protection deserve more detailed analysis. Though such legal practices and the underlying rationales seem eccentric to common law lawyers, they can be well explained and justified in specific political-social contexts.

In light of this, a discussion of the above issues will help illustrate the fact that while law has its own internal morality and logic,⁷ it can never be separated from specific political contexts, social ethos, and cultural backgrounds. It makes sense to analyze the related various legal apparatuses for protecting posthumous reputation and privacy, ranging from traditional blasphemy law, insult law and sedition law, to defamation law and privacy law, and to modern memory law and oblivion law. In explaining and comparing different approaches to posthumous reputation and privacy across the world, what is well observed in legal development is a general tendency shifting from privileged protection of reputation and privacy of the nobles and aristocrats, to more equal protection of ordinary people, from protection of the collective and political state, to more liberal protection of

7. See generally LON L. FULLER, *THE MORALITY OF LAW* 4 (Yale Univ. Press 1969).

individuals.

Following De Baets' initiative, this paper intends to bring his research of legal protection of posthumous reputation and privacy in history censorship a step further in three directions. First, it will broaden his analysis beyond Western Europe by analyzing more representative legal cases collected from across the world. Second, it will provide a more structured analysis of the law's potential role and various mechanisms in implementing history censorship via protecting posthumous reputation and privacy, as well as the accompanied problems. It will also explain the political and cultural backgrounds that have shaped the use of law for this purpose. Third, this paper will offer a more thorough explanation of the phenomenon by engaging in theoretical discussion of posthumous reputation and privacy and their general role in the social order. Thus, this paper is both analytical and descriptive, both theoretical and practical, with the main purpose to **offer a thorough analysis** of how legal protection of the deceased's reputation and privacy can be used to restrict free speech and achieve history censorship.

Section II will explain the concepts of posthumous reputation and posthumous privacy and their relationship with history censorship in theory, so that it is clear why history censorship can be achieved by protection of the two posthumous interests. Section III discusses the legal apparatuses that can be manipulated to protect the deceased's reputation and privacy in law development, whose abuse or misuse may lead to history censorship to different extents. Section IV will classify the collected legal cases on posthumous reputation and privacy into eight categories and discuss the circumstances of history censorship in each category. Section V will deepen the case analysis by discussing regional and international criteria of free speech right protection, defining the icons of history censorship in such legal cases, illustrating the dilemma confronted by judges between historical truth and judicial truth, and explaining the negative impacts on law itself. Section VI will further explore the interactions of law, politics and culture, which can account for the differentiated legal treatments of the two posthumous interests in different jurisdictions. It concludes with an invitation to reconsider law's role in resolving posthumous defamation controversies when history narratives are involved, proposing how related history controversies should be resolved in the future.

II. POSTHUMOUS REPUTATION AND HISTORY CENSORSHIP

A. Reputation and Posthumous Reputation

An individual's reputation is the societal-moral judgment of the person based on facts considered to be relevant by a community; such facts include personal acts and characteristics, and these judgments are based on certain moral standards of that community.⁸ Reputation lies in reputational networks of various agents including friends, family members, colleagues, and all those who know a particular agent, even those who only read about the person but never meet him or her, or friends' friends.⁹ Reputation is important to a community in terms of mutual trust and cooperation formation, mutual treatment, social learning, social control etc.¹⁰ According to Robert Post, reputation can be understood as personal honor, indicating an individual's social status in a community, as intangible property consequent to personal achievements, and as human dignity based on equal respect.¹¹

Reputation is a concept related to, or somewhat overlapped with other concepts such as honor, dignity, respect, privacy, and personal identity in general. An important aspect of reputation is identity. Identity comes into being usually when a sort of reputation of an individual or a social group becomes strong enough for one to be distinguished from others. Therefore reputation is vital to identity formation in individual life. Privacy as information control also plays a role in identity formation in individual life.¹² In particular, reputation and privacy cannot be separated from each other since both are effective means of personal information management and personal boundary control.¹³

8. See LAWRENCE McNAMARA, *REPUTATION AND DEFAMATION* 21–22 (Oxford Univ. Press 2007).

9. See KENNETH H. CRAIK, *REPUTATION: A NETWORK INTERPRETATION* 6–9 (Oxford Univ. Press 2009) (noting in Craik's terms, social networks and "the outer tires").

10. JOHN WHITFIELD, *PEOPLE WILL TALK: THE SURPRISING SCIENCE OF REPUTATION* 7, 64, 102, 121 (John Wiley & Sons, Inc. 2011).

11. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 700 (1986); see also JAMES BOWMAN, *HONOR: A HISTORY* (Encounter Books 2007) (explaining a more detailed discussion of honour history and culture developments).

12. See, e.g., Mireille Hildebrandt, *Privacy and Identity*, in *PRIVACY AND THE CRIMINAL LAW* 43 (Erik Claes et al. eds., 2006); Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371 (2011); Clare Sullivan, *Privacy or Identity?*, 2 INT'L J. INTELL. PROP. MGMT. 289 (2008); Lisa M. Austin, *Privacy, Shame and the Anxieties of Identity* (Jan. 1, 2012) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=2061748> (last visited Oct. 12, 2014).

13. See generally Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3

Plainly, they are just two opposite presentations of one's self.¹⁴ In many cases, disclosure of private matters that deviate from commonly accepted social morals,¹⁵ can harm reputation,¹⁶ even if such disclosure is true, as seen in common law torts of public disclosure of private issues and false light.¹⁷ "Still, some invasion of privacy causes of action," according to Iryami, "do primarily involve loss of reputation and may inevitably lead themselves into defamation action."¹⁸ Reputation and privacy are closely affiliated with each other in that both are crucial components of human dignity, protected by constitutions and international treaties as fundamental human rights. Under the European Convention of Human Rights ("Convention"), a right of reputation is a right derived from Article 8, which prescribes the protection of family life or private life, or the right to privacy.¹⁹

(1998).

14. See, e.g., ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (Anchor 1959) (explaining the external self and internal self).

15. See, e.g., Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 *BUFF. L. REV.* 1 (1978); Richard A. Posner, *The Right of Privacy*, 12 *GA. L. REV.* 393 (1977) (arguing privacy is meant for personal secrecy that shall not be protected by law in general since it increases costs of market exchanges).

16. A telling example is the American *Steinbuch* case in which Steinbuch's graphic bed stories were disclosed by his ex-girlfriend Jessica Cutler in her blog and publicized on the Internet before millions of people. Steinbuch sued for invasion of privacy, which damaged his reputation meanwhile. See *Steinbuch v. Cutler*, 463 F. Supp. 2d 4 (D.D.C. 2006).

17. See ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 103-29 (Thomson West 2007). Disclosure of private matters and false lights are two of the major aspects of privacy invasion according to Prosser; the other two are appropriation of images and the like, and the trespass of private spheres. See William L. Prosser, *Privacy*, 48 *CAL. L. REV.* 383, 389 (1960).

18. 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, 1099 (2006).

19. Since *Chauvy v. France*, the right to reputation has been gradually established by the Eur. Ct. H.R. under Article 8, which was followed in its sequent rulings. See Pfeifer v. Austria, App. No. 12556/03, para 35 (Eur. Ct. H.R. Feb. 15, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-12556/03>,"itemid":["001-83294"] (last visited Dec. 3, 2014); see *White v. Sweden*, App. No. 42435/02, para. 26 (Eur. Ct. H.R. Sept. 19, 2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76894> (last visited Dec. 3, 2014). The judgment was followed and strengthened later. *White*, App. No. 42435/02, para. 26. In the most recent *Lindon v. France*, for instance, Judge Loucaides in his concurring opinion criticized the over protection of freedom of speech in past cases by the Court and expressed the right to reputation should always be considered as safeguarded by Article 8, "as part and parcel of the right to respect for one's private life." *Lindon v. France*, App. Nos. 21279/02, 36448/02 (Eur. Ct. H.R. Oct. 22, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82846> (last visited Dec. 3, 2014).

Posthumous reputation, by analogy, is the social evaluation and assessment of the deceased's acts and characteristics. Plainly, posthumous reputation is what we think about the dead and their past acts. Our reputations "outlive us," Whitfield noted, "advancing or damaging our interests[, just as they did during our lives, for instance,] influencing the way people treat our children."²⁰ Posthumous defamation accordingly refers to the communications or expressions that bring disrepute or dishonor to the deceased, degrading their social status, or making others think less of them. Posthumous reputation has been used to support the concept of posthumous harm in philosophical debates.²¹ According to the proponents, the deceased's reputation could be damaged.²² However, the philosophical arguments of posthumous harm is apparently not enough to provide a justification for legal protection in Western democracies, unless the dead occupy a special status so that their reputations must be protected for other reasons like social ordering or public order.²³

After death, one's reputation in general will diminish or disappear gradually, as his or her reputational networks become weakened, information regarding the dead stops disseminating, and less and less people know the deceased. In certain circumstances, however, the deceased's reputation could grow even stronger.²⁴ Similar to the living, the dead's reputation closely relates to concepts of privacy, honor, respect, and dignity. For instance, the disclosure of the deceased's private issues can alter their posthumous reputations in significant ways, in particular, the reputations of public figures and celebrities.²⁵ When we discuss posthumous reputation and the related legal issues, those

20. WHITFIELD, *supra* note 11, at 7.

21. See generally DANIEL SPERLING, *POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES* 15–23 (Cambridge Univ. Press 2008) (discussing the philosophical debate of posthumous harm); JOHN MARTIN FISCHER, *THE METAPHYSICS OF DEATH* 53, 126, 160, 179–83 (Stanford Univ. Press 1993).

22. See Joel Feinberg, *The Rights of Animals and Unborn Generations*, in *PHILOSOPHY AND ENVIRONMENTAL CRISIS* 43, 57–60 (William T. Blackstone ed., 1974); 1 JOEL FEINBERG, *Harm to Others*, in *THE MORAL LIMITS OF THE CRIMINAL LAW* 79–82 (Oxford Univ. Press 1984).

23. See generally *infra* Section VI.B.

24. For instance, through biography and "the chorus of survivors", the deceased may be known by more people than before their death. See CRAIK, *supra* note 10, at 173–99.

25. A more recent example is the swift of the public attitudes to Jimmy Savile, the famous British entertainer, after the posthumous disclosure of his sexual abuse cases. See *Savile Abuse Claims: BBC Must 'Command Credibility'*, BBC NEWS (last updated Oct. 8, 2012, 11:13 PM), available at <http://www.bbc.com/news/uk-wales-south-east-wales-19878433> (last visited Dec. 3, 2014); see generally Bo Zhao, *Public Figures and Their Posthumous Reputation*, 59–60 *STORIA DELLA STORIOGRAFIA* 87 (2011) (discussing public figures posthumous reputation).

concepts are usually mentioned in plaintiffs' complaints and court verdicts to justify their claims. The big difference is that after death, the dead are no more and have no control of their own reputation and privacy in person, which mostly are at the mercy of the living.

B. Posthumous Reputation and History Censorship

"The dead belong to history[,]”²⁶ and “history is replete with tales of people[,]”²⁷ in particular dead people. This is true first with respect to dead public figures, especially political figures. When a defamation claim concerns a public figure, the related truth is relevant to narratives of public history.²⁸ No one would deny that human history is made by such persons and filled with their names and stories, although unknown ordinaries certainly are no less important. It is not exaggerated to say that the study of our past is the study of those who have left traces in history and memory.²⁹ Therefore history is in a sense the narrative composed of reputations of the deceased, the record of their past deeds, and the assessment of such deeds and their characteristics by the living. Intentional control of speeches and expressions regarding the dead's reputation, either facts or opinions, may lead to censorship of history in different degrees on the following grounds.

Posthumous reputation matters to the dead's family and acquaintances in view of individual memories.³⁰ Changes in individual reputations of the deceased can threaten or alter the memory of their family members, which is possibly not satisfactory and therefore will encounter the living's resistance and interference. Another important dimension of posthumous reputation lies in a collective sense. It is true that not only do individuals have personal reputations, but many collectives such as commercial institutions and NGOs also have personal reputations.³¹ We also talk about reputation of a people or a

26. See Pierre Guillaume, *Law and History*, VHO 31 (2008), available at <http://www.vho.org/aaargh/fran/livres7/PGLawhistory.pdf> (last visited Dec. 3, 2014).

27. RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 119 (2010).

28. Daphne Barak-Erez, *Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court*, 16 CAN. J. LAW & SOC. 93, 95 (2001).

29. See Ariela J. Gross, *The Constitution of History and Memory*, in *LAW AND THE HUMANITIES* 416, 416-23 (Austin Sarat et al. eds., 2010) (explaining the relationship between memory and history is controversial among historians and sociologists).

30. See *id.* at 416-31 (discussing collective memory and individual memory and law's role in their formation).

31. For instance, reputation of the American FDA was regarded as a powerful instrument in drug regulation. See generally David T. Zaring, *Regulating by Repute*, 110 MICH. L. REV 1003 (2012).

national state, in more collective sense, such as the reputation of Jews and Chinese, or the Americans, or the French. Here, reputation is more related to *collective identity* or *collective honor* in that it can distinguish one ethnic group of people from another. The victim status of the Nazi Holocausts, for example, has been deemed a strong collective identity of the Jewish community.³² Even for private associations, such as local clubs, collective reputation and honor matters when members act in improper ways, posing threats to internal order.³³

In some cases, individual reputations and identities are regarded as heritage or legacy of ethnic groups, social groups or religious groups, so that as the representatives of collective identities, such reputations and identities deprive protection from well-accepted mores and ethics. In this regard, strong historical figures, such as Mao and Stalin, are not always approached in negative ways by their own nationals; many hold great respect for the two deceased and regard them as inviolable, great heroes. Similarly, Washington and Lincoln are icons of the American's national characters and their reputations are public goods, albeit still under public scrutiny.³⁴ Their posthumous reputations are significant parts of national history and national identities.

Since the dead are important to our understanding and assessment of the past,³⁵ they are important targets of history censorship. Thus an unavoidable part of history censorship is the "systematical control" of posthumous reputation. This includes a control of both factual accounts of the dead's past behaviors and the related judgments. This includes a twist of "well established truth of the past", or as selective use of the past, or as intended blurs of facts or opinions, etc. Political states are not the sole censor. Posthumous reputation is related to history censorship in the following ways.

First, the dead themselves are the censors of *post mortem*

32. Amit M. Schejter, 'The Pillar of Fire by Night, to Shew Them Light': Israeli Broadcasting, the Supreme Court and the Zionist Narrative, 29 MEDIA CULTURE SOC. 916, 929 (2007) (arguing the significance of Holocaust victims status in the creation of a shared collective identity for the Jewish community).

33. In *Bath Club*, the plaintiff was expelled for his defaming another member's deceased father, which was deemed as injurious to the character and interests of the club. See generally F.P. Walton, *Libel upon the Dead and the Bath Club Case*, 9 J. COMP. LEGIS. & INT'L L. 1 (1927); see also Götz Böttner, *Protection of the Honour of Deceased Persons – A Comparison Between the German and the Australian Legal Situations*, 13 BOND L. REV. 5 108, 116 (2001).

34. Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 745 (1986).

35. For instance, see Craik's explanation of how biography studies relate closely to cultural history and their relationship with posthumous reputation. See CRAIK, *supra* note 10, at 194-99.

reputations. Before death, those who cherish their own names would destroy, hide, or alter the materials and information that may have negative impacts on their reputation afterwards. Such efforts include autobiography or biography writing under the control of the protagonists themselves, so that their desired portraits or images can preclude the negative judgment of others after death.³⁶ This is a kind of self-censorship for self-protection, or for a protection of their legacy and family interests, when the deceased's names matter a lot to surviving families.

Second, close relatives, family members, and heirs have direct interests in the dead's good reputation. Not only will they protect the dead's reputation, but they also are more willing to protect their own and their family's reputations that are in most cases closely-affiliated with the deceased.³⁷ Those people may encounter mental distress and personal, emotional harm consequent to defamation of their beloved deceased. There are monetary interests involved in the dead's reputation and privacy as well.³⁸ The dead's family may be the most motivated censors and they can intimidate critics who dare to stand out against their memory of the dead. This is especially true when the deceased's families hold high social status that may be even more degraded by posthumous defamation, were there no strong defense from the families *before the public*. Such families can censor negative information regarding the dead with considerable economic and political resources available.³⁹

Third, many people other than family members and designated heirs bear no less strong motivations to defend the deceased's reputation. Numerous foundations, institutions and associations of non-governmental nature are ready to take necessary steps to protect the dead for whose remembrance they have been established. They are

36. *Id.* at 190; see also Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299 (2011) (discussing the relation between law and biography writing in the U.S.).

37. Following Brewer, family is the first natural honor groups, which we are all, affiliated with. See BOWMAN, *supra* note 12, at 4.

38. Especially in the cases of publicity rights and copyrights involve. See MADOFF, *supra* note 28, at 130-51.

39. According to Post, there is a shift from government silencing powerless people to powerful people silencing the powerless behind state power. See ROBERT POST, CENSORSHIP AND SILENCING: PRACTICES OF CULTURE REGULATION (Getty Research Inst. 1998). MacKinnon has a similar expression: "The operative definition of censorship accordingly shifts from government silencing what powerless people say, to powerful people violating powerless people into silence and hiding behind state power to do it." CATHARINE A. MACKINNON, ONLY WORDS 10 (Harvard Univ. Press 1996)(1993).

history museums, private foundations, war crime memorial associations, victims associations, religious groups, and even commercial institutions.⁴⁰ This also includes determined individual supporters of deceased politicians, war heroes (heroines), religious martyrs, or even celebrities like Diana, Princess of Wales. They make open protests on streets,⁴¹ publish advocates in newspapers,⁴² initiate petitions against defamers of their religion,⁴³ and participate in litigation.⁴⁴ In many cases, their motivations could be their love of and trust in the deceased politicians, such as Gandhi, and dead religious leaders, such as the Vatican Pope,⁴⁵ or merely sympathy and determination to seek justice for the deceased, or shared contribution to the same ideal or project,⁴⁶ etc.

Fourth, a community as a whole can play the role of censorship in

40. For example, to protect Jobs' likeness, Apple considered suing in California against a Chinese company that made toy products by illegal appropriation of Jobs' likeness. Tecca, *Apple May File Lawsuit Against the Makers of Disturbingly Realistic Steve Jobs Doll*, YAHOO NEWS (Jan. 6, 2012, 9:06 PM), available at <http://news.yahoo.com/blogs/technology-blog/apple-may-file-lawsuit-against-makers-disturbingly-realistic-020637702.html> (last visited Dec. 3, 2014).

41. As seen in the recent popular protests against describing Trayvon Martin as a potential killer and a convict, as well as George Zimmerman's acquittal. Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Killing of Trayvon Martin*, N.Y. TIMES (July 14, 2013), available at <http://www.nytimes.com/2013/07/15/us/george-zimmerman-verdict-trayvon-martin.html> (last visited Dec. 3, 2014).

42. As seen in *Lehideux and Isorni v. France*, in which the plaintiffs published an advertisement on the local newspaper to remind the French people of Philippe Pétain, the formal collaborator of Nazi occupation. See *Lhideux & Isorni v. France*, App. No. 24662/94, para. 45 (Eur. Ct. H.R. Sept. 23, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58245> (last visited Dec. 3, 2014).

43. As seen by the numerous protests of Muslims against defamations of their religious prophets.

44. Across the world, many associations consisted of lawyers, activists, academics and veterans are actively supporting the victims of comfort women from Japan, Korea, China and other Asian countries to seek legal remedies in Japan. For a detailed discussion of the international support, see PEIPEI QIU, *CHINESE COMFORT WOMEN: TESTIMONIES FROM IMPERIAL JAPAN'S SEX SLAVES 184-90* (Oxford Univ. Press 2014).

45. See the libel trial of Robert Katz regarding the accused silence of Pope Pius XII in Nazi occupation. See Bruce Weber, *Robert Katz, Who Wrote of Nazi Massacre in Italy, Dies at 77*, N.Y. TIMES (Oct. 22, 2010), available at <http://www.nytimes.com/2010/10/22/arts/22katz.html> (last visited Dec. 3, 2014) (the case will be further discussed in Section IV(H)).

46. As such in the military struggles of the Partisans in Spain, Italian and France against German occupation, which were overlooked or underestimated during the Cold War Period, many partisans have sued to correct the "wrong version" of the past military conflicts. See, e.g., *Chauvy v. France*, App. No. 64915/01 (Eur. Ct. H.R. June 29, 2004), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861> (last visited Dec. 3, 2014).

order to protect its collective identities and honor, so that the past may only be portrayed in a much-favored way and the deceased are forbidden to be criticized. In this context, collective morals are a firm source and confirmation of potential censorship. For instance, a German local community tried to silence a young researcher who investigated its previous support of the Nazi regime, and her research would downplay the previous collective identity of resisting Nazi policies.⁴⁷ Another situation involves “vulnerable” racial or religious communities (groups) that are sensitive and paranoid to certain expressions and speeches about their past, so that they need official protection for control.⁴⁸ Such collective identity and emotional interest may generate a strong atmosphere or ethos to support censorship.

Finally, the strongest censors are the political state in abstract. Political states and ruling parties need political legitimacy and justification of their ruling. For totalitarian or dictatorial states, history plays a considerable role in providing legitimacy for political leaders such as Stalin and Saddam Hussein.⁴⁹ In China and North Korea, history has been tightly controlled for political use.⁵⁰ In such countries, open discussion of the dead’s name, and of dead political figures in particular, is not allowed. Some countries, such as Turkey, even have direct statutes to protect dead leaders’ reputation and honor. In sharp contrast, most democracies draw legitimacy from ballots and rule of law. They do not have a strong motive to censor history for legitimacy. This, however, does not say that they do not conduct history censorship or similar activities. It only means that there is no systematic history

47. See the story of German author Anja Rosmus-Wenninger, which will be discussed below. Corinna Coulmas & Saul Friedlander, *Memory and Identity Problems in Post-War Germany According to Age Groups*, available at <http://www.corinna-coulmas.eu/memory-and-identity-problems-in-post-war-germany-according-to-age-groups.html> (last visited Dec. 3, 2014).

48. For instance, Canadian Human rights jurisprudence supports the concept that “Islam needs singular protection against defamatory speech.” Allison G. Beinap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*, *BYU L. REV.* 635, 676 (2010).

49. MACMILLAN, *supra* note 4, at 17-18.

50. For example, children of North Korea were taught that the South started the Korean War in 1950s and was defeated by the North; with the interference of Soviet Unions and China also not mentioned as the critical support of its war efforts. See Sarah Buckley, *North Korea's “Creative” History*, BBC (July 25, 2003), available at <http://news.bbc.co.uk/2/hi/asia-pacific/3096265.stm> (last visited Dec. 3, 2014). China’s official history is no better than the North Korean’s version, however. Howard W. French, *China’s Textbooks Twist and Omit History*, *N.Y. TIMES* (Dec. 6, 2004), available at <http://www.nytimes.com/2004/12/06/international/asia/06textbook.html> (last visited Dec. 3, 2014). As the high school history teacher Chen Minghua said in Shanghai, the closer the Chinese history gets to the present, the more political it becomes. *Id.*

ensorship in Western democracies. Instead they have been troubled by other problems of a different nature at different historical periods.⁵¹

III. THE LEGAL APPARATUSES FOR PROTECTION

Be it interests of the dead, their surviving families, their associates, affiliated social groups, special communities, or political states, nowadays the control (or censorship) of speeches and information regarding the past has to be carried out through legal means; otherwise, it lacks legitimacy and cannot be accepted in modern politics. In the following, different legal apparatuses that can be used to protect posthumous reputation and privacy will be briefly discussed for the further case analysis.

