POSTMORTEM DEFAMATION IN A SOCIETY WITHOUT TRUTH FOR THE LIVING

Reid Kress Weisbord[*]

ABSTRACT

Defamation law limits the private action for reputational injury to plaintiffs who are alive at the time of disparagement. In a novel reform proposal, Professor Don Herzog argues that we should extend defamation liability to disparaging statements about dead people. This Essay evaluates Herzog's theory of postmortem reputational harm by focusing mainly on two counterarguments not addressed in his proposal: The first is that, since the election of President Trump, the modern political discourse has become so detached from the truth and callous about death that it is difficult to envision a moral obligation to protect postmortem reputational interests. The second distinguishes the consequentialist doctrine of testamentary intent from Herzog's moral theory of postmortem defamation. This Review Essay concludes that, while society should indeed strive to recognize a moral obligation to protect decedents against reputational harm, we cannot do so without first restoring our commitments to truth-telling and respecting the solemnity of death.

[*] Vice Dean, Professor of Law, and Judge Norma L. Shapiro Scholar, Rutgers Law School. The author is grateful to David Horton for helpful comments.

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INTRODUCTION

Barbara Bush, former First Lady (and First Mother) of the United States, died on Tuesday, April 17, 2018 at the age of 92.[1] Widely admired for her folksy charm and love of country, Mrs. Bush was fondly remembered in the news coverage following her death.[2] Such high regard, however, was not entirely unanimous. Roger Stone, a close confidante of President Donald Trump, stated the following in response to news of her death:

> Barbara Bush was a vindictive, entitled, mean spirited woman. May she rest in peace.
>
> She is descending into hell right now. She's not going to heaven. She was a bad person.
>
> Barbara Bush drank so much booze, if they cremated her . . . her body would burn for three days.[3]

1. *See* Enid Nemy, *Barbara Bush, Wife of 41st President and Mother of 43rd, Dies at 92*, N.Y. TIMES (Apr. 17, 2018), https://www.nytimes.com/2018/04/17/us/barbara-bush-dead.html.

2. *See* Lois Romano, *Barbara Bush, Matriarch of American Political Dynasty, Dies at 92*, WASH. POST (Apr. 17, 2018), https://www.washingtonpost.com/local/obituaries/barbara-bush-matriarch-of-american-political-dynasty-dies-at-92/2018/04/17/200bfaee-40de-11e8-bba2-0976a82b05a2_story.html?utm_term=.10dcced14c8d.

3. Naomi Lim, *Roger Stone Steps Up Attacks on Barbara Bush: 'She Is Descending into Hell Right Now*,*'* WASH. EXAMINER (Apr. 19, 2018, 1:15 PM), https://www.washingtonexaminer.com/news/roger-stone-steps-up-attacks-on-barbara-bush-she-is-descending-into-hell-right-now.

To cite another example, Randa Jarrar, an English professor at California State University at Fresno, posted the following remark on her Twitter account:

> Barbara Bush was a generous and smart and amazing racist who, along with her husband, raised a war criminal.
>
> I'm happy the witch is dead. can't wait for the rest of her family to fall to their demise the way 1.5 million iraqis have. Byyyeeeeeeee.[4]

Those remarks were newsworthy, not merely because they sought to disparage Mrs. Bush's profoundly positive legacy, but because they violated a widely shared cultural norm against speaking ill of the dead.

Suppose that Stone and Jarrar had chosen to disparage Mrs. Bush while she was still alive. During life, defamation law provides a private action in tort for the publication of false statements of fact that injure the victim's reputation and standing in the community.[5] Disparaging insults, while often offensive, are not legally actionable because the First Amendment freedom of speech limits defamation liability to false statements of fact.[6] So Mrs. Bush could not have recovered for disparaging opinions, such as Stone's claim that she was a "vindictive," "bad person," or a "mean spirited woman." But she might have recovered for statements of factual content that portrayed her as chronically drunk, racist, or the mother of a war criminal, provided that the defendants could not prove the truth of those assertions.

In real life, unlike the preceding hypothetical, Stone and Jarrar waited until after Mrs. Bush's death to publish their statements. Their posthumous timing is significant because it immunized them from tort liability. A decedent's reputation may live on