A. Blasphemy Law, Insult Law and Sedition Law

As an old legal instrument, blasphemy laws protect religious belief and dead religious figures in many countries.⁵² Many Western countries, such as the United States, have abolished blasphemy laws while others keep such laws merely on paper, a step away from abolishment.⁵³ Some countries, such as Ireland and Russia, have recently enacted blasphemy laws.⁵⁴ As Uta Melzer noted, such laws exist in Asia and the Middle East, particularly in Islamic countries that

51. For instance, history can be controlled to strengthen national identity formation and to enhance political transition by avoiding hatred and revenge among previously conflicted social groups in a community. See Josep Maria Tamarit Sumalla, *Transition, Historical Memory and Criminal Justice in Spain*, 9 J. INT'L CRIM. JUST. 729 (2011). For example, see the court's role in Israeli state formation (Barak-Erez) and the use of oblivion law in Spain's restoration of democracy. See *id.*; Miren Gutierrez, *Spain: Historical Amnesia on Display*, INDEX ON CENSORSHIP (Nov. 28, 2012), available at <http://www.indexoncensorship.org/2012/11/spain-historical-amnesia-on-display/> (last visited Dec. 3, 2014).

52. They "act as a sanctioned limitation on the right of expression." Belnap, *supra* note 49, at 670-71. Note that many UN commission resolutions over years "have asked state governments and international bodies to provide protection against defamation of religions in increasingly robust terms." *Id.* at 664.

53. See generally *id.* at 670-79 (discussing such laws in most OIC (Organization of Islamic Cooperation) member states and other western countries). For a country-to-country list of Blasphemy laws in the Middle East see *Country-by-Country Blasphemy Laws in the Middle East*, SELF SCHOLAR (Dec. 19, 2012), available at <http://selfscholar.wordpress.com/2012/12/19/blasphemy-laws-in-the-middle-east/> (last visited Dec. 3, 2014).

54. Though Ireland decriminalized defamation, Article 36 of the 2009 Defamation Act introduced blasphemy as an offense. PATTI MCCrackEN, *INSULT LAWS: INSULTING TO PRESS FREEDOM-A GUIDE TO EVOLUTION OF INSULT LAWS IN 2010*, at 16 (Ronald Koven ed., 2012), available at Freedom House.

campaign to criminalize defamation of religion, and such laws usually reach beyond religious protection, restricting calls for political reform.⁵⁵ For religious reasons, dead religious figures are not allowed to be criticized and commented about negatively, which is a strong category of repression of free speech.

Some jurisdictions directly protect honor and reputation of the nobles by insult laws without even concealing the intention, which criminalizes posthumous defamation. Such laws usually protect monarchs, kings or state heads (nowadays) not necessarily in non-democracies. Rulers, as De Baets commented, “have recorded [certain] version[s] of history to secure their posthumous fame[s,] and their successors often abide by [such] version[s].”⁵⁶ For instance, the 1959 Thai legislation protects the deceased Monarchs,⁵⁷ the 1951 Turkish law secures the legacy of Atatürk,⁵⁸ and Iranian law punishes insults against the memory of Imam Khomeini.⁵⁹ Meanwhile, Kings and emperors “proved sensitive” in other countries such as Morocco, Kuwait and Bahrain.⁶⁰ Furthermore, insult laws also protect the honor of political figures and public officials in some European countries, including the dead. For example, Article 490 and Article 491 of the Spanish Penal Code punish insults of the royal family and use of their images, including the king’s ancestors.⁶¹ French law prohibited insult of heads of state under its 1881 legislation for a long period until the annulations by European Union (“EU”) judges that French law has violated a protestor’s right to freedom of expression.⁶² In general, as Whiteman

55. UTA MELZER, INSULT LAWS: IN CONTEMPT OF JUSTICE, A GUIDE TO EVOLUTION OF INSULT LAWS IN 2009, at 8-11 (Ronald Koven ed., 2010), available at World Press Freedom Committee.

56. DE BAETS, *supra* note 4, at 77.

57. MELZER, *supra* note 56, at 165-69.

58. See *id.* at 40 (describing the Law on Crimes Committed Against Atatürk (Law No. 5816)).

59. See *id.* at 192 (describing Article 514 of the 1991 Islamic Penal Code of Iran).

60. *Id.* at 9.

61. CÓDIGO PENAL [C.P.] art. 490, 491 (Spain), available at <http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444> (last visited Dec. 3, 2014).

62. A Parisian bystander at a parade uttered the words “Hoo-hoo” when President Charles de Gaulle passed by, and this merited a conviction for insult under article 26 of the 1881 Law on Freedom of the Press. But this law has been challenged by the verdict of the ECtHR in March 2013 in that France has violated a protestor’s right to freedom of expression by fining him. See *Eon v. France*, App. No. 26188/10 (Eur. Ct. H.R. March 14, 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117742> (last visited Dec. 3, 2014); see also Peter Allen, *French President Insults no Longer an Automatic Criminal Offence*, TELEGRAPH (Jul. 25, 2013), available at <http://www.telegraph.co.uk/news/worldnews/francois-hollande/10203142/French-president-insults-no-longer-an-automatic-criminal-offence.html> (last visited Dec. 3, 2014).

pointed out, there is a long tradition in European countries of protecting the nobility of upper classes, which is represented by France and Germany.⁶³

With a long tradition, sedition law, in particular seditious libel and seditious words,⁶⁴ can be manipulated for history censorship while sought to protect reputations of selected people to prevent social disorder and public incitement. “The point of sedition law was to protect the status quo, the regime—and the reputation of elite people, respectable people in general.”⁶⁵ As Mayton said, the law of seditious libel has shifted its emphasis from protecting “government or governmental officials” to restricting “the potential of dissident speech to bring about illegal acts” in modern times.⁶⁶ “In most of the mature democracies, the law of sedition has now either formally been rescinded or is largely defunct”,⁶⁷ but some democracies still keep such a law or even revive it.⁶⁸

B. Defamation Law

Defamation is both a criminal offense and a civil offense,⁶⁹ and can be conducted by means of libel in written forms and slander in spoken forms. Defamation of the dead can be punished in some jurisdictions.

63. See James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *Yale L.J.* 1279 (2000).

64. Post, *supra* note 12, at 736.

65. LAWRENCE FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 54 (Stanford Univ. Press 1st ed. 2007).

66. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 *COLUM. L. REV.* 91, 91 (1984).

67. *Memorandum on the Malaysian Sedition Act 1948*, ARTICLE 19, at 6 (2003), available at <http://www.article19.org/data/files/pdfs/analysis/malaysia-sedit.03.pdf> (last visited Dec. 3, 2014).

68. For instance, the Australian Federal Parliament passed a law about sedition in late 2005, which was criticized by scholars. See, e.g., George Williams, Op-Ed., *Speak up in Defence of Free Speech*, *SYDNEY MORNING HERALD* (May 30, 2006), available at <http://www.smh.com.au/news/opinion/speak-up-in-defence-of-free-speech/2006/05/29/1148754937566.html?page=fullpage> (last visited Dec. 3, 2014). For a list of these countries, mostly common law countries, updated to 2010 at the official website of Australian Federal Parliament see Roy Jordan, *In Good Faith: Sedition Law in Australia*, PARLIAMENT OF AUSTRALIA (2010), available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/sedition (last visited Dec. 3, 2014).

69. There are only about a dozen of countries that decriminalize defamation while the majority keeps it, even if for most democracies they are merely laws on paper. See an analysis of criminal defamation by ARTICLE 19. See *Defamation Maps*, ARTICLE 19, available at <http://www.article19.org/defamation/map.html> (last visited Dec. 3, 2014) (analysis of criminal defamation).

In the first instance, when there are no particular laws protecting the deceased's reputation and honor, they might still be protected by courts under ordinary defamation law. In general, continental law jurisdictions protect the deceased's reputation and dignity to different extents. For instance, French courts protected the deceased's reputation and privacy especially when public figures are involved.⁷⁰ Maltese courts protected the reputation of the deceased Prime Minister, Dr. Bofa, when he was alleged by Journalist Mizzi of abusing power in land planning for private interest.⁷¹

In the second instance, there are direct clauses in criminal law and civil law to protect the deceased's reputation and privacy in some jurisdictions. For instance, the Indonesian Penal Code explicitly protects the deceased's reputation and likeness.⁷² Sections 305 and 306 of the Cameroon Penal Code prescribe that defamation of the dead is punishable if the intent is "to injure the honor or reputation" of a living spouse or heirs.⁷³ Similar laws can be found in Turkey, although the intention is to protect the affiliated living's reputations.⁷⁴ One may also note that the Sudanese Penal Code punishes any person who "imputes to any honorable living or dead person by express words, implicitly, by writing or via indicative signs accusations of *Zina* or Sodomy, or illegitimacy commits *Qadhif*."⁷⁵ This is not limited to developing countries. Article 188 of German Penal Code prescribes that the deceased's parents and children have the legal standing to sue⁷⁶; Article 175 of the Swiss Criminal Code punishes defamation of the dead who have been deceased no less than thirty years.⁷⁷ Israeli defamation law

70. For instance, see the French *Plon* case regarding the late President Mitterrand. See *Éditions Plon v. France*, App. No. 58148/00, para. 71 (Eur. Ct. H.R. May 18, 2004), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014) (case regarding the late French President Mitterrand).

71. *Mizzi v. Malta*, App. No. 17320/10, para. 39 (Eur. Ct. H.R. Nov. 22, 2012), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 4, 2014).

72. MELZER, *supra* note 56, at 157–58.

73. *See id.* at 74.

74. *See id.* at 37–40 (highlighting Article 130 of the Turkish Penal Code).

75. *Id.* at 211 (quoting Article 157 of the Sudanese Penal Code).

76. *See, e.g.,* Hannes Rösler, *Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT'L L. 153 (2008); Götz Böttner, *Protection of the Honour of Deceased Persons—A Comparison Between the German and the Australian Legal Situations*, 13 BOND L. REV. 121, 121 (2001), available at epublications.bond.edu.au/cgi/viewcontent.cgi?article=1199&context=blr (last visited Dec. 3, 2014).

77. SCHWEIZERISCHES STRAFGESETZBUCH [StGB], CODE PÉNAL SUISSE [CP] [CRIMINAL CODE] Dec. 21, 1937, AS 311 (2014), art. 175 (Switz.), available at http://www.admin.ch/ch/e/rs/311_0/a175.html (last visited Dec. 3, 2014).

also accepts complaints against defamation of the dead.⁷⁸

In contrast, common law countries do not protect posthumous reputation and privacy. The rationale is that since the dead are no longer living, they cannot be harmed after death.⁷⁹ In common law jurisdictions, particularly in the U.S., reputation is a personal matter and the right cannot be inherited by the living.⁸⁰ “Though most rules in modern defamation law defy mechanical application, the centuries-old rule against liability for defamation of dead people kicks in automatically.”⁸¹ Family members or heirs of the dead have no legal standing to sue on the deceased’s behalf.⁸² Also, “defamation of a deceased person generally does not give rise to a right of action at common law in favor of the surviving spouse, family, or relatives who are not defamed.”⁸³ However, they can initiate lawsuits to protect their own reputation and privacy, so that the deceased’s name could be restituted to some extent.⁸⁴

78. Section 5 of the 1967 Defamation Law (amended version) prescribes that “[d]efamatory statements regarding a Deceased Person that are published after his or her death shall be treated as the defamation of a living person, but do not constitute cause for a civil claim or a private criminal complaint, and no indictment shall be submitted for an offense under this section unless it is requested by the deceased’s spouse or one of his children, grandchildren, parents, brothers or sisters.” Defamation Law, 5725-1965, 19 LSI 254, Sec. 5 (1967) (Isr.), available at www.nevo.co.il/law_html/Law01/019_002.htm (last visited Dec. 3, 2014); see also Elad Peled, *Israeli Law of Defamation: A Comparative Perspective and a Sociological Analysis*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 735, 753 (2011), available at www.uiowa.edu/~tlcp/TLCP%20Articles/20-3/Peled%20Final.pdf (last visited Dec. 3 2014).

79. See Iryami, *supra* note 19, at 1088 (“the rule on defamation of the dead is consistent through-out common law jurisdictions.”).

80. *Libel. Defamation of Dead Person. Injury to Reputations of Surviving Relatives*, 40 COLUM. L. REV. 1267, 1268-69 (1940), available at www.jstor.org/stable/1117780 (last visited Dec. 3, 2014) (describing the rationales underlying the denial in majority of American cases).

81. Lisa Brown, *Dead but not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1525 (1989).

82. Iryami *supra* note 19, at 1089-95.

83. Smolensky, *supra* note 82, at 23 (quoting 50 AM. JUR. 2D *Libel and Slander* § 336 (2014)).

84. This indirect approach is successful at least in the U.S. in some occasions. See Iryami, *supra* note 19, at 1095-96. In the UK, there are a couple of cases in which the living family of the dead won in exceptional cases. For instance, Mrs. Sukarno won an apology in court from a publisher alleging her husband having sexual relations with a call girl when he was a guest of the British Government. See *News in Brief: Mrs. Sukarno Wins Libel Suit*, MILWAUKEE J., June 21, 1974, part 1 pg. 3, available at <http://news.google.com/newspapers?nid=1499&dat=19740621&cid=TwgqAAAAIBAJ&sjid=8SgEAAAAIBAJ&pg=4238,14080> (last visited Dec. 3, 2014). The case was the first time in British court that any one not directly implicated in the publication successfully sued over defamatory statements made about a dead person. *Id.* (Mrs. Sukarno won an apology in court from a publisher

C. Privacy Law and Others

Reputations during life are also protected by the right of privacy.⁸⁵ Due to the close affiliation of privacy with reputation,⁸⁶ the dead's privacy is also closely related to their posthumous reputation. In particular, laws regarding public disclosure of private affairs and false lights may protect the dead's reputations to a certain degree.⁸⁷ After death, disclosure of private issues can have a great impact on the dead's reputation, which we can observe in many real cases.⁸⁸ To put the dead under a false light by disclosing their names, private activities, or their likeness can be against the dead's will to be left alone post mortem and can create a misleading impression of the dead, harming their dignity and reputation, and in many occasions, also the honor and dignity of the dead's family in the eyes of the living.⁸⁹

In continental law countries, the dead's privacy may have been protected and the living family members are allowed to sue on their behalf. For example, French courts protect the dead's privacy and reputation even if there is no statutory law explicitly protecting the interest of the dead.⁹⁰ Another example is that privacy laws of the Czech Republic and Slovakia; both protect the privacy of the dead on the ground of human dignity.⁹¹ However, common law countries do not protect the privacy of the dead, since privacy is a personal issue and one

alleging her husband having sexual relations with a call girl when he was a guest of the British Government. The case was the first time in British court that any one not directly implicated in the publication successfully sued over defamatory statements made about a dead person).

85. MADOFF, *supra* note 28, at 123.

86. *See supra* Section II.A.

87. For a more detailed discussion of posthumous privacy in light of Prosser's categorizations, see DE BAETS, *supra* note 4, at 124-26.

88. Again, for example, see that case of the British Jimmy Savile. *See Reuters, Jimmy Savile: NSPCC Say Report May Help Victims to Come to Terms with Abuse*, TELEGRAPH (Jan. 12, 2013), available at <http://www.telegraph.co.uk/news/uknews/crime/jimmy-savile/9796852/Jimmy-Savile-NSPCC-say-report-may-help-victims-to-come-to-terms-with-abuse.html> (last visited Dec. 3, 2014).

89. *See Hachette Filipacchi Associés v. France*, App. No. 71111/01 (Eur. Ct. H.R. June 14, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81066> (last visited Dec. 3, 2014) (see for instance, the French case in which a dead local politician's death scene pictures were published by a newspaper after his assassination).

90. *Éditions Plon v. France*, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

91. Analysis and Translation by Martin Duchac, Student Research Assistant (June 23, 2011) (on file with author).

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cannot sue on the dead's behalf.⁹² Obviously the dead cannot feel humiliation and shame *post mortem*.⁹³ The living may lodge cases because their own privacy is directly involved or they may suffer from emotional distress upon privacy invasion of the dead.⁹⁴ In this regard, even the American law protects the living family's privacy involving death-scene photographs to provide "refuge from a sensation-seeking culture."⁹⁵

Privacy laws that can indirectly protect the dead's reputation are laws protecting publicity rights after death, including illegal appropriation of the dead's likeness, illegal use of the dead's names, false lights, and publication of private affairs.

Closely related to illegal appropriation of personal likeness are the right to publicity and copyright that make it possible to generate revenue after one's death. The first allows a person to control the exploitation of his image and the later to control his creations.⁹⁶ For example, the protections from the right to publicity and copyright can continue after death in the U.S. In recent years such protections (rights), according to Madoff, "have grown in strength and duration, providing posthumous protections never before seen in history", though strictly limited to economic interests, as opposed to reputational interests.⁹⁷ But, as the author argued, in the U.S. context at least, both rights co-exist with reputation and personality, and they cannot be separated from each other with clear-cut lines.⁹⁸

Furthermore, confidentiality rules of some special professions request service providers to keep personal data of the deceased from

92. Iryami, *supra* note 19 at 1097–99 (arguing "the common law rule that prohibits a cause of action for defamation of the dead is analogous to its rule for invasion of privacy upon the dead", and "courts and authorities have long assumed that one's legal interest in privacy ends upon death.").

93. Paul Roth, *Privacy Proceedings and the Dead*, 11 PRIV. L. & POL'Y REP. 50 (2004); see also *Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice*, AUSTRALIAN L. REFORM COMMISSION 355 (2008), available at http://www.alrc.gov.au/publications/8.%20Privacy%20of%20Deceased%20Individuals/introduction#_ftn1 (last visited Dec. 3, 2014).

94. See also Daily Mail Reporter, *Westboro Baptist Church Vows to "Quadruple" its Protests at Military Funerals After Supreme Court Rules in its Favour*, MAILONLINE, available at <http://www.dailymail.co.uk/news/article-1362288/Westboro-Baptist-Church-victory-Supreme-Court-rules-favour-protests-military-funerals.html> (last visited Dec. 3, 2014) (describing the story of Matthew Snyder, a deceased American soldier).

95. National Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

96. See MADOFF, *supra* note 28, at 131 for Madoff's account of the two rights under the U.S. law that protects the dead's interest.

97. *Id.* at 131.

98. *Id.* at 131–40, 148–49.

unintended disclosure, which can pose potential harm to the dead and their families. For example, medical data of the deceased and personal information of customers in hands of their lawyers is under protection of confidentiality law, so that those professions would not be destructed by such breach.⁹⁹

D. Memory Law and Oblivion Law

Privacy law and defamation law are the two major legal instruments to protect the deceased's reputation. Their locus is at the individual level. In contrast, there are also legal instruments protecting the dead's reputation in a collective sense. Such laws protect reputation, honor, identities, or dignity of various social groups and communities whose degradation naturally lowers the reputation and honor of their members as a consequence.

The first category includes memory laws that are widely criticized as against international human rights law. For instance, the 1990 French Memory Law criminalizes denial of the Jewish Holocaust.¹⁰⁰ The law, on the one hand, punishes the denial of the Holocaust that particularly amounts to a rejection of the Jewish victims' social status and harm to their dignity. On the other hand, a court-supported historiography functions as a tool to combat racism, negationism, and revisionism.¹⁰¹ Similar laws can be found in European countries such as Belgium, Poland, Germany, Austria, Lithuania, and the Czech Republic.¹⁰² Other countries, such as Spain, Portugal, Luxembourg, and Switzerland, take a more general approach to cope with denials of all

99. For medical data confidentiality, see D. S. James & S. Leadbeatter, *Confidentiality, Death and the Doctor*, 49 J. CLINICAL PATHOLOGY 1, 1-4 (1996); Jessica Wilen Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 84 CONN. L. REV. 81 (2001); Mary Donnelly & Maeve McDonagh, *Keeping the Secrets of the Dead? An Evaluation of the Statutory Framework for Access to Information About Deceased Persons*, LEGAL STUDIES (2010).

100. Loi 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe [Law No. 90-615 of 13 July 1990 on the Punishment of All Racist, Anti-Semitic or Xenophobic], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 24, 2004 (also known as the Gayssot Act, Law No. 90-615 of July 13, 1990); see also Roger W. Smith, *Legislating against Genocide Denial: Criminalizing Denial or Preventing Free Speech*, 4 ST. THOMAS J. L. & PUB. POL'Y 128, 133 (2009).

101. Raffi Wartanian, *Memory Laws in France and Their Implications: Institutionalizing Social Harmony*, HUMANITY IN ACTION, available at <http://www.humanityinaction.org/knowledgebase/117-memory-laws-in-france-and-their-implications-institutionalizing-social-harmony> (last visited Dec. 3, 2014).

102. See Jacqueline Lechtholtz-Zey, *The Laws Banning Holocaust Denial*, GPN BULLETIN (2012), available at http://www.genocidepreventionnow.org/Portals/0/docs/Holocaust_Denial_Updated_2.8.pdf (last visited Dec. 3, 2014) (discussing such domestic laws and international treaties).

crimes against humanity, including the Holocaust.¹⁰³

Protection of posthumous reputation and dignity can be found in rehabilitation laws that aim to relieve the deceased victims and their surviving families from unjust political accusations. In the early 1990s, most former communist countries in Eastern Europe promulgated rehabilitation laws.¹⁰⁴ Since then, family members of the dead victims have started to bring justice to the deceased, trying to restore their honor and dignity by law.¹⁰⁵ In addition, posthumous rehabilitation also involves the dead victims of atrocities and massacres such as Katyn, who are still denied victim status by the Russian authority.¹⁰⁶

A similar situation involves the truth commissions established in many countries by law after political traumas and military conflicts. Whether the dead victims can be offered restoration and justice, and the dead perpetrators would be prosecuted, is crucial not only for future peace construction, but also for the dead victims' dignity and reputation, and their remaining families.

In this respect, however, amnesty laws may function as a shield to retroactively exempt political leaders and military leaders from criminal charges of their past crimes against humanity and human rights abuses. For instance, the Spanish Amnesty Law was democratically voted and is still valid today.¹⁰⁷ In the deeply wounded Spanish community, reprisals and revenges would have led to social disorder and distracted its transition to democracy without this law.¹⁰⁸ In some truth

103. *Id.* (under the rubric of hate speech, incitement speech, and racial discrimination).

104. LAVINIA STAN, *TRANSITIONAL JUSTICE IN POST-COMMUNIST ROMANIA: THE POLITICS OF MEMORY* 163–65 (Cambridge Univ. Press 2012). For instance, the Russian Rehabilitation Act's purpose is "the rehabilitation of all victims of political repression who were prosecuted on the territory of the Russian Federation after 7 November 1917, and restoration of their civil rights." *Id.*; see *Janowiec v. Russia*, App. nos. 55508/07 & 29520/09 (Eur. Ct. H.R. Oct. 21, 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684> (last visited Dec. 3, 2014).

105. *Kurzac v. Poland*, App. No. 31382/96 (Eur. Ct. H.R. Feb. 22, 2001) (for instance, a brother of the dead victim of the political conviction by the previous Polish Communist regime, appealed before the ECtHR for a violation of his right to fair trial under Article 6 of the Convention and won).

106. See *Janowiec v. Russia*, App. nos. 55508/07 & 29520/09 (Eur. Ct. H.R. Oct. 21, 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684> (last visited Dec. 3, 2014).

107. Aekar Kadrabisic, *Transitional Justice in Democratization Processes: the Case of Spain from an International Point of View*, 1 INT'L J. RULE L., TRANS'L JUST., & HUM. RTS. 132, 132–33 (2010).

108. *Id.* at 132–33 (in contrast, the Chilean amnesty law is a product of the military before the end of totalitarian ruling in contrast to exempt military leaders from future charges).

commissions' reports, even names of the perpetrators were not mentioned because of the existence of such amnesty law.¹⁰⁹ This means that the dead perpetrators cannot be singled out or named responsible for past crimes and their reputations remain somehow intact.

However, the recent practice of international law has challenged such an approach to promote political transition at the price of justice and human rights. The Special Court for Sierra Leone decided that the amnesties granted by a peace agreement are no bar to prosecutions before it.¹¹⁰ Also, the 2005 UN General Assembly Resolution 60/147 prescribes, as one of the ways of giving satisfaction, "an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim."¹¹¹

What's related to the deceased's reputation in a fundamental sense is human dignity and respect, which have been protected by the laws both at the national level and at the international level. The idea is that even if the dead are no longer living, they still deserve the minimum respect and decent treatment as passed human beings.¹¹² In constitutions of many Western countries, in particular European countries, human dignity has been regarded as the fundamental right to include individual honor, reputation and private life (family life). For example, German law recognizes dignity of human beings covering not only the living, but also the dead.¹¹³

A last note is the legal protection of the dead's dignity and reputation after enforced disappearance that has been recognized in an important international treaty promulgated in December 2010: The International Convention for the Protection of All Persons from Enforced Disappearance. Article 24, clauses 4 & 5(c), of the law prescribe that "the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation", and

109. *Id.* at 132.

110. See Simon M. Meisenberg, *Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone*, 86 INT'L REV. RED CROSS 837, 843 (2004) (as the first decision to deny the validity of amnesty law, this decision is of critical importance for the development of International Humanitarian Law).

111. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/4/1 (Mar. 21, 2006).

112. A reason why in most communities we are asked to keep silence in graveyards and cannibalism is regarded as against humanity even in times of war and famines. See DE BAETS, *supra* note 4, at 124–25.

113. See Hannes Rösler, *Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKLEY J. INT'L L. 153, 196 (2008).

reparation includes not only material and moral damages, but also other forms such as “satisfaction, including restoration of dignity and reputation.” This law defines victims as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”¹¹⁴

The above are the relevant domestic laws and international laws regarding protection of the dead’s reputation, privacy and dignity from different perspectives. Laws protecting the free speech rights of individuals shall also be considered in this context, since on the contrary, their stronger protection means a weaker protection of the dead’s reputation and dignity. Protection of free speech and its relationship to posthumous reputation protection will be further discussed in Section V.

IV. LEGAL CASES ON POSTHUMOUS REPUTATION AND PRIVACY

History censorship has been conducted by state authority not only in totalitarian and authoritarian countries, but also in democracies. This is reflected in legal cases in which state authority tries to support official versions of history, and restrict its critics to protect public figures, in particular political leaders. The state has done this by passing special laws to prevent public scrutiny, by protecting religious identity by punishing certain expressions, and by refusing rehabilitation of victims of crimes against humanity for national pride, etc.

Since it is impossible to discuss all the cases that have been collected by this research, this section will classify them into eight categories for analysis. It will try to explain the circumstances of such cases, including the disputed history at stake, complaints of plaintiffs, political-social settings, court rulings with regard to interference, etc. to check possible history censorship involved and the underlying reasoning.

A. Posthumous Reputation and Collective Memory

Posthumous reputation is an important element to national identity formation, national history, and collective memory.¹¹⁵ This is the

114. International Convention for the Protection of All Persons from Enforced Disappearance art. 24(1), Dec. 23, 2010, 2715 U.N.T.S (validated since Dec. 23, 2010, with 92 signatories and 38 parties).

115. Though history and collective memory are perceived differently by many historians. See GROSS, *supra* note 30, at 6-9.

reason why many states demonstrate great interest in its protection. First of all, reputations of deceased heroes, heroines, or martyrs, who are regarded as icons of the national identities by their communities, are good targets for recounting the stories of history.

In the Israeli case of *Szenes*, the deceased heroine is “one of the prominent icons of the Zionist narrative.”¹¹⁶ Fifty years after her brave death in 1944, Chana Szenes was ridiculed and defamed by the Broadcasting Authority and others posthumously in a fictional drama.¹¹⁷ The petitioners claimed the tale of Szenes’ bravery belongs to the history of the Jewish nation and is part of national folklore,¹¹⁸ demanding protection of the dead’s reputation for public interest. Chief Justice Barak of the Israeli Supreme Court, on behalf of the majority, first explained the importance of posthumous reputation to the Israeli community, expressing that “the only asset of many people, both public servants and those working in the private sector, is their reputation, which they cherish as life itself. This applies to both the living and the dead.”¹¹⁹ He further explained “[w]e must protect the dignity of the deceased and their good name.”¹²⁰ He recognized that the alleged paragraph “offended the memory of Chana Szenes[,] . . . maligned her dignity and the myth surrounding her”, and injured the feelings of the public in general and that of Holocaust survivors in particular, and also injured those who “cherish the memory” of the dead Szenes.¹²¹ Also, Chief Justice Barak confirmed that the defamation of Szenes harmed national values¹²² and the public interest for Israeli law to protect includes collective identity and national history.¹²³

Justice Cheshin, in the dissenting opinion, clarified that human dignity and the right to liberty, the right to reputation and the right to freedom of expression are of equal legal status under the Israeli Basic Law.¹²⁴ He further stated that “human dignity includes a person’s reputation”,¹²⁵ while stressing the importance of Freedom of speech as

116. Schejter, *supra* note 33, at 924.

117. HCJ 6143/94 *Szenes* etc. v. Broadcasting Authority [1999] (Isr.).

118. *See id.* para. 4.

119. *Id.* para. 12.

120. *Id.*

121. *See id.* para. 12-14.

122. HCJ 6143/94 *Szenes* etc. v. Broadcasting Authority para. 12-14 [1999] (Isr.).

123. *See id.* para. 13-14 (“Each state has its own collective identity; each state has its national history and its own social goals, the realization of which forms part of the public interest.”).

124. *Id.* para. 18, 21, 26 (Cheshin, J. dissenting).

125. *Id.* para. 29 (Cheshin, J. dissenting).

one of the State of Israel's fundamental values as a democratic state.¹²⁶ Cheshin ruled that “[w]e are dealing with a right of dimensions struggling against a smaller right. The dignity and reputation of Chana easily prevail over the rights of the playwright and the Broadcasting Authority.”¹²⁷ However, the majority of the court disagreed that only a near certainty of grave and severe harm to public interest, the reputation and dignity of the deceased and public feelings, can warrant the court's intervention.¹²⁸ Since this is not the situation in the instant case, the majority refused to protect the dead's reputation, even noting the importance of the dead's reputation to Israeli collective memory.¹²⁹

Justice M. Cheshin made an important distinction between persons and historical figures of the Israeli Deformation Law (1967) regarding protection of the deceased.¹³⁰ Cheshin explained that the law protects only the dead persons' reputations and dignity, not historical figures.¹³¹ Cheshin explained that persons are those dead who have relatives to sue for protection of their interests, namely heirs, family members and close relatives.¹³² Another criterion to define a dead person is whether there are people alive who knew the dead personally; if there are persons still knowing him or her, the dead continues to be a person.¹³³ The two criteria can define the confine of the protection of posthumous reputation and dignity by the Israeli law.

In contrast, following Justice Cheshin's distinction, Taiwanese courts went too far in 1976 to protect a Chinese poet's reputation, who died a thousand years ago.¹³⁴ The poet Han Yu holds an iconic status in Chinese classical literature and has been highly respected for his contribution to traditional Chinese culture. He was “defamed” by a historian in the latter's journal article that described the dead as a Lothario who died from abuse of poisonous chemicals. A distant descendent accused the author of libelling the dead and damaging the respect and memory of his ancestor. Both the trial court and the appeals

126. *See id.* para. 9.

127. HCJ 6143/94 *Szenes etc. v. Broadcasting Authority* para. 37 [1999] (Isr.) (Cheshin, J., dissenting).

128. *See id.* para. 20, 28, 34.

129. *See id.* para. 24 (the court concluded: “However, a democratic society does not preserve the image of its heroes by repressing freedom of expression and artistic creation.). The legend must flow from free exchange of ideas and opinions. *See also id.* para. 27.

130. *Id.* para. 24 (Cheshin, J. dissenting).

131. *Id.*

132. HCJ 6143/94 *Szenes etc. v. Broadcasting Authority* para. 19, 24 [1999] (Isr.) (Cheshin, J., dissenting).

133. *Id.* para. 24 (Cheshin, J. dissenting).

134. *See* YANG RENSHOU (杨仁寿), *FAXUE FANGFA LUN* (法学方法论) 1-6 (1999).

court found the accused guilty, partially due to the reason that the defamation was a threat to the Chinese cultural identity. The posthumous protection has its deep origin in the long Chinese tradition to respect dead ancestors.¹³⁵

After the death of many dictators and the collapse of their regimes, they have been re-evaluated by new communities with transformed morals and political ideologies. Their supporters have conflicted with dissenters over the problem of how to handle the memory and legacies of the deceased dictators. Many have lodged defamation cases in court. For instance, Franco, the deceased Spanish dictator, was recently mocked by an artist who put a sculpture of him in a refrigerator, indicating his still "being fresh" in modern Spain.¹³⁶ The artist was accused in 2012 by an organization called the Francisco Franco Foundation, claiming defamation of Franco and seeking 18,000 euros in damages. Supporters and opponents also bear different memories to the dead dictators and they have much departed views of the past. In such cases, judicial decisions are critical in confirming which view is justified before the public.

Under many circumstances, historians' research and publication regarding the deceased's reputation have challenged the memory and identity of *local communities* that have constructed a desired memory and identity by means of voluntary forgetting or hiding some dark past. When historian Anja Rosmus-Wenninger stood up to investigate what had happened to the Jews at her hometown Passau, Germany, she was shocked by her findings of the close cooperation of the locals with the Nazi regime. Instead, the local community, contrary to her findings, has proclaimed an identity of strong resistance against the Nazi policy. She discovered that two distinguished Paussau priests, whose names were under data protection, denounced Jews to the Gestapo in 1936, but one died with the reputation of a saint and the other as a resistant to the Nazi regime. The revelation of the facts led to the accusation of monstrous defamation by the locals. She was watched, molested and assaulted by her co-citizens. Though her victory in court helped her regain confidence in the German community,¹³⁷ she eventually migrated to the U.S.

135. See XIAO ZESHENG (泽晟), MUDI SHANG DE XIANFA QUANLI (地上的宪法权), FAXUE(法学) 70-79 (2011).

136. Guy Hedgecoe, *Spanish Left Cold over "Franco in a Fridge"*, DW (Aug. 19, 2013), available at <http://www.dw.de/spanish-left-cold-over-franco-in-a-fridge/a-17029255> (last visited Dec. 3, 2014)(the case was first rejected by a Spanish judge in July 2013 and now is pending on appeal).

137. See COULMAS, *supra* note 48.

B. *Political Figures and History Controversies*

As noted above, Anja Rosmus-Wenninger only conflicted with her local community. Reputations of dead political figures that bear more substantial connections with present politics will be under much closer watch by many, including the dead's families and their political allies, who are usually powerfully equipped with sufficient social resources to win defamation battles.

In the French case of *Éditions Plon*, the family of the dead French President Mitterrand accused his former private physician of breaching medical confidentiality, and therefore invading the privacy of the dead and his family,¹³⁸ degrading the deceased's reputation and honor.¹³⁹ In his book *Le Grand Secret*, which was published shortly after Mitterrand's death, Dr. Gubler wrote that the dead president had been diagnosed with cancer a few months after his first election, but he ordered concealment of his illness and issued false health bulletins.¹⁴⁰ The French courts upheld the accusations and restricted the book's distribution with an interim injunction in the first instance.¹⁴¹ The family also brought civil proceedings against Dr. Gubler and others, prohibiting the resumption of the book's publication, or deleting certain pages and paragraphs as alternative.¹⁴²

The European Court of Human Rights ("ECtHR") found a violation of Article 10 of the Convention in that the legal measures restricting the publication of the book were not appropriate to the ends of the French law in pursuit after balancing them with the author's free speech rights protected by Article 10.¹⁴³ The Court recognized the interim injunction as a justified legal measure to protect the plaintiffs' privacy. It is rather clear in this case that posthumous publication would have big influences on the late President's reputation and his family pride. But, the Court defined that the disclosure is of public interest, "in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether

138. See *Éditions Plon v. France*, App. No. 58148/00, para. 34 (Eur. Ct. H.R. 2004), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014). A breach of confidentiality in France is a criminal offense under Article 226-13 of the Criminal Code. See also *id.* para. 3.

139. *Id.* para. 34.

140. *Id.* para. 6.

141. *Id.* para. 12.

142. *Éditions Plon v. France*, App. No. 58148/00, para. 14 (Eur. Ct. H.R. Aug. 18, 2004), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

143. *Id.*

a person who knew that he was seriously ill was fit to hold the highest national office.”¹⁴⁴ The information is important to transparency of government and there is no “pressing social need” to take the prescribed measures against the publishing company.¹⁴⁵

In *Mizzi v. Malta*, the ECtHR quashed the judgements of Maltese courts, finding a violation of Article 10 of the Convention.¹⁴⁶ The Court did not directly reject the protection of the dead Prime Minister’s reputation by the domestic courts. However, it argued that the protection is disproportionate, particularly in the view of the dead as a former politician and a public figure, who should be subject to wider limits of acceptable criticisms and that the disputed article covered a subject of public interest.¹⁴⁷

In the Spanish case *Rosa María López & Gutiérrez*, the author and editor of a newspaper were accused of violating the right of honor of the Moroccan King Hassan II due to their report of a drug trafficking issue, of which the ECtHR found the Spanish state violated the free speech rights under Article 10 of the European Convention on Human Rights (“Convention”).¹⁴⁸ The Spanish courts took measures to restrict the publication of the newspaper article that reported the suspicious connection of the then-living King to a drug smuggling caught by Spanish police.¹⁴⁹ The Court quashed the domestic decisions and ruled that the measures taken by the Spanish authority cannot be proved that the interference claimed was “necessary in a democratic society” and could not meet “a pressing social need”; it simply did not find that the

144. *Id.* para. 44.

145. *Id.*

146. *Mizzi v. Malta*, App. No. 17320/10, para. 39 (Eur. Ct. H.R. Feb. 22, 2012), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 4, 2014).

147. *Id.* para. 38; see also *Lombardo v. Malta*, App. No. 7333/06, (Eur. Ct. H.R. July 27, 2007), available at <http://www.pfcmalta.org/uploads/1/2/1/7/12174934/7333-06.pdf> (last visited Dec. 3, 2014) (ruling “the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former Correct inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance”).

148. The monarch filed the case himself but later died during domestic proceeding. *Gutierrez Suarez v. Spain*, App. No. 16023/07 (Eur. Ct. H.R. 2012). Hereinafter, the English version of the verdict will be referenced. *Victory of Spanish Journalist at European Court Is Final*, WORLD PRESS FREEDOM COMM., Nov. 30, 2010, available at: <http://www.wpfc.org/?q=node/447> (last visited Dec. 3, 2014).

149. The alleged article mentioned similar reports that were also published in *El Mundo*, *Le Monde*, and *Herald Tribune*, which stated that drug trafficking was the main source of foreign currency for Morocco and pointed to some Moroccan politicians close to the king. *Id.* para. 6.

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information disclosed was capable of causing injury to the personal reputation of the king.¹⁵⁰ The Court prescribed that while journalist reports can be presented in different ways, “it is not for the Court of Justice or for the national jurisdictional authorities to otherwise replace the press to say what technique must the journalists adopt.”¹⁵¹

The author and editor involved in the Spanish case above are not the only authors and journalists who were punished for defaming deceased kings and their families. In 2007, Swiss citizen Oliver Jufer was sentenced to ten years imprisonment in Thailand for insulting King Bhumibol Adulyadej by vandalising portraits of the monarch with black spray-paint during a drunken spree.¹⁵² Citizens of democracies might have problems with the rationales to protect dead kings and state heads, as discussion of their past activities is of public interest and important for public discourse of state policy. Political figures of high status, such as state heads, are obviously important historical figures (or persons in the Israeli term), and shall be under public scrutiny. When defamation cases concern public figures, the truth that the defendants claimed to have spoken is relevant to the narration of public history.¹⁵³

As indicated above, re-assessment of the dead’s reputation can modify our view of the past and collective memory. In *Lehideux & Isorni v. France*,¹⁵⁴ the French judicial authority convicted the authors of an advertisement published in *Le Monde*. The text was read as defending the memory of Marshal Pétain, the famous collaborator of the Nazi Party who was responsible for the death of many French Jews in Nazi concentration camps. The ECtHR overruled the French decisions and found the criminal conviction unnecessary in a democratic society.¹⁵⁵ It made an important distinction between clearly established historical facts, such as genocide and Holocaust, and historical facts that are not clearly established, as in the instant case.¹⁵⁶ As a leading case, the Court set out the rule that denial of the Holocaust and atrocities

150. *Id.* para. 36.

151. *Id.* para. 33 (reiterating its previous ruling in *Bladet & Stensaas v. Norway* [GC], App. No. 21980/93, para. 63 (E. Ct. H.R. 1999)).

152. *World Briefing | Asia: Thailand: Man Who Insulted King Pardoned*, N.Y. TIMES (Apr. 13, 2007), available at <http://query.nytimes.com/gst/fullpage.html?res=9A00E4D9133FF930A25757C0A9619C8B63&module=Search&mabReward=relbias%3As> (last visited Dec. 3, 2014).

153. Barak-Erez, *supra* note 29, at 95 (arguing that defamation cases in which the defendant claims to have spoken the truth, may sometimes be the background for judgments of historical significance).

154. *Lehideux & Isorni v. France*, App. No. 55/1997/839/1045, (Eur. Ct. H.R. 1998).

155. *Id.* para. 58.

156. *Id.* para. 47.

should be excluded from protection of Article 10 of the Convention.¹⁵⁷

By denying protection of revisionists and Holocaust deniers, the Court has obviously promoted a judicial narrative and forbids further challenges, which leads to a further question of the proper roles of court in general. Many have doubted the roles of courts in handling cases regarding historical controversies, questioning if courts are the right locus to address historical events. As Barak-Erez noted, courts may choose three roles to play: as judges and arbiters of historical events; as narrators of history; and as students and teachers of historical lesson.¹⁵⁸ In my view, courts of law can nevertheless avoid to play such roles either singly or simultaneously in handling defamation cases regarding historical events, though their capacities are under doubt.

We observe a similar role played by a Japanese court to affirm the official narrative, like the ECtHR, in reaffirming Japan's dark past during the WWII. Shortly before the notorious Nanjing massacre, two Japanese officers participated in a killing contest with swords to prove their military bravery or brutality. Both were executed after the war in Nanjing for their committed war crimes by the Nanjing War Crimes Tribunal. The story was reported in 1971 by two Japanese newspapers, *Mainichi Shimbun* and *Asahi Shimbun*. The dead's families sued for posthumous defamation, claiming fabrication of the story.¹⁵⁹ The Japanese court rejected their claims and confirmed the trueness of the reports, despite some minor mistakes. The case concerns Japan's war crimes in China that are well-established historical facts and unable to be overturned in the defamation case.

It is no doubt that the dead's families are the strongest defenders of their reputation since they are directly impacted in their daily life. Negative reputation of the dead will have passive influence on the living's life and repute. In the French case, *Fondation Franco-Japonaise dite Sasakawa vs. Karoline Postel-Vinay*,¹⁶⁰ Sasakawa Franco-Japanese Foundation accused French historian Karoline Postel-

157. *Id.* (prescribing that denial or revision of "clearly established historical facts -- such as the Holocaust -- . . . would be removed from the protection of Article 10 by Article 17.")

158. Barak-Erez, *supra*, note 29, at 91-100.

159. *Mainichi Shimbun* and another newspaper *Asahi Shimbun*. *Suit Denying Pair's Wartime Beheading Spree Fails*, JAPAN TIMES ONLINE (Aug. 24, 2005), available at <http://www.japantimes.co.jp/news/2005/08/24/national/suit-denying-pairs-wartime-beheading-spree-fails/#.Uee836xoVt0> (last visited Dec. 3, 2014).

160. Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Paris, Sept. 22, 2010 (Fr.), available at http://www.concernedhistorians.org/content_files/file/LE/184.pdf (last visited Dec. 3, 2014).

Vinay for slurring on its respectability. Postel-Vinay sent an e-mail to participants of a symposium held on the big social event of the 150th anniversary of the diplomatic relations between Japan and France, of which the Foundation was a sponsor. The controversial e-mail was entitled "Sasakawa, a war criminal to celebrate 150 years of Franco-Japanese Diplomacy?"¹⁶¹ The author explained that together with other sixteen historians and academics, she felt it was "quite inappropriate that a foundation fashioning its own name after that of a class A war criminal should sponsor such a gathering."¹⁶² The Paris District Court found part of the e-mail text libellous, but dismissed the case due to a successful defense of good faith by the author.¹⁶³

C. Rehabilitation and Posthumous Justice

As noted above, the Japanese court rejected the defamatory accusation of the journalists and affirmed the war crimes of the two executed military officers. However, Japanese courts have been very reluctant to deliver judgments in favor of the victims of Chinese comfort women, as some survivors have sued for remedies of past suffering.¹⁶⁴ In a collective sense, whether victims of war crimes, atrocities and the Holocaust are recognized by their victim status and offered proper compensations is important not only as a matter of justice, but also as a matter of human dignity and respect. The living victims should not be hurt a second time and those dead should not have their names lost in the dust of history. This is especially true for the dead victims of war atrocities during the Second World War, either conducted by Nazi Germany or by the former Soviet Union.

The Katyn tragedy shocked the world by the annihilation of almost a whole generation of Polish elites by the Russian military after its invasion. The tragedy left a deep wound in Polish people and human history. It is after the collapse of the Soviet Union that the truth came out. On November 26, 2010, the Russian State Duma issued a formal

161. *Id.*

162. *Id.* at 3.

163. *Id.*

164. After 1996 such victims are defined by United Nations as forced slaves. Many Korean victims acquired remedies and formal apology from the Japanese government. See *Japan Court Backs 3 Brothel Victims*, N.Y. TIMES (Apr. 28, 1998), available at <http://www.nytimes.com/1998/04/28/world/japan-court-backs-3-brothel-victims.html?src=pm> (last visited Dec. 3, 2014). However, the law suits lodged by Chinese victims ended only with recognition of the historical tragedy, but without any compensation since, among other justifications, the Japanese Supreme Court deferred to a 1972 bilateral treaty signed by the Chinese Communist government to abandon war compensation. PEIPEI QIU, *supra* note 45, at 175.

statement on the tragedy, declaring that “[i]t is necessary to continue studying the archives, verifying the lists of victims, restoring the good names of those who perished in Katyn and other places and uncovering the circumstances of the tragedy.”¹⁶⁵ However, when some surviving family members of the deceased victims tried to seek the whereabouts of their beloved, time and again they were confronted with obstacles from the present Russian authorities. They were refused further help and serious replies from the Russian authorities,¹⁶⁶ and an official investigation ended prematurely and the related documents were classified afterwards. The case finally ended up in ECtHR to which the Russian state authorities still refused to provide key documents relating to the case upon the Court’s request. The Chamber first found violations of some applicants’ rights not to be subjected to inhumane or degrading treatment protected under Article 3 of the Convention, as well as a violation of Article 38 of the Convention.¹⁶⁷ The Chamber commented that the Court “is struck by the apparent reluctance of the Russian authorities to recognize the reality of the Katyn massacre” noting the fact that after the discontinuation of the investigation, “the Russian prosecutors consistently rejected the applicants’ requests for rehabilitation of their relatives.”¹⁶⁸ The Grand Chamber upheld the Chamber decision on a violation of Article 38, but overruled its decision of an Article 3 violation by the Russian State authorities.¹⁶⁹

It seems that requesting rehabilitation from a foreign state is not easy for many reasons. Rehabilitation of dead victims consequent to communist political convictions was not an easy thing either even in their motherlands. In *Kurzac v. Poland*, a Polish-American tried to rehabilitate his deceased brother – a victim of the Polish Communist suppression – and to restore his own family’s reputation.¹⁷⁰ However, the legal procedures had lasted for five years and were unbearable to the applicant, so that the case was eventually brought to ECtHR for a violation of Article 6-1 (hearing within a reasonable time).¹⁷¹ In the admissibility judgment, the ECtHR decided that “the result of the

165. See *Janowiec v. Russia*, App. nos. 55508/07 & 29520/09 (Eur. Ct. H.R. 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684> (last visited Dec. 3, 2014).

166. See *id.* para. 39.

167. See *generally id.*

168. *Id.* para. 45-46.

169. *Id.* para. 50.

170. *Kurzac v. Poland*, App. No. 31382/96 (Eur. Ct. H.R. May 22, 2001), available at <http://www.echr.coe.int> (last visited Dec. 3, 2014).

171. *Id.* para. 1. In this case, the Court considered the possibility of extending its jurisdiction to cases of atrocity that happened more than half a century ago.

proceedings in issue was decisive for rights which by their very nature were civil, namely, the applicant's right to enjoy a good reputation and his right to protect the honour of his family and restore its good name.¹⁷² The Court therefore puts the reputation of a surviving family under its consideration in the case of rehabilitation of dead victims.

In Spain, the 1977 Amnesty Law has blocked the road both to rehabilitate the deceased victims of the brutal Civil War and long dictatorship, and to condemn the responsible perpetrators, whether dead or alive. The law has been passed consequent to a compromise made among different social forces to facilitate the democratic transition.¹⁷³ But the amnesty law was defined by the UN as incompatible with the International Human Rights law with respect to crimes against humanity that should enjoy no statute of limitations.¹⁷⁴

A Spanish judge's effort to apply such international human rights law was impeded when the Spanish Amnesty Law was under scrutiny. Judge Garzon issued the historical arrest warrant of former Chilean dictator Augusto Pinochet and contributed to legal proceedings against the perpetrator.¹⁷⁵ He also tried to apply the same standard to Spain's historical crimes, when some family members of the missing asked the Audiencia Nacional (National Court) to investigate the whereabouts of their remains for a decent burial.¹⁷⁶ Garzon conferred his jurisdiction to the local courts to answer such inquiries.¹⁷⁷ But this caused chaos and he was accused of flouting the Amnesty Law and committing the crime of *prevaricación*.¹⁷⁸ He was eventually exonerated by the Spanish Supreme Court, but the decision ended the legal approach of Civil War

172. Decision as to the Admissibility of Application no. 31382/96, para. 6 (Eur. Ct. H.R. May 25, 2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5297> (last visited Dec. 3, 2014).

173. Or the pact of oblivion (*el pacto de olvido*). See Teresa Fernández Paredes, *Transitional Justice in Democratization Processes: the Case of Spain from an International Point of View*, 1 INT'L J. RULE L., TRANSITIONAL JUST. & HUM. RTS. 124, 125 (2010); Sumalla, *supra* note 52, at 733-37. This law was counter-balanced recently by a new Historical Memory Law in Spain (Ley de la memoria historica). See Sumalla, *supra* note 52, at 737-43.

174. See the relative comment from the UN Human Rights Office. See *Spain Must Lift Amnesty for Franco Era Crimes-U.N.*, THOMSON REUTERS FOUND. (Feb. 10, 2012), available at <http://www.trust.org/item/?map=spain-must-lift-amnesty-for-franco-era-crimes-un> (last visited Dec. 3, 2014).

175. Naomi Roht-Arriaza, *The Spanish Civil War, Amnesty, and the Trials of Judge Garzón*, 16 AM. SOC'Y INT'L L. (July 25, 2012), available at <http://www.asil.org/insights/volume/16/issue/24/spanish-civil-war-amnesty-and-trials-judge-garzón> (last visited Dec. 3, 2014).

176. *Id.*

177. *Id.*

178. *Id.*

Era claims.¹⁷⁹ This reaction indicates the difficulties in the implementation of the 2007 Law of Historical Memory, which addresses the need to honor the victims of the Civil War and Franco dictatorship and to provide them with reparation.¹⁸⁰

What the living sought for the deceased are posthumous dignity and justice in the sense that they should have not been wronged. The deceased victims' names should be cleaned of political smears. The deceased should not die with wrongly charged crimes. In this sense, rehabilitation of the deceased victims relates more to the concept of justice, or historical justice, and historical truth or correct historical narrative.¹⁸¹ Even deceased victims have the moral rights to truth, justice and reparation in a fair community and this explains why the British Government recently decided that the army should not have executed soldiers for cowardice in WWI and posthumously pardoned the deceased.¹⁸² Similarly, the Americans have apologized for the mistreatments of Japanese migrants during WWII and of indigenous Indians for past injustice.¹⁸³

Lastly, one must note that the rehabilitation of the dead victims in the above cases is possible because of changed social morals or ethos consequent to political changes or the advancement of humanity. This will be discussed further in Section VI, which illustrates how political change and cultural shift have influenced posthumous reputation and our understandings of the past.

D. Posthumous Privacy and Individual Dignity

The dead may be no more, but their past deeds are kept among the memories of those who know them in person or who have heard of them, or who read their diaries, letters or memoranda. More importantly, their images and likeness, as a crucial part of their past existence and the living's impression, can be kept in various forms such as photographs, newspapers, archival documents, films, or most recently, in digital forms on the Internet. In particular, their names and voices can be used commercially; their images and likeness may be

179. *Id.*

180. See Sumalia, *supra* note 52, at 743-44.

181. In this regard, reparation of injustice, according to the United Nations, includes five forms, namely: restitution, compensation, rehabilitation, guarantees of non-repetition, and satisfaction. Satisfaction includes symbolic reparation or posthumous rehabilitation. See G.A. Res. 60/147, *supra* note 112 at para. 22(d).

182. MACMILLAN, *supra* note 4, at 28.

183. See generally Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 ETHICS 114 (2001).

exhibited in history museums for public knowledge; or statues and monuments may be erected to keep their memory alive in community life; or foundations, cities and streets may be named after the deceased for their remembrance or collective memory.

In many occasions, such uses may cause conflicts with their surviving family's interest as well as the dead's privacy and reputation (or in abstract, dignity). For instance, the likeness could be used in a defamatory way, or the dead's families are not willing to disclose such materials to the public, whether for commercial use or for public knowledge; or they are reluctant for such disclosure because the end products are not in favor of the dead. The most extremist version of this category of "defamation" is the defamatory treatment of the likeness of political figures to present political opinions. When the deceased are treated as the icons or pride of a national state and under protection, such "mistreatment" can be handled seriously.

During the 1989 Beijing Student Protest in June, to advocate their anti-dictatorship opinion, three young Chinese threw ink-filled eggs to deface the great portrait of Mao hung on the Tian'an Gate overseeing the Tiananmen Square. They were caught and sentenced to long-term imprisonments for crimes of anti-revolution and defamation of the founder of the communist state.¹⁸⁴ We can find a similar situation in Turkey where acts against the late Atatürk were punished by Law No. 5816 with harsh imprisonment.¹⁸⁵ Many journalists and historians have been accused of defamation of Atatürk in the past under this special legislation, which has been criticized by international society.¹⁸⁶

184. Mao was and still is the icon and pride of the national state to many Chinese today. The three convicts got, respectively, sixteen, twenty and life imprisonment. *China Is Accused of Torturing 3 Who Defaced Mao Portrait*, N.Y. TIMES (June 1, 1992), available at <http://www.nytimes.com/1992/06/01/world/china-is-accused-of-torturing-3-who-defaced-mao-portrait.html> (last visited Dec. 3, 2014); *Mao Portrait Protesters Reunited*, RADIO FREE ASIA (June 21, 2010), available at <http://www.rfa.org/english/news/china/portrait-06212010110340.html> (last visited Dec. 3, 2014).

185. McCracken, *supra* note 55, at 31.

186. See *Prosecutor Investigates A TV Show For Defamation Of Atatürk*, BIANET (June 13, 2008, 11:30 AM), available at <http://www.bianet.org/english/religion/107620-prosecutor-investigates-a-tv-show-for-defamation-of-ataturk> (last visited Dec. 3, 2014); Julia Wetherell, *EU Fines Turkey for Blocking Google Sites*, TECHPRESIDENT (Dec. 19, 2012), available at <http://techpresident.com/news/wegov/23289/eu-fines-turkey-blocking-google-sites> (last visited Dec. 3, 2014); Nagehan Alçı, *Journalist to Sue for Defamation After Atatürk Remarks*, TODAY'S ZAMAN (Nov. 11, 2011, 5:30 PM), available at <http://www.todayszaman.com/news-262347-journalist-to-sue-for-defamation-after-ataturk-remarks.html> (last visited Dec. 3, 2014). For a more detailed discussion, see Antoon De Baets, *Defamation Cases Against Historians*, 41 HIST. & THEORY 346, 349 (2002)(particularly note 12).

The likeness of the dead can be well protected by law in Western democracies under privacy law, especially when the proprietary interests of the dead's likeness and name are of concern. In the U.S., the dead's images or likeness could be protected indirectly, as surviving families claim invasions of their own privacy or reputation against disclosure or appropriation. Journalist Allen Favish was denied access to posthumous photographs taken of the late Vincent Foster at the death scene and during the autopsy.¹⁸⁷ Foster was a high-ranking White House lawyer involved in the investigation of Clinton family's scandal of Whitewater Real Estate Venture. He was found to have committed suicide following the official investigation. Favish suspected that the denial to the requested photos of the deceased was part of a cover-up of the murder. The U.S. government refused his request on the ground of protection of the privacy of Foster's family. They explained that disclosure of such photographs would traumatize the family and invade their privacy. The Supreme Court of the U.S. ruled that the privacy interests of the family trump the public's interest in seeing the pictures of his death scene.¹⁸⁸

But, the dead's privacy and reputation were not without consideration of the Chief Justice. In *Swidler & Berlin v. United States*,¹⁸⁹ Justice William Rehnquist, on behalf of the majority, concluded that to assume a dead person's interest in reputation ends upon his death is unreasonable, which the dissenting Justice Sandra O'Connor also agreed on.¹⁹⁰ In *MacDonald v. Time*, District Judge Sarokin said that such an idea, that a man's defamed reputation dies with him, is to ignore the realities of life and the bleak legacy which he leaves behind.¹⁹¹

Many European jurisdictions offer direct protection by statutory law. Appropriation of the dead's likeness as invasion of posthumous privacy is forbidden in Italy. The Italian magazine *Chi* purchased the exclusive right to publish the pictures taken shortly after Princess

187. See generally *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).

188. See *id.* at 170-72.

189. See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); see also 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, 1099 (2006) (discussing the Supreme Court's recognition for decedents' reputation).

190. See generally *Swidler & Berlin*, 524 U.S. at 411 (O'Connor, J. dissenting) (agreeing that normally the attorney-client privilege survives the death of a client).

191. *MacDonald v. Time, Inc.*, 554 F. Supp. 1053, 1055 (D.N.J. 1983) ("Why should a claim for a damaged leg survive one's death, where a claim for a damaged name does not. After death, the leg cannot be healed, but the reputation can.").

Diana's fatal accident and obtained the findings of the autopsy. The Italian court regarded it as a violation of the dead's dignity and found that the disclosure was not justified by the need of free information of the public.¹⁹² Further dissemination of such information may face criminal punishments, such as imprisonment for up to two years.¹⁹³ According to Madoff, after the death of Saddam Hussein, even the Italian special authority gave a press release to caution the media to respect the dead's dignity.¹⁹⁴

Protection of the deceased's last dignity, in particular their death scene pictures, has been recognized by other EU countries. In *Hachette Filipacchi Associes v. France*, the dead's widow and children accused several companies of an infringement of the right to respect of their private life after the companies disclosed a photograph of the murdered Prefect Claude Erignac in Ajaccio for commercial use. The photograph was supplementary to an article and displayed his dead body lying on the ground.¹⁹⁵ The French Court of Cassation concluded that because the photograph clearly indicated the body and face of the murdered, the publication showed disregard for human dignity and therefore the publication was illegal.¹⁹⁶ In replying to the ECtHR, the French Government explicitly expressed that though the publication of that article concerned a matter of public interest, it affected the dignity of a civil servant, which is part of "the hard core" of his rights, as well as the private life of his family.¹⁹⁷

In the Slovak Republic, courts judged in similar ways to protect the privacy of the dead and their family. For example, in *Weiss vs. R., a. s.*, several photographs of a mother's dead body and others *ante mortem* were published, together with some excerpts of her suicide letter. The deceased was Ms. Marcela Weissová, wife of Slovak politician Mr. Peter Weiss. Her son accused the publisher of violating his own and his late mother's personality rights. The Slovakia judiciary authorities acknowledged that the publication of photographs of the dead body violated Article 15 CC of the Civil Code, which protects posthumous

192. MADOFF, *supra* note 28, at 128.

193. *Id.*

194. *Id.*

195. See *Hachette Filipacchi Associés v. France*, App. No. 71111/01, para. 7-11 (Eur. Ct. H.R. June 14, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81066> (last visited Dec. 3, 2014).

196. *Id.* para. 19.

197. *Id.* para. 11 (finding no violation of free speech rights of the applicant company under Article 10 of the Convention).

personality rights and therefore ordered remedies.¹⁹⁸

Not only is dignity of the dead under legal protection when the dead's likeness is in controversy, but also when the related economic benefits are of much closer concern of the living families. This concerns the economic perspective of the dead's name, likeness, etc. Again, Princess Diana would be bothered if she had the chance to know the fierce legal battles fought under the name of her remembrance, of which millions of dollars were at stake.¹⁹⁹ A similar story happened to Martin Luther King, whose family charged heavily on the use of his likeness, name and the famous "I have a dream" speech.²⁰⁰

German law, as Rösler suggested, differentiated more clearly between protection of reputation and privacy as dignity and as property in particular in the 1999 Marlene Dietrich Decision.²⁰¹ It is the first time that the German Federal Court rendered damages to posthumous invasion of personality on the ground of commercial exploitation of the decedent's name, voice or image, which was part of marketing strategy about Marlene Dietrich. This involved various products such as bags, t-shirts, watches, calling cards, pins, etc. The Constitutional Court of Germany upheld the decision and affirmed the inclusion of commercial aspects of personality rights under constitutional protection.²⁰²

E. Biography Writing and Posthumous Disputes

Biography writing matters not only to the living, but also to the dead because this is an important means to recount their life and

198. The Constitutional Court upheld the decision with a monetary compensation for the invasion of the deceased mother's privacy Weiss vs. R., a. s., 7.07.2009 (ÚS), III. ÚS 185/09-24 (Slovak Republic) (the case is briefed to the author by his student research assistant, Mr. Martin Duchac).

199. See Matthew Magee, *Court Rules that Newspaper does not have to Identify Commenters*, GUARDIAN (Mar. 1, 2011, 9:54 PM), available at <http://www.guardian.co.uk/law/2011/mar/01/sue-commenters-libel-daily-mail> (last visited Dec. 3, 2014); Heather Timmons, *Diana Charity Halts Grants, Citing Lawsuit*, N.Y. TIMES (July 12, 2003), available at <http://www.nytimes.com/2003/07/12/world/diana-charity-halts-grants-citing-lawsuit.html> (last visited Dec. 3, 2014); Marius Meland, *Princess Diana Fund, Franklin Mint Settle Trademark Dispute*, LAW360 (Nov. 11, 2004, 12:00 AM), available at <http://www.law360.com/articles/2540/princess-diana-fund-franklin-mint-settle-trademark-dispute> (last visited Dec. 3, 2014).

200. Jonathan Turley, *Cashing in on Martin Luther King Jr.*, LOS ANGELES TIMES (Apr. 22, 2009), available at <http://articles.latimes.com/2009/apr/22/opinion/oc-turley22> (last visited Dec. 3, 2014) (King's family winning landmark case against USA Today and CBS for the illegal use of King's speech without paying them); see also MADOFF *supra* note 28, at 9-10.

201. Rösler, *supra* note 77, at 181.

202. *Id.*

achievement. As Craik pointed out, many dead even got more famous after their death through successful biographies.²⁰³ Some people will get their autobiographies ready before death to prevent defamatory statements; others may hire professional writers to put down their stories before death,²⁰⁴ as Apple's founder Steven Jobs made such an arrangement with the author of his biography.²⁰⁵ After death, living families may also hire professional writers to complete the story of the deceased for many reasons. Or, biographies of the dead could be written by many without the consent of the dead before death and of their families after death. These two circumstances can both lead to controversies.

The Canadian case *Turgeon v. Michaud* lasted for seven years because of the vague assignment of the author's rights upon writing a biography for a famous Quebec businessman. The dead's family commissioned author Pierre Turgeon to write Desrosier's biography in order to promote business by telling the stories of the founder and how he managed to establish a commercially successful enterprise.²⁰⁶ The timeline set out in the initial agreement was not respected and the writing was delayed several times. At last the author's manuscript was not to the heirs' satisfaction, who decided not to publish it. Nevertheless, the author sought to publish the draft at another publishing company other than the agreed one. The Quebec Superior Court issued a permanent injunction against Turgeon, halting him from publishing the manuscript. The trial judge claimed that the deceased's heir had the right to refuse to publish the manuscript and the author could not publish any content that is based on the confidential information provided by the deceased's family.²⁰⁷

Biographers are likely to disclose private matters that others would have no chance to know. This influences the deceased's' reputations as

203. CRAIK, *supra* note 10, at 182-86 (arguing that biography may extend a dead's reputational network and biographical reputational network ultimately serves as the major locus of the posthumous reputational network).

204. *Id.* at 190 (an example of "pre-posthumous tasks" is Thomas Hardy, who spent years ghostwriting his official biography and then covered it as his wife's memoir).

205. With an agreement that Jobs would not interfere with the contents of his own biography. Nick Bilton, *One on One: Walter Isaacson, Biographer of Steve Jobs*, N.Y. TIMES: BITS BLOG (Nov. 18, 2011, 9:41 AM), available at http://bits.blogs.nytimes.com/2011/11/18/one-on-one-walter-isaacson-biographer-of-steve-jobs/?_r=0 (last visited Dec. 3, 2014).

206. Alexandra Steele, *Once Upon a Time, There was a Manuscript*, CENTRE CDP CAPITAL, available at <http://www.robic.ca/admin/pdf/537/173.14.pdf> (last visited Dec. 3, 2014).

207. *Id.*

well as their families' reputations. Francis Russell, an American writer and biographer, was confronted by the heirs of ex-president Harding who sought injunction from Ohio court to exclude the use of love letters of the dead in his book *The Shadow of Blowing Grave* regarding Harding. These love letters were from Mrs. Phillips who had had an affair with Harding for more than fifteen years and was persuaded by Russell to relent. These letters were confiscated by an Ohio Court and they remained under a protective order until 2014.²⁰⁸ They cover the controversial period regarding Harding's nomination for the Republican presidency in 1920, when it was too late to change the nominee upon knowledge of the affair by the Republican Party, which sought ways to cover the affair.²⁰⁹ The author protested by leaving the spaces for the citations from the letters merely blank in his published book.²¹⁰ Yet during Harding's full term, voters never knew anything about his extramarital affairs, though he suffered multiple posthumous indignities.²¹¹

The above two cases show the importance of using unpublished materials in biographical writings and the big impacts of legal interferences on historical studies under copyrights.²¹² Still, if a biography is not written in favor of the dead, their families may seek damages, injunctions, remedies and an obligatory formal apology to protect themselves and the dead. In China, the children of the deceased ex-prime minister Cheng Yonggui sued historian Wu Shi and won the case with remedies of emotional distress and a formal apology from the author and publisher.²¹³ Wu described the deceased as "the peasant of Chairman Mao" and listed his previous deeds unknown to the public in

208. Francis Russell, *A Naughty President*, NEW YORK REVIEW OF BOOKS (1982), available at <http://www.nybooks.com/articles/archives/1982/jun/24/a-naughty-president/> (last visited Dec. 3, 2014).

209. John H. Summers, *What Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy*, 87 J. AM. HIST. 825, 836 (2000).

210. The letters are confiscated under the protection of common law copyright interests of the heirs. See John Dean, *The Harding Affair: Evidence or Racism Rising*, FINDLAW (Sept. 18, 2009), available at <http://writ.news.findlaw.com/dean/20090918.html> (last visited Dec. 3, 2014) (detailing the story regarding Harding in his interview).

211. Summers, *supra* note 210, at 836.

212. For a general discussion regarding unpublished expressions in biographical writing without consent of the copyright holders in the United States, see Bilder, *supra* note 37.

213. Chen Mingliangyu Beijing qingnianbao he Wu Shi QianfanMingyuquan An (陈明亮与北京青年报社、吴思名誉权纠纷案) [Chen Mingliang v. Wu Shi & Beijing Youth Newspaper] (Beijing No. 1 Intern. Ct. Dec. 29, 2003) (China), available at <http://www.qinquan.info/138v9.html> (last visited Dec. 3, 2014).

a biography.²¹⁴ Chen's living family would not accept such a negative account of the former politician with a good repute. Even if true, such writing denigrates the reputation of the dead. The adjudicating court ruled that the author used sources, such as private memos, personal interviews, etc., which are not official and un-authoritative.²¹⁵ Although the author had been cautious and acted with due care in selecting materials and writing, the Chinese courts still demanded the use of certain sources and materials in favor of the deceased.²¹⁶

Closely related to biographical writing are novels or fictions that are based on real stories of the deceased, but taken as defamatory against the deceased by their families. Such writings and narratives attract disputes from the dead's families or even agitate them because many audiences know clearly whom those characters are in real life. In a famous German case regarding the Klaus Mann's novel *Mephisto-Novel of a Career*, Mann portrayed a character attributed to the well-known, controversial German actor and theatre director Gustaf Gründgens (1899-1963).²¹⁷ The heir of Gründgens filed a defamation suit and the German Constitutional Court judged in favor of the dead, finding that the defamation overrode constitutional values.²¹⁸ The problem of such artistic works lies in the blurs of facts and imaginations that may mislead the audience to mistake fictions as reality of the past.²¹⁹

No wonder Rosler questioned: "what would happen if such a fusion of fiction and fact took place on a large scale, changing even the perception of history?"²²⁰ This is the rationale behind the Brazilian Civil Code, which requires works of a biographical nature to have consent from their subjects before public release. This obviously

214. *Id.*

215. *Id.*

216. *Id.* In another case, a young Chinese biographer, based on accessible university archives, depicted some notorious acts of a famous scholar, the former president of that university, during China's Culture Revolution. The presiding judge in this case explicitly expressed that memos included in such archives putting down people's self-and-mutual criticisms shall not be used for historical studies like author's work. *Feng Boqun (冯伯群), Yinyong Dangan Rechu de Yichang Guansi (引用档案惹出的一场官司)*, 3 DANGAN CHUNQIU (档案春秋) 10-15 (2006).

217. Rösler, *supra* note 114, at 154-55, 174-78.

218. *Id.* at 155.

219. Take the Oscar-winning film *Braveheart* for example, which has been criticized by many historians of its inaccurate narrative. See Elizabeth Ewan, *Braveheart*; *Roy Roy*, 4 AM. HIST. REV. 1219, 1219-21 (1995), available at <http://www.cias.ufl.edu/users/burt/Medieval%20cinema%20recommended/AHR%20Braveheart.pdf> (last visited Dec. 3, 2014).

220. Rösler, *supra* note 114, at 156.

influences contents of biographical works so that they “end up being eulogistic to the people they portray.”²²¹ For instance, Ruy Castro was accused by the relatives of the late footballer, World Cup champion Garrincha, of libel for his description of the deceased’s penis length.²²² Defamation suits are a big threat to journalists and biographers who are willing to reveal the secrets and realities of the deceased that were once hidden for various reasons.

If biographers are restricted in their writings in using unpublished expressions, then the value of biographical writings – in particular in view of their contribution to history – is shaky on the whole.

F. Religious Honor and Group Identity

With respect to defamation of religion, many will recall the Danish newspaper *Jyllands-Posten* that printed cartoons portraying Muhammad in a less favorable way. The case was defeated by the Danish court,²²³ although publishers of the same cartoon were punished in Jordan, Indonesia and Belarus²²⁴ which shows a different tolerance of free speech. The recent example is an Egyptian Christian teacher who was accused of defamation of Mohammed and Islam by her students and their parents.²²⁵ She was eventually removed from her job. No doubt, defamation of the dead prophet and religious leaders is somehow defamation of the accusers’ religious identity, and therefore themselves. In jurisdictions where defamation of religion is punished, historians have been silenced and journalists have to conduct self-censorship to

221. Rafael Spuldar, *New Law Set to Ease the Way for Biographies in Brazil*, XINDEX (May 9, 2013), available at <http://www.indexoncensorship.org/2013/05/new-law-set-to-ease-the-way-for-biographies-in-brazil/> (last visited Dec. 3, 2014).

222. ALEX BELLOS, FUTEBO: THE BRAZILIAN WAY OF LIFE 105 (Bloombury Publ’g Plc. 2009) (ironically, it was regarded by the adjudicating judge not as degrading, but as a pride of most Brazilians in that country).

223. AFP, *Muslim Cartoon Case Fails to Reach Denmark’s Top Court*, CANADA.COM (Oct. 21, 2008), available at <http://www.canada.com/topics/news/world/story.html?id=c25b9b8a-2906-453f-a671-1a4a137fe61f> (last visited Dec. 3, 2014).

224. Meagan McElroy, *Denmark Court Dismissed Lawsuit Against Editors over Muhammad Cartoons*, JURIST (Oct. 26, 2011, 12:00 AM), available at <http://jurist.org/thisday/2011/10/danish-court-dismissed-lawsuit-against-editors-over-muhammad-cartoons.php> (last visited Dec. 3, 2014); see also L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT’L L. REV. 69, 69-73 (2009); see also Belnap, *supra* note 49, at 638-42.

225. Pamela Geller, *Sharia in Action: Christian Teacher in Egypt Accused of ‘Defaming Islam’ Goes on Hunger Strike*, ATLAS SHRUGS (May 13, 2013, 8:43 AM), available at http://atlasshrugs2000.typepad.com/atlas_shrugs/2013/05/sharia-in-action-christian-teacher-in-egypt-accused-of-defaming-islam-goes-on-hunger-strike.html (last visited Dec. 3, 2014).

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avoid troubles.²²⁶ Such official reaction can even influence publishers from Western democracies who have to take into account negative consequences. For instance, a student editor from University of Illinois and an author from Cambridge University confronted aftereffects of their reproduction of the famous cartoon against Muhammad, implicating potential self-censorship by both university authorities.²²⁷

We shall not be surprised to observe similar cases even in European democracies that should have been more tolerant to extreme speeches. These cases usually stir up agitation and sentimental distress within religious communities. In the controversial *Giniewski v. France*, the author published an article in a Paris newspaper that was deemed racially defamatory against the Christian community.²²⁸ The author was accused for condemning Christianity's historical anti-Semitism while claiming a direct relation to the horrors at Auschwitz with the core doctrines of Catholic faith, which undermines "the honour and character of Christians and, more specifically, the Catholic community."²²⁹ In the subsequent legal proceedings, the criminal charge was dropped, but the civil complaint was upheld with remedies awarded and a public statement of court ruling ordered.²³⁰

The case went to the ECtHR for breaching the author's free speech rights. The applicant claimed that his speech was subject to stricter control regarding a sensitive religious matter and the French judicial interpretation of his article was not in accordance with the original texts, whose intention was to contribute to the public debate on the origins of anti-Semitism and the extermination of the Jews.²³¹ The ECtHR admitted that the interference was prescribed by law, and followed a legitimate aim to protect the reputation of others (the Christian community at stake).²³² The Court realized the fact of the broadened margin of appreciation of its contracting states, due to the "absence of a uniform European conception of the requirements of the protection of

226. See Graham, *supra* note 225; see also ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, ENDING THE CHILLING EFFECT: WORKING TO REAL CRIMINAL LIBEL AND INSULT LAWS 97 (2004) (in many Eastern Europe and Central Asia countries, journalists are actively convicted and prosecuted by state authorities to encourage self-censorship).

227. IVAN HARE & JAMES WEINSTEIN, *EXTREME SPEECH AND DEMOCRACY* 312 (Oxford Univ. Press 2010).

228. *Giniewski v. France*, App. No. 64016/00, para. 14 (E. Ct. H.R. Apr. 31, 2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216> (last visited Dec. 3, 2014).

229. *Id.* para. 15.

230. *Id.* para. 18-23.

231. *Id.* para. 27-28.

232. *Id.* para. 38-42.

the rights of others in relation to attacks on their religious convictions.”²³³ It admitted that a proper decision was within its jurisdiction to decide on the pressing social need and proportionality of interference in balancing different interests.²³⁴

The Court concluded that the defamation accusation is ill grounded on the texts of the article. It held that the author made a contribution to the debate of a particular doctrine, which is open to further discussion by others.²³⁵ The Court could not find attacks on religious beliefs even though it involved a religious doctrine and the gravity of the matter such as the Holocaust, and the author’s article is not gratuitously offensive, or insulting, and did not incite disrespect or hatred or cast doubt on clearly established historical facts.²³⁶ Therefore, in the Court’s view, the interference was not necessary in a democratic society and the charge of defamation of the Christian community did not confront a pressing social need.²³⁷ Though the criminal charge was acquitted and the civil decision ordered a remedy of merely 1 FRF in damages and publication of a notice of the ruling, the involvement of a criminal offence per se amounted to a deterrent effect and the sanction appeared to be disproportionate in the Court’s view.²³⁸

Though this case did not involve the dead’s reputation, it eventually reflects the never-modest reactions from religious groups, including threatening dissents with defamation petitions, either criminal or civil. In this case, Christians are no different from Muslims in defending their beliefs. Not so long ago, Robert Katz wrote in his book *Death in Rome*, which was subsequently turned into a film *Massacre in Rome* (1973), that then deceased Pope Pius XII knew the planned executions of Italians nineteen hours before the event. The killings were in reprisal of the deaths of Germans in Rome due to a partisan attack. The Vatican denied Katz’s allegation of the Pope’s silence.²³⁹ A niece of the Pope lodged the case in the Italian courts claiming defamation of her uncle’s memory. Katz lost his criminal case and was sentenced to fourteen months imprisonment, which was eventually set

233. *Giniewski*, App. No. 64016/00, para. 44.

234. *Id.*

235. *See id.* para. 50.

236. *See id.* para. 51-52.

237. *See id.* para. 53.

238. *Giniewski*, App. No. 64016/00, para. 14.

239. *See Robert Katz*, TELEGRAPH, available at <http://www.telegraph.co.uk/news/obituaries/religion-obituaries/8144130/Robert-Katz.html> (last visited Dec. 3, 2014).

aside following an amnesty in 1980.²⁴⁰

The Italian judges in charge carried out an investigation of historical event themselves for two years, trying to find out what really happened on March 23rd and 24th of 1943. They travelled around Italy and Germany to interview witnesses.²⁴¹ The local court concluded that the “one and only truth” is that Pius XII did not know anything about the planned reprisal, at least no proof could be shown to the court.²⁴² The Appeal Court quashed the decision of the first instance court and decided not to get into any historical ascertainment of truth. It granted the historian “an almost absolute immunity on the basis of Article 33 of the Italian Constitution.”²⁴³ However, the Court of Cassation overturned this ruling and Katz’s immunity was abolished. The case was sent back to the Appeal Court of Rome, which ruled against Katz and restated the “truth” established by the local court. According to Resta and Zeno-Zencovich, the final decision is extremely long and more like a historical treatise than a judicial opinion, and the court has somehow established an official, authoritative version of the story to replace Katz’s findings.²⁴⁴

G. Holocaust Deniers and Revisionists

We must, when appreciating Rosmus-Wenninger’s courage and achievements in revealing historical truth,²⁴⁵ pay attention to a different category of historical studies that are not favoured by many state laws and communities, as well as historians. History revisionists and Holocaust deniers belong to this category in advocating different versions of the dark sides of human history such as war crimes, genocides and atrocities against humanity and concluded with clearly established historical facts.²⁴⁶ Their expressions have been strictly

240. See *id.*; see also WEBER, *supra* note 46 (another version of the story is that the Supreme Court of Italy threw out the case after several appeals ten years later); see also Emma Brown, *Robert Katz, 77, Wrote History of WWII Massacre in Italy*, WASH. POST, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/21/AR2010102105984.html> (last visited Dec. 3, 2014).

241. See Giorgio Resta & Vincenzo Zeno-Zencovich, *Judicial Truth and Historical Truth: The Case of the Ardeatine Quarries Massacre*, 31 L. & HIST. REV. 844, 877 (2013) for a more detailed analysis of the case.

242. See *id.* (the Court’s role in finding historical truth would be under critiques of many historians and lawyers); see also discussion *infra* Section VI.

243. Resta & Zeno-Zencovich, *supra* note 242, at 877.

244. See *id.* at 878.

245. See discussion *infra* Section IV.A for her story.

246. See *Lehideux & Isorni v. France*, App. No. 1045/839, 1997 Y.B. Eur. Conv. on H.R. 55 (Eur. Comm’n on H.R.) (ruling speeches denying Holocaust are not protected by Article 10 of the European Convention of Human Rights).

restricted in most Western democracies whose laws directly treated such expressions as crimes against humanity and human dignity,²⁴⁷ even in the case that such expressions are presented as academic discourse or an extreme form of freedom of expression. This is in particular the case in countries whose people experienced such tragedies.

When Garaudy challenged the orthodoxies of the Holocaust against Jews and the existence of Hitler's final solution in his book *The Founding Myth of Modern Israel*, he was found guilty of denial of crimes against humanity, racially defamatory statements, and incitement to racial hatred.²⁴⁸ Before the ECtHR, Garaudy claimed that his views were not revisionist and his book was a political piece of work, instead of historical, questioning Israeli policies. He also complained that his book had been misunderstood and distorted by French Courts.²⁴⁹ Garaudy submitted to the Court that the 24 *bis* of Act of 29 July 1881 Law, the French Freedom of Press Act, created "a censorship mechanism that wrongfully restricted freedom of expression."²⁵⁰

The Court reiterated that justification of a pro-Nazi policy is against the Convention's fundamental values and could not be allowed to enjoy the protection afforded under Article 10.²⁵¹ It regarded the author's expressions and ideas in the book not as historical research akin to a quest for the truth, but as trying to rehabilitate the National-Socialist regime and accusing victims of falsifying history. It concluded that "denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incident to hatred of them."²⁵²

But the latest decision of the Court shows a different tendency on a similar issue: the Armenian genocide, which has been long debated by history scholars all through the world and the official history of Turkey

247. See Kenneth Lasson, *Holocaust Denial and the First Amendment The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV 35, 77 (1997).

248. See *Garaudy v. France*, App. No.65831/01 (E. Ct. H.R. June 24, 2003), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23829> (last visited Dec. 3, 2014). Exclusion of protection of free speech rights of Holocaust denial and other similar speeches from Article 10 of the Convention, according to some scholars, is not justified and the case law of ECtHR shall be changed. See, e.g., Hannes Cannic & Dirk Voorhoof, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*, 29 NETHERLANDS Q. HUM. RTS. 54, 83 (2011) ("Applying the abuse clause in order to deal with and legitimize the criminalization of the worst kinds of speech is not a desirable project for the future development of democracy in Europe.").

249. See *Garaudy*, App. No.65831/01, para. 17-18.

250. *Id.* para 20.

251. See *id.* para. 22.

252. *Id.* para. 23.

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is under constant criticism. In *Perinçek v. Switzerland*, the Court denied the genocide from falling into the legal concept of “genocide” precisely defined by the International court of Justice and the International Criminal Tribunal for Rwanda and thus not convinced by the Swiss court’s decision.²⁵³ It regarded the plaintiffs as engaging in speech of a historical, legal and political nature as part of a heated debate.²⁵⁴

Many jurisdictions have special memory laws to punish speeches of deniers of the Holocaust, atrocities, war crimes and massacres and related revisionists.²⁵⁵ In Europe, negationism is punishable in countries such as Germany, France, Austria, Belgium, Spain, Portugal and Switzerland.²⁵⁶ Regarding revisionism in Europe, Germany and France use different legal terms to cover revisionist views, including approval or justification, and contestation.²⁵⁷ This includes, in the European context, three verbs – to deny, to justify, and to minimize – repeatedly used to define negationism and revisionism.²⁵⁸

Memory law can be used by new democracies to declare a clear-cut departure from the past, although possibly at the cost of free expression, which they should respect and protect more. Consequent to the recent democratization process, Cambodia has recently passed the Law Against Non-recognition of the Crimes Committed during the Democratic Kampuchea Period, which attracted criticism from ARTICLE 19, a NGO defending free speech rights across the world and taking its name from Article 19 of the Universal Declaration of Human Rights. The law’s purpose is to punish those who do not recognize, downplay, deny, or dispute the existence of the massive crimes in the

253. See Press Release, European Court of Human Rights, Criminal Conviction for Denial that the Atrocities Perpetrated Against the Armenian People in 1915 and Years After Constituted Genocide was Unjustified ((E. Ct. H.R. Dec. 17, 2013), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4613832-5581451#%22itemid%22:\[%22003-4613832-5581451%22}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4613832-5581451#%22itemid%22:[%22003-4613832-5581451%22})) (last visited Dec. 3, 2014)[hereinafter Judgment *Perinçek v. Switzerland* Press Release].

254. See *id.* at 3.

255. Revisionist perspective does not deny the Holocaust but rather aims to challenge the conventional view of responsibility for it; Negationist perspective denies the existence of the Holocaust, disregards settled historical norms, and distorts the relationship between the Holocaust and historical reality. See Emanuela Fronza, *Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609, 613–14 (2005); see also Pascale Bloch, *Response to Professor Fronza’s the Punishment of Negationism*, 30 VT. L. REV. 627 (2005).

256. See Fronza, *supra* note 256, at 614–17.

257. See *id.* at 618.

258. *Id.* at 619.

Democratic Kampuchea period.²⁵⁹

Other jurisdictions, in contrast, are more tolerant and do not punish such expressions as Guraudy's that, according to ECtHR, are certainly against humanities and lead to racial defamation of Jews. In these jurisdictions, free speech rights are more respected and better protected, with the protection extending to extreme expressions.

The Canadian Supreme Court decided so in the famous 1992 Case of *R. v. Zundel*.²⁶⁰ Ernst Zundel was very determined in voicing doubts over the Holocaust of Jews in his self-published pamphlet called *Did Six Million Really Die?*²⁶¹ He was convicted for spreading false news contrary to Section 181 of the Canadian Criminal Code.²⁶² Regarded as revisionist history, the pamphlet proposed: *inter alia*, the amount of Jewish victims is exaggerated and the Holocaust is a myth made by the Jewish conspiracy.²⁶³ After convicted twice in lengthy legal proceedings, Zundel appealed and the Canadian Supreme Court held that the appeal shall be admitted and Section 181 is unconstitutional.²⁶⁴ Chief Justice McLachlin, writing on behalf of the Court, said that Section 2(b) of the Canadian Charter of Rights and Freedoms protects all expression of non-violent form, and the content of Zundel's pamphlet is irrelevant in the instant case.²⁶⁵ Furthermore, "[t]his Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by [Section] 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection."²⁶⁶

One may compare *Zundel* with an earlier 1990 case *Keegstra*. The Canadian Supreme Court ruled differently, upholding *Keegstra*'s

259. *Cambodia: Law Against Non-Recognition of the Crimes Committed During Democratic Kampuchea*, ARTICLE 19 (June 2013), available at <http://www.article19.org/data/files/medialibrary/37127/13-06-27-cambodia-LA.pdf> (last visited Dec. 3 2014).

260. *R. v. Zundel*, [1992] 2 S.C.R. 731 (Can.).

261. *See id.* at 743.

262. *See id.* at 744.

263. *See id.*

264. *See id.*

265. *R. v. Zundel*, [1992] 2 S.C.R. 731 (Can.). Zundel was also involved in two other cases regarding Holocaust denial and finally was denounced by the Canadian authority as a threat to national security who denied his application for Canadian citizenship. Deported back to Germany, he was convicted of repeated Holocaust denials and sentenced to five years imprisonment in 2007. Associated Press, *German Activist Ernst Zundel Gets 5 Years for Denying Holocaust*, FOX NEWS (Feb. 16, 2007), available at <http://www.foxnews.com/story/2007/02/16/german-activist-ernst-zundel-gets-5-years-for-denying-holocaust> (last visited Dec. 3, 2014).

266. *Zundel*, 2 S.C.R. at 753.

conviction of hate propaganda and dissemination.²⁶⁷ In this case, Justice McLachlin, as the dissenting judge, opined in similar lines as in *Zundel* that the alleged speeches conveyed a meaning or a message of non-violent nature.²⁶⁸ Thus, it is under the protection of Section 2(b), which protects the fundamental rights to free expression and thought.²⁶⁹ It “protects all content of expression irrespective of the meaning or message sought to be conveyed, no matter how offensive it may be.”²⁷⁰ She reasoned that “Section 319(2) does not constitute a reasonable limit upon free speech” and “lacks the required degree of proportionality.”²⁷¹

In the United States, freedom of expression extends even to a much wider scope including hate speeches and Holocaust denial. As Persinger noted, “[o]ne of the principles this country holds dear is the opportunity to express and receive information regardless of how unpopular it may be.”²⁷² This broadened free speech protection covers civil public discourses, including hate speeches and speeches denying Holocaust for various reasons.²⁷³ Lasson noticed that the only jurisprudential remedy against Holocaust denial was by means of contract law.²⁷⁴ The related case is about a Holocaust survivor who won back his denied award of \$50,000 for providing successful evidence for the death of Jews at Auschwitz offered by the Institute for Historical Review.²⁷⁵

The American Constitution, said Lidsky, does not allow the State to “punish citizens for holding anti-Semitic beliefs nor prevent them from receiving information likely to foster such beliefs.”²⁷⁶ It is strongly argued that rebuttal of such speeches should be combated in markets of free speech and the State should be out of this terrain, since potential censorship may follow state interference in public discourses

267. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 795-96 (Can.).

268. *Id.* at 701.

269. *Id.*

270. *Id.*

271. *Id.* at 703, 706.

272. Jason Persinger, *The Harm to Student First Amendment Rights When School Boards Make Curricular Decisions in Response to Political Pressure: A Critique of Griswold v. Driscoll*, 80 U. CIN. L. REV. 291, 312 (2012).

273. See Lyrisa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1092 (2008) (arguing “unlike other countries, the United States has never justified the regulation of verifiably false speech on the grounds of that it poses a generalized threat of dignitary harm,” such as Holocaust denial speeches).

274. See Lasson, *supra* note 248, at 77.

275. *Id.*

276. Lidsky, *supra* note 274, at 1095.

that are critical to a democracy.²⁷⁷

For many, the protection of free speech by the Americans probably goes too far sometimes, in particular for those who regard such unpopular, distorted speeches as a means to engrain critical thinking for students and provide bad examples. When Myers sought to remove books of Holocaust-denial nature at Texas A&M University Library, worrying about their influences among students, he was only able to get them removed from the category of Holocaust and Jewish History to a different sub-category called Errors and Inventions. Even worse, he attracted criticisms from fellow scholars across the country, arguing that any suppression of books is wrong, no matter how repugnant their message, since *no fine line can be drawn on the issue*.²⁷⁸ Even his sympathizers agreed that such books should not be removed so that they could be used to study anti-Semitism.²⁷⁹

The popular fear among the Americans of a slippery road to state censorship of free expression bears a heavier weight than their impulse to prevent dignitary harms, mental distress, incitement, and social disorder consequent to such expressions.²⁸⁰ The First Amendment right of free expression has been worshiped on the sanctuary altar by many Americans as an absolute right.²⁸¹

H. Immortality in the Information Age

The Information Age has fundamentally changed the situations of posthumous reputation and history studies. Online defamation and privacy invasion cases have attracted attentions of legal scholars to debate their impact on defamation law and privacy law all over the world. Due to the information persistence on and easy access to the Internet,²⁸² on the one hand, the dead's reputation can be kept longer

277. See *id.* at 1095-99 (illustrating the reasons to allow the breathing space for lies); see also Lasson, *supra* note 248, at 52-64 (discussing the First Amendment consideration regarding Holocaust denial speeches in U.S. law).

278. See Mary Ann Roser, *A&M Professor Stirs Debate over Holocaust Denial Books*, H-NET (Apr. 11, 1996, 11:15 PM), available at <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-holocaust&month=9604&week=b&msg=MvFTsuPctbrs1hgNxSzTtQ&user=&pw=> (last visited Dec. 3, 2014).

279. Lasson, *supra* note 248, at 43.

280. See *id.* at 68 (Lasson argued that "anything which restricts this right (freedom of self-expression) is a step on the road toward tyranny.").

281. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

282. See SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY (O'Reilly Media 2001) (discussing the threat of the Internet to personal data protection for information persistency); see also Jean-Francois Blanchette & Deborah G.

and become known via the Internet, and therefore becomes more connected with history. On the other hand, the popular use of the Internet makes defamation of the dead much easier because everyone has the chance to speak to the whole world on social media and social networks. While the Internet has posed a new threat to the reputations of the deceased, it also provides a new forum for public discussion of the past. The Internet has escalated the conflict between free expression and protection of the dead's reputation and privacy.

Disclosure of the dead's information, even for good purposes, attracts complaints from surviving families. In 2003, Dutch citizen Eiseres, as the only daughter of her Jewish parents and one of the so-called child survivors, sued in Amsterdam for the publication of information of her dead parents and her family. The Foundation of Digital Monument of the Jewish Community in Netherlands (*Stichting Digitaal Monument Joodse Gemeenschap*) was founded in 2000 for the purposes of keeping alive the memory of the dead victims of the Nazi Holocaust and for promoting scientific research and use of educational materials.²⁸³ The plaintiff complained that the online publication of her family's data caused her psychological damage and invaded the privacy of the family.²⁸⁴ The Amsterdam court judged in favor of the foundation after considering the facts that the deceased victims' information has already been disclosed online and such publication is not in violation of their honor and reputation in reality. It ruled that the publication is not unlawful and does not lead to abuse of right,²⁸⁵ so that in the instant case "the importance of freedom of expression shall prevail."²⁸⁶

In some jurisdictions, the dead's online reputation has been well secured, which leads to censorship of history from state authorities. The Thai government, for instance, blocked the domestic access to the Yale University Press website in 2006 when the latter planned to publish Paul Handley's *The King Never Smiles: A Biography of Thailand's Bhumibol Adulyadej*.²⁸⁷ The book portrayed a disfavored image of the dead king

Johnson, *Data Retention and the Panopticon Society: The Social Benefits of Forgetfulness*, 18 INFO. SOC'Y 33 (2002); see also Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012), available at <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten> (last visited Dec. 3, 2014).

283. HR 12 november 2003, KB 2003, 1363 m.nt GJ (Eiseres/ Stichting Digitaal Monument Joodse Gemeenschap in Nederland en Gedaagde)(Neth.)[hereinafter Eiseres].

284. *Id.* at 6.1.

285. *Id.* at 7.4.

286. *Id.* ("... moet het belang van de uitingsvrijheid de doorslag geven.")

287. James Warrick-Alexander, *Thailand Bars Univ. Website*, YALE DAILY NEWS, available at http://yaledailynews.com/blog/2006/02/06/_-31649/ (last visited Jan 9, 2015).

in contrast to the popular official image and encountered many obstacles in publication and dissemination from the Thai state authority.²⁸⁸ In 2011, Joe Gordon, a Thai-born American, was punished with two and a half years' imprisonment for his defaming the royal family after he posted translated sections of the book online on American territory.²⁸⁹ In such jurisdictions, the Internet has become a new battlefield to suppress criticisms of official history and national honor, of which posthumous defamation is a handy cause of action ready for use.

V. FREE SPEECH AND HISTORY CENSORSHIP

Many may regard the American law's strong protection of free speech, including hate speech and revisionism or negationism, as radical. But from another point of view, such protection draws a clean line to prevent the potential instrumental use of defamation law and privacy law to introduce history censorship by political power. As the protection of posthumous dignitarian personality rights covers the dead's reputation and privacy, we have observed the disproportional restrictions of free expression of journalists or historians by European domestic courts that were overruled by ECtHR.²⁹⁰

In this regard, the common law's general rejection of protecting posthumous reputation has wiped out the possibility totally, unless it has a strong connection to the living's legally protected interest. One has to admit that the American approach is the approach to best meet the international standards promulgated by abovementioned international human rights law.

A. International Standards

Article 19 of the Universal Declaration on Human Rights ("UDHR") protects the right to free expression and the rights to seek,

288. Jane Perlez, *A Banned Book Challenges Sainly Image of Thai King*, N.Y. TIMES (Sep. 25, 2006), available at <http://www.nytimes.com/2006/09/25/world/asia/25thailand.html> (last visited Dec. 3, 2014).

289. *Thai Judge Gives American Two Years' Jail for "Insulting Monarchy"*, GUARDIAN (Dec. 7, 2011), available at <http://www.theguardian.com/world/2011/dec/08/thai-american-jail-insulting-monarchy> (last visited Dec. 3, 2014).

290. See generally *Editions Plon v. France*, 2004-IV Eur. Ct. H.R. 39 (2004); *Lehideux v. France*, 1998-VII Eur. Ct. H.R. (1998); *Mizzi v. Malta*, Chamber Judgment Eur. Ct. H.R. (2006).

receive and impart information and ideas of all kinds.²⁹¹ Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) prescribes in particular the right to freedom of expression and freedom to access to information and ideas, and recognizes relative duties and responsibilities carried with such rights, like to respect others’ reputation, etc.²⁹² Article 20 of ICCPR excludes expressions of “propaganda of war, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” from its protection.²⁹³ The rights to freedom of expression under such international treaties are broad enough to include and extend to “almost everything intended to convey meaning”, including “information and ideas of all kinds”,²⁹⁴ even speeches regarded as “deeply offensive.”²⁹⁵

According to these international treaties, expressions of historical research nature shall be protected by domestic law – in the same way as expressions of political discourse,²⁹⁶ political canvassing,²⁹⁷ journalism,²⁹⁸ cultural and artistic expression,²⁹⁹ teaching,³⁰⁰ religious discourse,³⁰¹ etc.³⁰² In particular, General Comment No. 34 of the Human Rights Committee pointed out that “[a]ll forms of opinion are protected, including opinions of a political, scientific, *historic*, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.”³⁰³ If such standards can be strictly taken into

291. Universal Declaration of Human Rights art. 19, G.A. Res 217 (III), U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

292. International Covenant on Civil and Political Rights art. 19, G.A. Res 2200A (XXI), U.N. Doc. A/Res/2200A(XXI), (Mar. 23, 1976).

293. *Id.* art. 20.

294. *Id.* art. 19.

295. U.N. Human Rights Comm., General Comment No. 34 on Art. 19: Freedoms of Opinion and Expression, Sept. 12, 2011, para. 11, CCPR/C/GC/34, 102nd Sess., (July 2011).

296. *See generally* *Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994).

297. Concluding Observations on Japan, Human Rights Comm., 94th Sess., Oct. 30, 2008, para. 26, U.N. Doc. CCPR/C/JPN/CO/5, (Oct. 2008).

298. *Mavlonov and Sa’di v. Uzbekistan*, Human Rights Comm, 95th Sess., March 16-Apr. 9, 2009, para. 8.4, U.N. Doc. CCPR/C/95/D/1334/2004 (March 19, 2009).

299. *Hak-Chul Shin v. Republic of Korea*, Human Rights Comm., 80th Sess., March 15-Apr. 2, 2004, para. 7.2, U.N. Doc. CCPR/C/80/D/926/2000 (2004).

300. *Ross v. Canada*, Human Rights Comm., May 1, 1996, para. 11.1, U.N. Doc. CCPR/C/70/D/736/1997 (2000).

301. *Id.* at 11.5.

302. *See generally Cambodia: Joint Submission to the UN Universal Periodic Review*, ARTICLE 19, (June 24, 2013), available at <http://www.article19.org/resources.php/resource/37121/en/cambodia:-joint-submission-to-the-un-universal-periodic-review> (last visited Oct. 13, 2014) (discussion of International standards).

303. U.N. Human Rights Comm., General Comment No. 34 on Art. 19: Freedoms of

account by the contracting states of the ICCPR, they shall have not criminalized Holocaust deniers and revisionists. In practice, most such laws are justified by prevention of racial discrimination, racial incitement, to "national security or of public order (order public), or of public health or morals", as prescribed by Article 19.³⁰⁴

The strong tune of these important international laws, of which most western countries are signatories, has been much softened in legal realities even in European democracies. As discussed in the above Section IV (G), European democracies such as France, Spain, Germany and Belgium have adopted memory laws regarding Nazi Holocausts, atrocities and other crimes against humanity. Furthermore, recently the new democracies in Eastern Europe have passed laws condemning the past sins of the communists, including the Ukrainian Famine.³⁰⁵ Even the European Union proposed a legislative framework for Member States that certain forms of conducts committed for a racist or xenophobic purpose such as, among others, "'publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes' should be punished with between one and three years' imprisonment."³⁰⁶

This attitude can be witnessed in ECtHR judgments. For example, in *Garaudy*, the Court unanimously ruled that speech in justification of a pro-Nazi policy could not be protected under Article 10, since it belongs to the clearly established historical facts and is "against the Convention's underlying values."³⁰⁷ But similar laws are not without criticisms.³⁰⁸ Even in France, which has taken to more memory laws than others with respect to Holocaust denial, Armenian genocide, slave trade and French colonialism, the French Constitutional Council announced the Armenian Genocide Law to be unconstitutional in a

Opinion and Expression, Sept. 12, 2011, para. 9, CCPR/C/GC/34, 102nd Sess., (July 2011) (emphasis added by author).

304. International Covenant on Civil and Political Rights, *supra* note 293, art. 19

305. Josie Appleton, *Freedom for History? The Case Against Memory Laws*, FREE SPEECH DEBATE (April 3, 2013), available at <http://freespeechdebate.com/en/discuss/freedom-for-history-the-case-against-memory-laws/> (last visited Dec. 3, 2014).

306. Council of the European Union, Council Framework Decision 2008/913/JHA, 2008 O.J. (L328/55) Art. 1(1)(c), Art. 3(2), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008F0913:EN:NOT> (last visited Dec. 3, 2014).

307. *Garaudy v. France*, HUMAN RIGHTS AND PUB. LAW UPDATE, available at http://www.icor.com/1315/?form_1155.replyids=875 (last visited Dec. 3, 2013).

308. See Gerald Tishler, *When Academic Freedom and Freedom of Speech Confront Holocaust Denial and Group Libel: Comparative Perspectives*, 8 B.C. THIRD WORLD L.J. 65 (1988).

2012 decision.³⁰⁹ The protection of free speech regarding the Armenian genocide has been supported most recently in a ECtHR judgment on December 17th, 2013 which overruled his criminal conviction under Swiss Criminal Code for “racialist discrimination.”³¹⁰

B. Historical Truth or Judicial Truth

While expressions regarding clearly established historical facts lead to controversies, it is easy for courts of law to make decisions, since there is no need to decide the truth of alleged expressions such as Holocaust denial and past atrocities. The court’s role is to analyze the desired aims, the deployed methods and the content of the expression, and then decide whether or not such expression denies clearly established historical facts.³¹¹ Whether memory laws are really a threat to free speech rights of the public, in particular historians, deserves more analysis when they restrict dissents of clearly established facts. Still, it is important to consider the common law approach that a clear-cut line is the best to protect free speech and to prevent state interference of free expression in posthumous defamation cases from sneaking into history censorship.

However, when controversies involve historical facts that are not clearly established, adjudicating courts will face difficulties, first in checking if such alleged expressions are true, and second, in balancing free speech rights with posthumous reputation protection.

Most courts will refuse to engage themselves in investigating historical facts or truth, because courts are neither composed for such purposes nor suitable for such tasks,³¹² when truth is an absolute defense in many jurisdictions.³¹³ The argument from historians that historical

309. Nicholas Vinocur & Jon Hemming, *French Court Rules Armenian Genocide Law Unconstitutional*, NAT’L POST (Feb. 28, 2012), available at <http://news.nationalpost.com/2012/02/28/french-court-rules-armenian-genocide-law-unconstitutional/> (last visited Dec. 3, 2014).

310. Judgment *Perincek v. Switzerland* Press Release, *supra* note 254.

311. *Garaudy v. France*, App. No.65831/01, para. 2 (E. Ct. H.R. June 24, 2003), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23829> (last visited Dec. 3, 2014) (highlighting the French government’s replies to the ECtHR).

312. The ECtHR in *Chauvy* explicated “it is an integral part of freedom of expression to seek historical truth and it is not the Court’s role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation.” *Chauvy v. France*, App. No. 64915/01, para. 69 (Eur. Ct. H.R. Sept. 29, 2004), available at <http://hudoc.echr.coc.int/sites/eng/pages/search.aspx?i=001-61861> (last visited Dec. 3, 2014).

313. An exception, for example, is Israeli Defamation Act that does not recognize truthfulness as a defense except a case is of public concern, though in practice “the courts

truth should be settled among historians themselves instead of in court is popularly supported and catches the nerves of judges.³¹⁴ Due to the vagueness of truth in historical study, judges are uncomfortable with truth defenses and will try to avoid questing controversial content at stake.³¹⁵ And if they cannot consider the truth-value of facts and opinions,³¹⁶ judges can only rely on the facts and opinions brought up by parties whose reliability is within their expertise.³¹⁷ Judges will decide on other standards that qualify such speeches to be under protection, such as qualified professional methods, fair comment, public interest, balanced opinions, prudence, and good faith.³¹⁸

But some judges do go that far to verify the truthfulness of defamation. In the above-discussed Italian case in 1970s, the Italian court conducted a two-year-long investigation in order to find what had happened, so that the dead Vatican Pop Pius XII was proved innocent of Katz's allegation of moral defects in being a bystander to the Ardeatine Quarries Massacre in Rome.³¹⁹ If courts involve themselves in such activities, then "the feasibility and desirability of authoritative judicial resolutions in matters of truth and falsity" is continuously under doubt.³²⁰ The Israeli Supreme Court, in *Sharon v. Benziman*, ruled that given other grounds to decide the case exists; judges shall avoid determining historical truth.³²¹ The fallout of court-decided historical truth is that any potential mistakes in the future can impair the judiciary authority before the public. However, the Israeli courts have performed such a role in seeking historical truth in past decisions. According to Barak-Erez, the courts' recounts of the past have served as the official history of the Israeli state and its official institutions within which the state organs operate including the judiciary.³²²

If misjudgments were made, they have to be followed in later cases and this puts courts in a passive position when new evidence or new facts may emerge regarding the same historical controversy. The judiciary's independence, very much dependent on the separation of its

seem to find public concern in the bulk of true publications". *But cf.* Peled, *The Israeli Law of Defamation: A Comparative Perspective and a Sociological Analysis*, 20 *TRANSNAT'L L. & CONTEMP. PROBS.* 735, 757 (2012).

314. *See* DE BAETS, *supra* note 4, at 86.

315. *Id.*

316. *Id.*

317. *Id.*

318. *See id.* at 87.

319. Resta & Zeno-Zencovich, *supra* note 242, at 877.

320. Peled, *supra* note 79, at 756.

321. *Id.* at 757.

322. Barak-Erez, *supra* note 29, at 100-01.

authority over legal issues from political power, will be diminished. Resta and Zeno-Zencovich observed this in their research concerning the dilemma between historical truth and judicial truth confronted by Italian courts.³²³ As in the *Katz* case, when new evidence was released by the CIA and the Vatican Archives, new doubts raised, which proved that courts may not be the appropriate place to settle historical disputes.³²⁴ The two authors in particular noted that when facts and past behaviors were evaluated in a court trial, the judgment made a judicial version of history and it entered the judicial circuit, influencing sequent decisions in a circular and self-referential way.³²⁵ As the authors observed in Italian cases regarding historical controversies, judicial truth “starts to work as an external limit on the freedom of the media to report about an historical event.”³²⁶

C. *The Icons of History Censorship*

Because it is an integral part of freedom of expression to seek historical truth,³²⁷ a total ban on contesting speeches against official or popular history – including those with well-established historical facts – may lead to censorship of history, even in case of the Holocaust and atrocities. While totalitarian states use censorship to gain legitimacy by forbidding open debate over historical lies, democracies should be confident in open discourses of dark past in order to protect free speech in abstract sense, avoiding any slippery move toward state interference, and protecting the breathing space even for lies.³²⁸ Constitutional courts should have a more active role to play in striking down such laws, as the French Constitutional Council’s recent move in quashing the French government’s peppy intervention of history, though somehow at the price of mental distress to Armenian people. History is not the stuff of justice, as Wartanian warned, “it belongs to historians who rectify lies, not to politicians.”³²⁹ As courts cannot decide on the truthfulness of the

323. Resta & Zeno-Zencovich, *supra* note 242, at 880-86.

324. *Id.* at 878-79.

325. *Id.* at 874-78. In multiple related cases regarding the Ardeatine Quarries Massacre in Rome, Italian courts offered different evaluations of historical facts. *Id.*

326. *Id.* at 874.

327. *Chauvy v. France*, App. No. 64915/01, para. 69 (Eur. Ct. H.R. Sept. 29, 2004), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861> (last visited Dec. 3, 2014).

328. Lidsky, *supra* note 274, at 1095.

329. See Raffi Wartanian, *Memory Laws in France and their Implications: Institutionalizing Social Harmony*, HUMANITY IN ACTION, available at <http://www.humanityinaction.org/knowledgebase/117-memory-laws-in-france-and-their-implications-institutionalizing-social-harmony> (last visited Dec. 3, 2014).

presented evidence by different parties, they have to ask for testimony from historians as expert witness.³³⁰

Courts should act more carefully in defamatory cases that involve historical facts that are not so clearly established but are of public interest. Courts shall leave historical facts for open discussions by others including historians. In such cases, courts also need to balance the dead's dignity, including their privacy and reputation – as well as their family's interests, both dignitary and commercial – with free speech rights of others. Since interference of free speech may be justified by protecting posthumous reputation, which is a legitimate goal in many laws, the focus of courts should be on seeking good balance, *not* investigation of truthfulness of the alleged expressions. But how can we judge the existence of potential chilling effects in court's balancing process or, more generally, in a judicial system? What are the possible criteria to define possible history censorship in court verdicts?

Above all, in my view we may look at how many categories of defense are available to defendants in defamation cases. The more defenses are allowed, and the higher the threshold of restriction of free expression, the less opportunity for censorship of history in court decisions.

As the oldest defense for defamation, truth defense has not been allowed as complete defense in some criminal charges.³³¹ When truth does not matter in defamation convictions, the purpose of the law is to protect the political authority or social ordering.³³² In criminal procedures, a combination of presumption of innocence and truth defense will obviously offer the charged a strong protection against defamation accusations. In *Colombani & Others v. France*, the ECtHR

330. There are critics against historians' role in court testimony. See Richard J. Evans, *History, Memory, and the Law: The Historian as Expert Witness*, 41 HIST. & THEORY 326 (2002) (commenting on Henry Rousso's book, the author argued that historians shall only elucidate the historical context and avoid being involved in judging whether an individual was guilty or otherwise of a crime).

331. See Elaine Pearson, *Criminal Defamation Laws in Indonesia Stifle Democracy*, HUM. RTS. WATCH, available at <http://www.hrw.org/news/2010/06/10/criminal-defamation-laws-indonesia-stifle-democracy> (last visited Dec. 3, 2014) (discussing the fact that in Indonesian law, truth is not a defense if an official found your expression to be insulting); Friedman, *supra* note 66, at 54 (noting that the truth only became an absolute defense in more democratic time; and authoritarian governments do not like criticism since truth hurts, so that in many ways the situation would be even worse if such charges were true, as said in the old maxim).

332. Elizabeth Samson, *The Freedom to Speak Truth to Power*, GUARDIAN, available at <http://www.theguardian.com/commentisfree/libertycentral/2012/apr/20/libel-law-tourism-reform> (last visited Dec. 3 2014).

regarded the rejection of the French judiciary of the applicant's use of truth defense as "beyond what is required to protect a person's reputation and right, even if that person was a head of a state or government."³³³

Another important defense widely adopted in most Western democracies is the public figure rule in particular in the U.S., which offers more protection over speeches regarding public figures.³³⁴ The Chinese defamation law has not recognized such a doctrine though some judges have mentioned it in the latest verdicts.³³⁵ This means that Chinese public figures, especially political figures, will enjoy equal protection of law with average people, while holding higher social status offers them more influence on public affairs. In Europe, the public figure doctrine (or rule) has gained more support at least in some ECtHR decisions. As in recent *Joe Luis*, the Court ruled that the limits of acceptable criticism in view of the press "are accordingly wider with regard to a politician acting in his public capacity than in relating to a private individual"; and politicians "must display a greater degree of tolerance."³³⁶ Again, in *Lehideux & Isorni v. France*, the Commission emphasized the importance of historical debate about a public figure and the related different opinions.³³⁷ In *Suarez v. Spain*, it stated that "[e]xceptions to freedom of expression must be interpreted

333. *Colombani & Others v. France*, App No 51279/99, para. 66 (E. Ct. H.R. Sept. 25, 2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60532> (last visited Dec. 3, 2014).

334. For an explanation of the public figure doctrine in U.S. law; see Scott Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125-208 (2012); George E. Stevens, *Local and Topical Pervasive Public Figures After Gertz*, 66 JOURNALISM QUARTERLY 463 (1989); Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, N.Y. INT'L L. REV. 81 (2006); James C. Mitchell, *The Accidental Purist: Reclaiming the Gertz: All Purpose Public Figure Doctrine in the Age of "Celebrity Journalism"*, 22 LOY. L.A. ENT. L. REV. 559 (2002); John J. Watkins, *The Demise of the Public Figure Doctrine*, J. COMMUN. A PUBL'N NAT'L SOC'Y FOR STUDY COMMUN 47 (1977).

335. *Hou Shoujin yu Zhongguodianting Jituan Gongshi Deng Qinheimingyuquan An* (霍寿金与中国电影集团公司等侵害名誉权案) *Huo Shoujin v. China Film Group et al.* (Beijing High Ct. 2007) (China) available at <http://www.fsou.com/html/text/fm/1176753/117675388.html> (last visited Dec. 3, 2014).

336. *Gutierrez Suarez*, App. No. 16023/07, para. 26 (2010); *Case of Jerusalem v. Austria*, App. No. 26958/95, para. 38 (Eur. Ct. H.R. May 27, 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59220> (last visited Dec. 3, 2014).

337. *Lehideux*, App. No. 24662/94, para. 45; see *Von Hannover v. Germany* (No.2), App. Nos. 40660/08 and 60641/08, para. 64, 69 (Eur. Ct. H.R. Feb. 7, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109029> (last visited Dec. 3, 2014) (explaining wider protection of privacy for public figures' awarded even when no public interest is involved in publication).

restrictively.”³³⁸ In the 2013 *Eon v. France*, it emphasised on the wider range of criticism of politicians than ordinary people, since they willingly subject themselves to public and media scrutiny.³³⁹

In addition, the Assembly Resolution of the Council of Europe on the Right to Privacy prescribes that the right to privacy of public figures is lucrative and often invaded, but they must recognize that the social position they occupy in society automatically entails increased pressure on their privacy.³⁴⁰ Also, most recently, the Council of Europe adopted a rule similar to public figure doctrine to restrict the extra-protection of public figures in their privacy (family life) and reputation.³⁴¹

The admission of opinions and fair comment for defense are important for free speech protection. After *Milkovich v. Lorain Journal Co.*,³⁴² the U.S. defamation law has moved away from the long doctrine since *Sullivan*,³⁴³ and a defense similar to opinion privilege has been adopted by the ECtHR when opinions or fair comments are “on a matter of public interest which was underpinned by a sufficient factual basis.”³⁴⁴

In addition, courts should allow historians and journalists the defenses of professional standards, sufficient prudence, good faith, and participation in academic debates.³⁴⁵ Once courts are willing to accept

338. *Gutiérrez Suárez*, App. No. 16023/07, para. 26. Also, note a series of recent cases judged by ECtHR regarding the analysis of term of public figures in its verdicts. See also *Verlagsgruppe News GmbH & Bobi v. Austria*, App. No. 59631/09 (Eur. Ct. H.R. Apr. 3, 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115013> (last visited Dec. 3, 2014); *OOO 'Vesti' & Ukhov v. Russia*, App. No. 21724/03 (Eur. Ct. H.R. Aug. 30, 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119969> (last visited Dec. 3, 2014).

339. ECtHR: *Eon v France*, ARTICLE 19 (Aug. 1, 2013), available at <http://www.article19.org/resources.php/resource/37188/en/ecthr:-eon-v-france> (last visited Dec. 3 2014).

340. EUR. PARL. ASS., *Res. 1165 – Right to privacy*, 24th Sess., at para. 6 (1998), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta98/eres1165.htm> (last visited Nov. 17, 2014).

341. EUR. PARL. ASS., *Res. 1577 – Towards decriminalization of defamation*, 34th Sess., at para. 6, 17.6 (2007), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm> (last visited Nov. 17, 2014) (describing resolutions regarding defamation and privacy laws).

342. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (ruling the First Amendment does not require a separate “opinion” privilege limiting the application of state defamation laws).

343. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

344. *Jucha & Žak v. Poland*, App. No. 19127/06, para. 45 (Eur. Ct. H.R. Jan. 23, 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113919> (last visited Dec. 3, 2014).

345. See DE BAETS, *supra* note 4, at 87.

such defenses, even if the alleged narratives or accounts of historical events bear some falsity, judges in general will rule in favor of free speech. For instance, French historian Jean-Luc Einaudi was found guilty, but with no remedy awarded because his research is of a “serious, relevant and comprehensive” nature according to the court.³⁴⁶

In contrast, rejection of justifiable defenses in courts is a clear sign of potential censorship in posthumous defamation cases. As De Baets pointed out in his study, historians were found as defamers on the following grounds: “they did not interview eyewitnesses, overestimated the value of certain texts or acts of the complainant, did not consult original sources but literature only, or attached [more] importance to a single source.”³⁴⁷ De Baets’ observations of the posthumous defamation cases find a parallel pattern in Chinese cases. In many cases, Chinese judges upheld defamation petitions because the authors did not use authoritative sources,³⁴⁸ did not verify the sources used with the deceased’s family before publication,³⁴⁹ did not verify the sources such as oral history and published individual memoirs,³⁵⁰ or did not work with due care in some cases,³⁵¹ etc. Also, there was no distinction between opinions and facts in historians’ alleged texts made by Chinese courts.³⁵² It proved that the more defenses that are accepted by courts, the more that professional methods are respected, and the less that censorship will occur in court decisions.

Secondly, courts may restrict free expression on obviously weird grounds in some cases, when procedural requirements prevent other ways of protecting the deceased’s reputation. In *Mizzi v. Malta*, the controversial text that was accused of being defamatory was a simple sentence “Dr. Boffa wanted to build there,” which was read by the deceased’s son as “attribut[ing] false and despicable intentions to his father,”³⁵³ and by the Maltase Court of Appeals as “it implied that Dr.

346. Ariane Chemin, *Long History of a Forgotten Massacre*, LE POINT INT’L (Nov. 5, 2011), available at <http://www.lepointinternational.com/it/cultura/europa/765-long-history-of-a-forgotten-massacre.html> (last visited Dec. 3, 2014). Due to the brave historians’ works on the subject, the killings of Algerians in France in 1961 were recognized by the French government and a plaque was put on the bridge where the event happened to commemorate the dead. *Id.*

347. DE BAETS, *supra* note 4, at 87.

348. See Bo Zhao, *Posthumous Reputation and Posthumous Privacy in China: The Dead, the Law, and the Social Transition*, 39 BROOK. J. INT’L L. 269, 323 (2014).

349. See *id.* at 347.

350. See *id.* at 341.

351. See *id.* at 347.

352. See *id.* at 347-48.

353. *Mizzi v. Malta*, App. No. 17320/10, para. 8 (Eur. Ct. H.R. Feb. 22, 2012), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec.

Boffa had taken advantage of his position as head of the civil administration," a reading supported by the Constitutional Court.³⁵⁴ It was denied by the ECtHR since such a reading "made it very difficult, if not impossible, for the applicant to provide direct corroboration of it."³⁵⁵ In the Spanish *Gutiérrez Suarez*, the Spanish Supreme Court, was unable to declare defamation on solid grounds, pointed to the headline of the alleged article instead of body content, as violating the honor of the then deceased Moroccan King.³⁵⁶ The ECtHR rejected this decision that headlines, whose aim is to call the attention of readers, must be read in combination with body context; and that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."³⁵⁷ Both interpretations of such texts were strange even to ordinary readers.

Lastly, censorship of free speech in posthumous defamation cases may generally be found in the disproportionality of court verdicts. This is seen either in improper protections given to posthumous reputation or privacy, while obviously it is not in great danger; or in the legal measures restricting free speech, such as injunctions, and remedies and damages awarded to plaintiffs, which are unusual, exceeding necessity.

While posthumous reputation is recognized as legitimate, it is a delicate issue for courts to balance the deceased's interests and their families' with the free speech of others, in particular when public interest is involved. As a fundamental value to democracy, free speech rights shall have certain priority, unless exceptional occasions are at stake.

Take *Szenes* for example, where Justice Cheshin even claimed the equal legal status of reputation to free speech in democracy and the Jewish community in particular, including reputation of the dead.³⁵⁸ It defined that among others, the realization of collective identity of the state, its national history, and its own social goals form part of public interest.³⁵⁹ The Israeli Supreme Court pointed out that the petition was filed under the public law to protect public interest, such as protecting the dignity and good name of the dead, protecting historical truth and

3, 2014).

354. *Id.* para. 12, 15.

355. *Id.* para. 35.

356. The Constitutional Court of Spain upheld the decision. *Gutiérrez Suárez*, App. No. 16023/07, para. 10 ("It stated that the headlines of the information led the average reader to believe that the Moroccan royal family had been an accomplice to illegal trafficking in hashish.").

357. *Id.* para. 36.

358. *Szenes*, 53(3) PD 817 at para. 9, 12.

359. *Id.* para. 17.

honoring national values, as well as the rights of defendants. The court judged that regarding the circumstances that can justify curtailing freedom of expression, expressions that are offensive to other's feelings are not a strong ground, because "if every such offense was to justify infringement, surely these freedoms and indeed democracy itself would be emptied of meaning."³⁶⁰

The court admitted that a democracy should be sensitive to such feelings, but "[a] democratic society is based on the recognition that the feelings of some will inevitably be offended by their fellows' exercise of their respective freedoms."³⁶¹ The court stated explicitly that in explaining the protection of heroes and collective memory, law in a democracy does not preserve the image of its heroes by repressing freedom of expression, and that truth shall reject falsehood in the free market of ideas.³⁶² In conclusion, the court rejected protection of the dead's name under public law, but ruled that the requested remedy could only be sought in private law, where the balance could be made differently.³⁶³

In the above reasoning, we observe a *clear* but *high* threshold of "a compelling or urgent need" to justify the restriction of free speech.³⁶⁴ This can be regarded as a standard to gauge potential censorship in relevant court decisions. At this point, the ECtHR carries out its balancing processes in a similar way when facing appeals from largely-diversified social-cultural backgrounds, by interpreting the adjective "necessary" in Article 10 (2) as implying the existence of a pressing social need.³⁶⁵ On the whole, the Court balanced different interests in a much-fixed pattern, in particular when it takes into account the margin of appreciation of Contracting States, so that it will not interfere with domestic affairs.³⁶⁶ The Court usually checks if state interference with free speech has a legitimate aim prescribed by law, if such restriction is necessary to a democracy, and if it is in accordance with the

360. *Id.* para. 20.

361. *Id.* para. 22.

362. *Id.* para. 27-28.

363. *Szenes*, 53(3) PD 817 at para. 28.

364. In Justice Mazza's words, "a concrete and imminent danger of uprooting the public order." *Id.* para. 28. (quoting H CJ 2888/97 *Novik v. Channel Two Television & Radio* PD 51(5)193, 202 (Isr.)).

365. See *Chauvy v. France*, App. No. 64915/01 (Eur. Ct. H.R. Sept. 29, 2004), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861> (last visited Dec. 3, 2014); see *Éditions Plon v. France*, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

366. See *Chauvy*, App. No. 64915/01; see *Éditions Plon*, App. No. 58148/00.

proportionality standard, not exceeding necessity.³⁶⁷

In *Chauvy*, the Court noted that it must consider the public interest in being informed of the circumstances of the previous French Resistance leader, and the need to protect the reputation of Mr. and Mrs. Aubrac in the impugned betrayal of the book.³⁶⁸ Furthermore, the Court prescribed that it “must verify whether the state authorities struck a fair balance when protecting two values guaranteed by the Convention”, namely the right of expression and the right of others to reputation.³⁶⁹ As pointed out already, the Court did not judge the legitimacy in protecting posthumous reputation or honor by contracting states, since this is a matter within margin of apperception.³⁷⁰ It merely executed its supervisory role to verify the proper use of legal measures in limiting free speech, and the proportionality of the interference contingent on the nature and severity of the penalties imposed.³⁷¹

In *Plon*, the Court pointed out the circumstance of time distance as an important element in striking a good balance.³⁷² The Court found the book ban in violation of Article 10 in that the more time elapsed after the President’s death, the more the public interest in debating the President’s two terms of presidency prevailed over his interest to medical confidentiality, in particular when the duty of confidentiality was breached and there was already dissemination in traditional media and the Internet.³⁷³ Another important ruling from the ECtHR is that posthumous reputation is a much weaker interest in balancing different values under its protection.³⁷⁴

The discussion of the proportionality standard brings us to available measures used by courts to restrict free speech in posthumous defamation cases. Usually this could be monetary damages awarded to plaintiffs or defamation victims, and injunctions (prohibitory or

367. See *Chauvy*, App. No. 64915/01; see *Éditions Plon*, App. No. 58148/00.

368. *Chauvy*, App. No. 64915/01, para. 69.

369. *Id.* para. 70.

370. *Mizzi v. Malta*, App. No. 17320/10 (Eur. Ct. H.R. Feb. 22, 2012), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 4, 2014).

371. *Chauvy*, 2004-VI Eur. Ct. H.R. at para. 78 (“Assessing the proportionality of the interference, the nature and severity of the penalties imposed.”).

372. See *Éditions Plon v. France*, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

373. *Id.* para. 53.

374. *Mizzi v. Malta*, App. No. 17320/10, para. 39 (Eur. Ct. H.R. Feb. 22, 2012), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 3, 2014) (ruling that “in this respect, although the possibility of bringing such an action existed in the Maltese legal system . . . it is of the view that this element should have been considered by the domestic courts when assessing the proportionality of the interference.”).

mandatory). Since defamation of the dead should generally cause less harm than defamation of the living, damages awarded accordingly should be comparatively lower. As seen in *Mizzi v. Malta*, the awarded damages were a symbolic amount of 700 euros.³⁷⁵ Interim injunctions are more acceptable for prevention of potential harm when the real circumstances are unclear.³⁷⁶ If a book has a small defamatory part about a deceased historical figure and can be corrected by deletion or change of text, banning the whole book after publication is obviously an indication of potential censorship by state.³⁷⁷

In many occasions, an obligatory publication of apology or court verdict will be ordered to restore the deceased's reputation. Though this might be an insult to authors, its real impact is doubtful in social reality. Bans and publication of apologies on widely circulated media or on the Internet could bring even more public attention because of the famous Streisand effect.³⁷⁸ In the history of censorship, many times banning books did not stop circulations; instead the bans even brought more readers to banned authors.

D. *A Threat from Law or to Law?*

A last point to make is that whether a law implements history censorship – or censorship of expressions regarding the past of the dead – has to be defined more carefully, *not* denoted in a few cases regarding posthumous defamation and privacy-invasion. It has to be found in a series of similar cases in which judges have constantly restricted free speech rights with respect to historical expressions, by upholding defamation convictions, awarding large damages, and imposing unnecessary injunctions. It has to be demonstrated that the pursued legal aims are not just and prescribed by law. It has to be demonstrated that free expression has been given less weight than they should have been, if following the proportionality standard endorsed by the ECtHR.³⁷⁹ However, if a jurisdiction always decides in favor of

375. See *id.* para. 39. Also, an award of eighty-eight Euros in damages is more or less symbolic in the famous *Flux v. Moldova*. See also *Flux v. Moldova* (No. 6) App. No. 22824/04 (Eur. Ct. H.R. Oct. 29, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88063> (last visited Dec. 3, 2014).

376. For instance, European Court of Human Rights accepted interim injunctions in general. *Editions Plon*, 2004-IV Eur. Ct. H.R. at para. 35, 48.

377. As pointed out by the ECtHR in *Plon*. See *id.*

378. See Mario Cacciottolo, *The Streisand Effect: When Censorship Backfires*, BBC (last updated June 15, 2012, 11:19 PM), available at <http://www.bbc.co.uk/news/uk-18458567> (last visited Dec. 3, 2014).

379. See discussion *supra* Section V(C).

posthumous defamation regarding deceased political figures with impact in history, while it awards no such protection to the ordinary deceased, we may observe possible censorship of history conducted in a legal system.

While historians and free speech rights advocates criticize censorship of history via legal protection of the dead's reputation and privacy, proponents of posthumous dignitary rights may argue that the presumed chilling effects are not only imaginary, but also practically not true. For example, for Hannes Rösler, the idea that a posthumous personality right could deter valuable historical research is not well justified.³⁸⁰ First of all, Rösler argued, since truth is the commonly acceptable defense of libel charges, it will motivate historians to publish more accurate, factually-based statements.³⁸¹ A second reason, he argued, is that adoption of the narrow dignitary personality right could encourage free speech instead of chilling it.³⁸² If one knows that his lifetime achievement and reputation in the public memory can be protected, he would participate more actively in public discourse and disclose more personal information.³⁸³ A third reason is that due to the failure of the marketplace of ideas, there is public interest to protect reputation against defamatory statements, in particular those against the deceased and defenseless minorities.³⁸⁴ Other arguments include the lack of societal interest in false communication, potential exceptional protection only for severely infringements, and proportional restriction via balanced decisions.³⁸⁵

Rösler's arguments cannot be denied in abstract. In reality, however, counter examples can be found in some ECtHR cases regarding posthumous defamation and privacy invasion. For many contracting states, protection of the dead's dignity and personality nevertheless ended up in decisions that were overturned by the Court for free speech protection.³⁸⁶ The threat from the deceased's families with a defamation suit, whether criminal or civil, causes authors to self-censor before publication. The legal recognition of posthumous dignity

380. Rösler, *supra* note 77, at 190.

381. *Id.* at 190.

382. *Id.* at 188.

383. *Id.* at 188-89.

384. *Id.* at 189.

385. Rösler, *supra* note 77, at 188-91.

386. See *Éditions Plon v. France*, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014); *Mizzi v. Malta*, App. No. 17320/10 (Eur. Ct. H.R. Feb. 22, 2012), available at hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 3, 2014); *Gutierrez Suarez v. Spain*, App. No. 16023/07 (Eur. Ct. H.R. 2012).

(including reputation, privacy, honor, etc.) per se provides a legal avenue to incorporate potential state censorship. This lies in the use of law to police the bounds of certain speeches, in particular speeches regarding Holocaust denial, which shall draw our caution. When state authority can regard all Holocaust or genocide denial or similar speeches illegal, it may exclude other speeches from protection of free speech as well, if not monitored closely by the public. Thus “a government that can tell us what not to say can also tell us what we must say”,³⁸⁷ which is detrimental to democracy holding free speech as the most fundamental value. In a more general sense, the law’s protection of the dead’s dignitary interests and the related interest of the living may cause a threat or chilling effect on free speech for democracy.

With respect to law’s instrumental use within this context, the threat is not only from law, but *to law itself*. According to Douglas, “certain features that define law as a formal discourse” concerning harm, culpability, proof and jurisdiction, have “distort[ed] . . . the very history record that law has been asked to [protect].”³⁸⁸ Even worse is that when law serves the end to protect certain kinds of information and suppress others, especially when involving historical facts that are too long to be investigated, law reaches its limit, as seen in the controversies around truth commissions in many post-war countries. With impossible missions, the real threat is to law itself, not only to historical research. Law cannot risk its independence, authority, and trust from the public to impose threat on free expression that is crucial to a democracy.

VI. LAW, POLITICS AND CULTURE

Law is vulnerable before politics. The Russian authority’s passive attitude to the rehabilitation of Katyn tragedy victims showcases that a political state can have difficulties confronting its dark past.³⁸⁹ The unexpected termination of the official investigation of the tragedy in the 1990s especially reveals the law’s weakness in handling sensitive, political events. When history has a significant role to play in politics,

387. Smith, *supra* note 101, at 137.

388. Lawrence R. Douglas, *Policing the Past: Holocaust Denial and the Law*, in *CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION* 67, 68 (Robert C. Post ed., 1998).

389. See *OOO ‘Vesti’ & Ukhov v. Russia*, App. No. 21724/03 (Eur. Ct. H.R. Aug. 30, 2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119969> (last visited Dec. 3, 2014).

ensorship of history becomes feasible and law might be a victim of political suppression of those who talk frankly about the past. Law is also a product of a particular culture. While in Germany and other continental law countries the dead's dignity and honor is significant and protected as fundamental values by law, common law countries offer almost no protection of such posthumous interests. This section tries to interpret, following the above case analysis, the political and cultural rationales underpinning potential history censorship within different conceptual and cultural embeddings.

A. Politics and Law

Authoritarian regimes and dictatorial states have the most and strongest motives to censor history. The primary reason is to gain legitimacy and support of the public by use (misuse or abuse) of history of which censorship and control of the past is a necessity. Dictators know well the power of history and lie to distort the reputation of many deceased opponents. For example, Stalin removed Leon Trotsky out of books to dehumanize him because the true record of Trotsky denied Stalin as the true heir of Lenin, showing no crucial role in the Bolsheviks' victory.³⁹⁰ The extreme use of history for legitimacy is the distortion of the North Korean War by North Korean dictators who described the West as the invader, diminished external military aids, and advocated "a total victory" on its own.³⁹¹ The past is usually cast as miserable and dark by a new political regime, so that a new community can be promoted and cherished for development and achievement.

Second, the deceased can be forged either as a moral model for others to follow, or as negative examples punished for political purposes. But, such distortion or fabrication of posthumous reputation can cause serious distrust of the regime in eventual disclosure of facts. The famous Chinese moral model Lei Feng set up by communist propaganda recently has been under serious scrutiny by a new generation of historians.³⁹² In contrast, many landlords who are

390. MACMILLAN, *supra* note 4, at 25.

391. A similar story happens to USSR's support in North Korean's version of the War. Sarah Buckley, *North Korea's 'Creative' History*, BBC NEWS ONLINE (July 25, 2003, 14:30 GMT), available at <http://news.bbc.co.uk/2/hi/asia-pacific/3096265.stm> (last visited Dec. 3, 2014); *Korean Independence: A History Re-Written by North Korea*, NEW FOCUS INT'L (Aug. 15, 2013), available at <http://newfocusintl.com/independence-day-in-north-korea-changing-with-the-times/> (last visited Nov. 13, 2014).

392. The defamer of the dead hero was detained by Beijing police recently in China's new wave to crackdown online social media which threatens official authority in various fields. *Questioning of Lei Feng's Frugality Leads to Detention*, WALL ST. J. (Aug. 21,

regarded as notorious and blood-sucking and who died during China's numerous political movements, have been later found out to be merely fabrications for political ends by the Chinese Communist Party.³⁹³

Even dictators themselves who have been worshipped by the populace are products of such powerful propaganda machines. Secrets and sins deliberately covered from being known would shock the public later. Mao's real characteristics nowadays gradually emerge before the public because of the disclosure of his brutal political decisions and policies from two sources: the declassification of some archives of former the Soviet Union regarding China,³⁹⁴ and the recently published stories of Mao's private life by the individuals who worked for or around him.³⁹⁵

When public figures' reputations are so closely affiliated with the official history of a state, to protect their reputations is to protect the official history. Turkey's special law directly protects the honor and dignity of the dead Atatürk.³⁹⁶ The Egyptian penal code criminalized and allowed detention for insulting the president before the Arab Spring.³⁹⁷ In these countries, law has been openly used for suppression of speeches concerning the late public figures as direct censorship of history per se.

"As social norms change, laws that touch on reputation and privacy change along with them."³⁹⁸ The shift in Stalin's reputation in Russia after his death reflects the influences of political change on social morals and ethos in Russian community. With the fall of communism in particular, the Russian authority to some extent allowed the

2013, 8:00 PM), available at <http://blogs.wsj.com/chinarealtime/2013/08/21/four-detained-for-questioning-lei-fengs-frugality/> (last visited Dec. 3, 2014).

393. For example, Liu Wencai was a fabricated figure of the communist propaganda machine, which is totally against his real personality, to incite political hatred between classes during the Culture Revolution. Gao Wenqian & Regina Hackett, *Revisiting the Past: Insights from the Art of the Cultural Revolution*, HUMAN RTS. IN CHINA (Oct. 21, 2009), available at <http://www.hrichina.org/content/3824> (last visited Dec. 3, 2014).

394. See ALEXANDER V. PANTSOV & STEVEN I. LEVINE, *MAO: THE REAL STORY* (Simon & Schuster reprint ed. 2013).

395. Mao's personal doctor, for instance, wrote a book portraying a different private life from the official version, which can lower the great leader's honor. See LI ZHI-SUI, *THE PRIVATE LIFE OF CHAIRMAN MAO* (Random House 1996).

396. *Law Concerning Crimes Committed against Atatürk No. 5816*, U.S. FOUNDATION, INC (2014), available at <http://www.usefoundation.org/view/878> (last visited Dec. 3, 2014); see MELZER, *supra* note 56, at 40.

397. MELZER, *supra* note 56, at 188.

398. FRIEDMAN, *supra* note 66, at 5.

discussion of Stalin's cruel ruling by historians and witnesses.³⁹⁹ Attitudes to Stalin are polarized between supporters and dissents, and between the Russian state authority and many EU countries that often compare him with Hitler. Recently top Russian leaders reclassified the related archives and portrayed him as an effective crisis manager.⁴⁰⁰ The earlier popular, liberal trend among Russian politicians after the collapse of communism seems to have been replaced with a strong sentiment of national pride and honor. This may somehow explain the Russian authority's reluctance to rehabilitate the deceased Polish victims of the Katyn tragedy, although Russia itself has a rehabilitation law to restore the reputations of those who died under communist repression.

However, there is no turning back in Eastern European countries that have joined the EU and willingly embraced Western political ideology after the collapse of communism. Many countries in Eastern Europe passed rehabilitation laws, investigated previous politically charged suppressions, and convicted political criminals. Posthumous reputations that were tarnished under previous communist regimes got the chance to be restored and remedied. For instance, relatives of the deceased Latvian peasants, who died in hands of paramilitary combatants led by communist partisans and supported by the Russian during the WWII, accused the surviving partisan of war crimes for killing innocent civilians.⁴⁰¹ Similar cases emerged especially after the collapse of the Berlin Wall, involving re-evaluation of communist resistant activities during WWII against Nazi occupation. In France, the *Chauvy* case involves the defamation of surviving communist resistant forces with suspicion of their potential betrayal.⁴⁰² In Italy, public debate on the values of the communist resistance was dramatically reopened and the sudden increase in civil actions concerning violations of personality rights was an immediate byproduct of the changed political climate and of a new phase of public confrontation with the

399. Anne Garrels, *Libel Case Sparks New Focus on Stalin's Reputation*, NPR (Sept. 8, 2009, 3:18 PM), available at <http://www.npr.org/templates/story/story.php?storyId=112642329> (last visited Dec. 3, 2014).

400. *Id.*

401. See *Kononov v. Latvia*, App. No. 36376/04 (Eur. Ct. H.R. May 17, 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98669> (last visited Dec. 3, 2014).

402. See *Chauvy v. France*, App. No. 64915/01 (Eur. Ct. H.R. Sept. 29, 2004), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861> (last visited Dec. 3, 2014).

past.⁴⁰³

Political change can cause re-evaluation of the past and reputations of the deceased in new democracies such as Spain, Peru, Chile, Argentina, etc. These countries went through political transition from dictatorship or totalitarian states to democracy. In these countries, it is possible to investigate political leaders' past sins and hidden secrets of militaries in previous oppression. Therefore, many people's reputations including the deceased could be altered in the context of political transition. Posthumous reputation can be protected by laws strongly supported by politicians who survived collapsed regimes or by their families and supporters who still stay in power. Further complicating the situation, amnesty laws may block the way to seek historical truth. To prevent opening old historical wounds, which may detain the restoration of democracy, the Spanish community reached compromise and passed the 1977 Amnesty Law after Franco's death.⁴⁰⁴ Though the treatment of the legacy of Franco's long dictatorship is still controversial, defamation of Franco cannot yet be tolerated by the deceased's proponents.⁴⁰⁵

In a sense, we may take Spanish Amnesty Law as a form of forced silencing or censorship of history. The 1977 Law is incompatible with international human rights law that overrides the imprescriptibility principle in criminal law. In addition, the Spanish Law to Historical Memory also brings the legal principles of irretroactivity and predictability into question. Both principles are critical to establishment of rule of law in new democracies.⁴⁰⁶ If such fundamental legal doctrines or principles can be ignored, even for higher values like justice and human dignity, the authority of law and its independence from political power would be under threat of political whims and sensations, which escalate easily during political change.

More importantly, Spain's Amnesty Law is the pact of different social forces that compromised their interests to have a better future. The law is of the nature of a social contract that should bear binding force over generations. A breach under political pressure can

403. In Italy there are cases against the communist resistant force concerning the Ardeatine Quarries Massacre. See Resta & Zeno-Zencovich, *supra* note 242, at 861–64.

404. Kadribasic, *supra* note 108, at 132.

405. It seemed that both supporters and the opponents have not been satisfied with the ways that the memory and legacy of Franco has been handled so far. Guy Hedgcock, *Spanish Left Cold Over 'Franco in a fridge.'* DW (Aug. 19, 2013), available at <http://www.dw.de/spanish-left-cold-over-franco-in-a-fridge/a-17029255> (last visited Dec. 3, 2014).

406. For a general discussion of internal principles of law see FULLER, *supra* note 8.

deconstruct mutual trust within the Spanish community. The idea that promise must be kept is essential for the existence and dignity of all human communities in the long run. This compromise or mutual trust should not be broken to meet short-term political needs. Otherwise, law is merely an instrument under the manipulation of politicians or the masses.⁴⁰⁷

Recently, Spanish law made a significant move in *Garzon* in which law stayed away from political whim,⁴⁰⁸ indicating that Spain now has a firm democracy and rule of law. In similar political context, the Israeli Supreme Court judged *Szenes* in favor of free speech, instead of being motivated by the political consideration to promote Israeli identity for state construction.⁴⁰⁹ In this case, national identity represented by the deceased heroine is of political importance to collective memory and collective identity, but the defamatory threat is not high enough to require more protection than free speech. The decision would have been different before in the formative stage of the Israeli State, when the Israeli law had played a significant role in state-construction and identity establishment. As Bilsky noticed, this transformation period lasted until the 1990s since the Zionist revolution, and many of the constitutional moments involved transformation trials of a more political nature.⁴¹⁰

In mature democracies, law is more independent from political power and is strong enough to rebut the political need of history censorship. Free speech rights are regarded as fundamental to a well-functioning democracy and are well protected by its constitution. Furthermore, political states draw legitimacy from ballots, not from history. Another notable reason that we see less censorship of history in democracies is that in democracies, citizens are treated equally as mature fellows, capable of making rational decisions themselves with free access to information. A political state is *not* assumed to be in the position to tell people what and what not to believe; which is contrary to authoritarian states, where there is a paternalist approach to think on behalf of subordinates. In addition, we have to note that democratic communities are more tolerant due to multiculturalist nature,

407. For a discussion of the independence of law and rule of law in Modern state from politics see PHILIPPE NONET & PHILIP SELZNICK, *LAW & SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978).

408. See Roht-Arriaza, *supra* note 176.

409. See generally H CJ 6126/94 *Szenes v. Broadcasting Authority* 53(3) PD 817 [1999] (Isr.).

410. LEORA BILSKY, *LAW, MEANING & VIOLENCE: TRANSFORMATIVE JUSTICE ISRAELI IDENTITY ON TRIAL* 7-10 (Univ. of Michigan Press 2004).

recognizing and treating different cultures rather equally.⁴¹¹

These are the reasons why most countries that have decriminalized defamation are mature Western democracies. However, this is not to say that rule of law and democracy, both respecting free speech as a fundamental value, can eradicate potential history censorship even in Western democracies. But, the non-protection of the dead's reputation and dignity in common law countries can block history censorship as justified by protection of the dead as a whole. Though the deceased's living family may sue to protect their own interest affiliated with the deceased, it offers no big chance to control information regarding the dead in a more systematic way.

Protection of the dead's dignitary interest by some continental law countries, in contrast, leaves a legal avenue open for state interference with history, even if such cases have to be waged by private parties. The disproportional interference of free speech rights, discussed above with respect to *Plon*, *Mizzi*, *Lehideux*, *Kurzac*, *Gutiérrez Suárez*, etc., denotes possible history censorship, even by European democracies via the protection of posthumous interests. Such cases, however, verify the importance of a transnational court in securing free speech rights and preventing state censorship of history. The critical role for the ECtHR is to make decisions from *a neutral position*, away from the compelling pressures of domestic politics, national identities, and cultural traditions. The contribution of the Court, therefore, lies in its juridical authority to bring difficult cases beyond the political and cultural limitations of domestic laws to meet higher standards.

We have to understand that protection of the dead's dignity is a well-justified end, since in many cultures the dead and their dignity are important, and law has to protect the related interests both of the living and the deceased. Law is a product of culture, and the values and morals of a particular culture should be respected in pursuit of human rights. The next section explains the reasons why reputations of the dead are important in some cultures, but not in others, as well as the resulting influence on law.

B. Law and Culture

The living law, Friedman said, "has its messages and functions . . . and one purpose is to protect the people who matter in society", and such a protection "prevents society itself from severe structural

411. CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 27 (Amy Gutmann ed., 6th ed. 1994).

damage.”⁴¹² Whether reputation and dignity of the dead deserve legal protection depends on a particular culture that defines social functions of reputation in that community. Reputation in general, according to Post, can be analyzed from the perspectives of honor, intangible property and dignity.⁴¹³ Reputation, as personal, intangible property, corresponds more to a community of individualist nature that comprehends reputation as individual achievements on the free market. In contrast, both the understandings of reputation as honor and as dignity reside in communities of a more collective nature, though in different ways.⁴¹⁴

The European continental laws represented by German law and French law have been established on a similar base of a communitarian or collective nature, stressing the value of human honor and dignity in more hierarchal communities.⁴¹⁵ Reputation as honor has deep roots in the two communities through their aristocratic traditions and has been leveled up from privileged, minority social groups, to the concept of mutual respects among all community members.⁴¹⁶ Actually, this kind of honor in reputation represents individuals' social status in a community that cannot be achieved by individual “effort and labor, [but as] a right to it by virtue of the status with which society endows his social role”.⁴¹⁷ And “the loss of honor is a loss of status and personal identity; the value of a good name ‘ought to be more precious’ than life.”⁴¹⁸

This emphasis on honor has been reflected in insult laws and memory laws that are popular in Europe, providing special protection for reputation of special groups, although as in Germany, it is “a kind of living fossil.”⁴¹⁹ The emphasis on human dignity and honor in

412. FRIEDMAN, *supra* note 66, at 12.

413. Post, *supra* note 12, at 693 (discussion of the concept of reputation as honor, personal property and dignity, which in the author's view co-exist in reputation but to different extents).

414. *Id.* (though Post talked about common law countries, his analysis can be applied to other communities equally).

415. Whitman, *supra* note 64, at 1284-85 (arguing that “the European culture of honor and dignity reaches very deep into everyday social life, covering what to us seem astoundingly trivial matters of civility” and describing “the dignitary cultures of civility that reign in both France and Germany today and traces the sources of those cultures to old traditions of social hierarchy.”); *see also* Peled, *supra* note 79, at 779-82 (arguing the communitarian tradition in German defamation law).

416. Whitman, *supra* note 64, at 1384-90 (“a commitment to the broad distribution of honor or dignity throughout society.”).

417. Post, *supra* note 12, at 700.

418. *Id.* at 703.

419. Whitman, *supra* note 64, at 1314.

European jurisdictions can be witnessed both in Article One of the European Union Charter of Fundamental rights, and in the constitutions of many European countries.⁴²⁰ Protection of human dignity has been recognized by the ECtHR in past judgments,⁴²¹ and the Court regards human dignity as supporting other Convention rights.⁴²² Following McCrudden, “[h]uman dignity has also been incorporated judicially as a general principle of European Community law, deriving from the constitutional traditions common to Member States.”⁴²³

Since honor and dignity refer to social status of individuals, protection of the dead’s reputation is more comprehensible against such legal-social backgrounds. The dead still need to be respected because of dignity as past human beings, and because their social status previous to death shall be cherished. As the German Constitutional Court pointed out long ago in *Mephisto*, “the human dignity of the deceased was of overriding constitutional value” and “it would be incompatible with the constitutional command of the inviolability of human dignity, if individuals could be freely disparaged after death.”⁴²⁴ In the decision, as Brugger commented elsewhere, an apparent communitarian concept could be found in German constitutional law.⁴²⁵

A similar treatment can be found in the Israeli Basic Law: Human Dignity and Liberty in 1992. According to the Supreme Court of Israel, the right of human dignity includes not only honor, but also reputation, privacy and property, among others;⁴²⁶ and both the right to reputation and the freedom of speech are derived from the mother right of human

420. Rösler, *supra* note 77, at 170; see also Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 216-17 (2008) (explaining Rao’s accounts of constitutional commitment to human dignity in Germany, France, South Africa, and Canada, as well as in international laws).

421. First mentioned in *Tyrer v United Kingdom* by the Court, involving corporal punishment, as against Article 3 protecting a person’s dignity and physical integrity. See *Tyrer v United Kingdom*, App. No. 5856/72, para. 33 (E. Ct. H.R. Apr. 25, 1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587> (last visited Dec. 3, 2014).

422. *Pretty v. United Kingdom*, App. No. 2346/02, para. 65 (E. Ct. H.R. July 29, 2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448> (last visited Dec. 3, 2014) (ruling “the very essence of the Convention is respect for human dignity and human freedom”); see also Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 683-84 (2008) (discussing the ECtHR’s protection of human dignity).

423. McCrudden, *supra* note 423, at 683.

424. Rösler, *supra* note 77, at 177-78.

425. See Winfried Brugger, *Communitarianism as the Social and Legal Theory Behind the German Constitution*, 2 INT’L J. CONST. L. 431, 433 (2004).

426. Peled, *supra* note 79, at 743-44.

dignity.⁴²⁷ In analyzing the jurisprudential foundations of Israeli defamation law, Peled noticed the moral influences of Jewish Law that “attaches significant weight to the right of reputation and treats defamation with great severity”, and whose protection of the dead has been absorbed by Israeli defamation law.⁴²⁸

Peled found that the Jewish majority, as the dominating force in shaping the country’s culture and politics before late 1970s, “was characterized . . . by communitarianism, collectivism and internal solidarity.”⁴²⁹ He concluded that communitarianism and solidarity parallel with each other with an ideology that values honor greatly and limits freedom and liberty “*in the name of moral commitment to society*”, and demands individuals’ compromise.⁴³⁰ However after the late 1970s, Peled noticed the Israeli law gradually witnessed a decline in such collective and communitarian tendencies for a variety of reasons.⁴³¹

We have to distinguish the two concepts of reputation which both originated from such collective communities: reputation as honor and reputation as dignity, which in Post’s view refer to different things.⁴³² Reputation as honor concerns unequal social status in honor communities with a deferential, hierarchical nature,⁴³³ while reputation as dignity refers to equal social status of community members and equal participation in communal issues.⁴³⁴ According to Whitman, European communities represented by France and Germany have leveled up the protection of honor (reputation) of higher social classes to other social classes after the Second World War, so that dignity and honor belong to *each member* of a community.⁴³⁵ In contrast, many societies protect the dead’s reputation more for the dead’s honor and their related social status. The stress is to secure social order and a hierarchical structure.

427. *Id.* at 748. It is worth of mentioning the plausible distinctions between posthumous dignity and human dignity made by Antoon De Baets. See Antoon De Baets, *A Successful Utopia: The Doctrine of Human Dignity*, 7 HISTOREIN 71, 80–82 (2007).

428. Peled, *supra* note 79, at 773.

429. *Id.* at 782–83 (pointing out three sources of the communitarianism before 1980s: Jewish tradition, Jewish immigrants from European societies and Arab societies which contained communitarian features, and the Zionist ideology with strong collectivist and communitarian themes).

430. *Id.* at 783.

431. *Id.* at 787.

432. Post, *supra* note 12, at 715.

433. See BOWMAN, *supra* note 12 (discussing honor cultures and communities both in the East and the West).

434. Post, *supra* note 12 at 715.

435. Whitman, *supra* note 64, at 1323, 1384 (In Whitman’s terms: “an equal honor for all” or “a minimum of honor for all.”).

Their laws have not yet shifted to the stage of protecting dignity of each human being of equal status, including equally protecting dignity of the deceased regardless of previous social status.

This doctrine is well explained in honor societies in which female victims of rape crimes are dishonored even within their own families. In communities where honor killings are popular, a woman's reputation or honor belongs to her husband or her father, who regard her tragedy as a big dishonor or disrespect of their incapacity to control or protect her.⁴³⁶ As David Pryce-Jones commented, honor acts as a kind of social glue in a shame society and the acquisition of honor brings high status to the individual and the avoidance of shame is a guarantee of low status.⁴³⁷ For John Davis, the essential character of honor is a system of stratification, describing distribution of wealth, prescribing appropriate behavior of people of various social positions, entailing the acceptance of subordination and super-ordination.⁴³⁸ Reputation as honor concerns simply not only the individuals whose reputation is under direct consideration, but also their families and relatives. Such an approach influences social rules or civility norms in Post's terms.⁴³⁹

In addition, attention shall be paid to the connection between honor society and collective identity. At this point, honor of a state or a particular racial group is collectively owned and appreciated, not allowed to be degraded by others. The escalating negative attitudes of many Russian authorities toward the Kytan tragedy, and the complaints from the Polish families of the deceased victims can be explained by changed political-cultural circumstances. Though Russia has been more democratized in past years, the new regime still needs a new national identity of self-pride and self-appreciation for unity. The over-disclosure of past massive murders of other peoples, as in the Katyn tragedy, though commanded by a few communist leaders, is still a big shame to the new identity.⁴⁴⁰ From this perspective, it is easy to

436. KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* 18 (W. W. Norton & Co. 2010).

437. David Pryce-Jones, *Shame and Honor, Terribly Twisted*, NAT'L REV., (Apr. 21, 2003) (citing Bowman, *supra* note 12, at 27).

438. Post, *supra* note 12, at 700 (citing JOHN DAVIS, *PEOPLE OF THE MEDITERRANEAN: AN ESSAY IN COMPARATIVE SOCIAL ANTHROPOLOGY* 98 (1977)).

439. *Id.* at 710 ("...when rules of deference and demeanor are embodied in speech, and hence are subject to the law of defamation, I shall call them rules of civility.").

440. See Anne Garrels, *Libel Case Sparks New Focus On Stalin's Reputation*, NPR (Sept. 8, 2009, 3:18 PM), available at <http://www.npr.org/templates/story/story.php?storyId=112642329> (last visited Dec. 3, 2014); Andrew Osborn, *Josef Stalin's Grandson Loses Legal Attempt at Rehabilitating Soviet Dictator's Reputation*, TELEGRAPH (Oct. 13, 2009, 8:29 PM), available at

understand why a Russian historian was arrested when he invested the fate of German soldiers imprisoned by Russian Security Services,⁴⁴¹ as just part of a “[p]utinite campaign against freedom of historical research and expression.”⁴⁴²

In sharp contrast, communities of an individualist nature take reputation as personal, achieved by personal efforts and labor. It can be lost and regained on free market as *personal, intangible* property. An individual can reconstruct his or her own reputation and therefore, reputation is different from personal identity.⁴⁴³ It is against this cultural concept that the deceased have no legal protection of reputation after death and their relatives and heirs cannot sue on their behalf to benefit from other’s good reputation.⁴⁴⁴ The American approach to reputation is a typical individualist one hatched in an individualist culture.⁴⁴⁵ The individualist approach can collapse or wear out the collective nature of honor in reputation, given that free market and democracy become the dominating auras. Market economy will recalculate the value of personal reputation as products of personal efforts and available for market exchange, while democracy requires equal respect of individuals in participating public issues regardless of their social status.

This explains the shift of reputation concept in many societies. Since the late 1970s, for instance, Israeli society has witnessed the decline of communitarianism, collectivism and solidarity and a concurrent rise of individualism, at least among those people whose influence on the character of the State of Israel is the greatest.⁴⁴⁶ Among other factors, that the economic growth especially during the 1990s increased living standards – together with the process of the Americanization – has strengthened individualism in Israeli community. This has helped maintain a liberal majority in the Supreme Court to attribute greater weight to freedom of speech and to embrace a liberal

<http://www.telegraph.co.uk/news/worldnews/europe/russia/6319755/Josef-Stalins-grandson-loses-legal-attempt-at-rehabilitating-Soviet-dictators-reputation.html> (last visited Dec. 3, 2014).

441. Lydia Harding, *Russian Historian Arrested in Clampdown on Stalin Era*, GUARDIAN (Oct. 15, 2009, 1:38PM), available at <http://www.guardian.co.uk/world/2009/oct/15/russia-gulag-historian-arrested> (last visited Dec. 3, 2014).

442. *Id.*

443. Post, *supra* note 12, at 700.

444. Iryami, *supra* note 19, at 1088.

445. See Bellah, *supra* note 35, at 743 (“Arguing that ‘America is a culture that focuses on the individual, a culture in which ‘individualism’ is a central value.’”).

446. Peled, *supra* note 79, at 787.

interpretation of the constitutional protection of dignity.⁴⁴⁷

In China, we observe a similar tendency. The rise of “a free market” and capitalism has helped with prioritizing individual interests in daily life after the 1980s, albeit collectivism is still the official ideology. Nowadays more people are likely to gauge other’s achievement (reputation) by economic achievements, and individualism becomes the dominant morals than collectivism.⁴⁴⁸ Reputation is not only understood as honor denoting personal social status among the Chinese, but more as the appreciation of personal economic achievements and human dignity.⁴⁴⁹ Moreover, the ordinary Chinese have gradually recognized the economic interest in reputation and privacy of the dead.⁴⁵⁰ Therefore, even the ordinary Chinese start to resort to law for protection.⁴⁵¹ The growth of individualism enriches the understandings of reputation in China. And it motivates the Chinese to speak out what they think about the past communist rulings and the late political figures, which have caused many troubles.⁴⁵²

It is in the communitarian culture that individuals are requested to compromise their free expression right to protect the collective identity or reputation, or human dignity for public interest. Laws of such communities accordingly provide protection of posthumous reputation, when reputation is more taken as either personal honor or individual dignity.⁴⁵³ While the emphasis on both concepts could be accepted by

447. *Id.* at 789–90.

448. See Liza G. Steele & Scott M. Lynch, *The Pursuit of Happiness in China: Individualism, Collectivism, and Subjective Well-Being During China’s Economic and Social Transformation*, SOC. INDICATORS RES. 442–51 (arguing that after decades’ market economy in China, Chinese people are increasingly prioritizing individualist factors in assessments of their own happiness and life satisfaction, suggesting that Chinese society becomes increasingly individualistic in social realities).

449. No wonder, the introduction of rule of law and the popularity of the idea of human rights among the public play a role in promoting the idea of equality and dignity of individuals. See *id.*

450. Many posthumous privacy cases are about the illegal appropriation of the dead’s likeness and the unconsented use of their names for commercial purposes. See Zhao, *supra* note 349, at 298.

451. See Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L. J. 34, 103 (2006) (arguing that the “increased use of defamation litigation by powerful parties in recent years may also be encouraging more ordinary individuals to assert their rights” and “Permitting such cases to be used to entrench local interests may be a necessary corollary or prerequisite to the effective use of litigation by ordinary people.”).

452. See Zhao, *supra* note 349, at 338.

453. At this point, I won’t discuss Muslim communities, for which the collective identity is of fundamental importance, in particular regarding the dead prophets and religious leaders. See *id.*

members of a society, it might be used as a good justification to limit free speech of others. Eventually, this becomes a matter of balancing different social interests by courts of law, which might lead to potential chilling effects and history censorship.

It is better to conclude the discussion of the relationship between culture difference, posthumous reputation protection, and legal interference by quoting an observation of Rösler that “the conceptual and cultural embedding is decisive.”⁴⁵⁴

VII. CONCLUSION: DEAD BUT NOT FAR AWAY

This article has discussed the relationship between legal protection of posthumous reputation and history censorship, explaining the interplays of law, politics and culture that contribute to the complexity of many posthumous defamation cases in different communities. On the whole, the crux of the issue is how we shall treat the dead and their posthumous interests, and how much compromise a community is willing to make to protect the deceased? As discussed above, different approaches can be interpreted by the characteristics of politics and culture of a particular community.

Totalitarian and dictatorial states protect the dead’s reputation, in particular the reputation of political leaders, on the ground of their social status, collective memory, and political legitimacy. Reputation and honor of the dead therefore are important values to be protected by their laws and free speech is usually compromised. It is also likely in religious communities that strictly forbid defamation of religious leaders and prophets. But, this is not to say that in Western democracies there exists no history censorship or censorship of speech regarding the past, or no official history or narrative is officially protected. We have observed that in many circumstances speeches regarding dead leaders and kings have been limited to different extents and some of which were overturned by the ECtHR as violating the right to free speech. This shows that free speech concerning the past may be restricted sporadically for various reasons in Western democracies.

Other reasons include the protection of national honor or dignity by preventing insults of state leaders, or protecting national identity. However, the tendency in mature democracies is that there is no systematic censorship of history, and that with the abolition of criminal defamation, insult law and blasphemy law, there will be less violation of

454. Rösler, *supra* note 77, at 186.

free speech rights of historians and journalists. Of course, the best practice in this regard is from common law jurisdictions, whose strong rejection of the protection of the dead's reputation and privacy has crased the potential to abuse defamation law and privacy law for history censorship.

This, however, does not mean that the strong tradition in some European countries to respect and protect the dead's dignity shall not be appreciated such as in German law and Maltese law. The point is that there is a big danger to violate the proportionality principle when balancing the posthumous protection with free speech right. Protection of the right to free speech may yield under accumulating exigent public needs and political whims, as seen in memory laws in Europe, opening the door for future state censorship. The safest way is to walk far away from the slippery water bank with a clear-cut line by resembling the common law approach.⁴⁵⁵ Even when protection of the dead's reputation and dignity are regarded as highly important to a community, courts of law shall make judgments in favor of free speech rights, unless there exists real, compelling social needs, or the offense is grave and serious enough to endanger the fundamental value of a society affiliated with posthumous reputation and privacy.

To prevent potential history censorship under this avenue, judges have to pay more attention to the following two issues: First, law is the last means, but not the best to resolve history's controversies. Judges are not well-equipped professional historians who can dig deep into the dusts of history. Actually, historians themselves run into difficulties too often in seeking historical truth (or facts). Though courts may dance with politicians to achieve certain critical, political ends, such as helping with the formation of Israeli state and Zionist identity, it should be crystal clear that they must avoid such a political role and protect the independence of law, so that law's authority and independency will not melt down before prevailing political whims and public outcry. Otherwise, what comes with the postponed suspicion of judicial truth (or historical truth) offered in court is eventual distrust of the judiciary. Therefore, second, when courts have to settle posthumous defamation disputes regarding sensitive history, their discretion should be strictly

455. A reason why the author is against the recent proposal to protect the dead's reputation by some law reform commissions in western democracies. See, e.g., *Report On The Civil Law Of Defamation*, LAW REFORM COMM'N (1991), available at http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm (last visited Dec. 3, 2014); *Death of a Good Name - Defamation and the Deceased: A Consultation Paper*, SCOTTISH GOV'T, available at <http://www.scotland.gov.uk/Publications/2011/01/11092246/0> (last visited Dec. 3, 2014).

limited to decide whether the accused authors have sufficient evidence to support controversial statements, and whether they have conducted research according to acceptable academic manners.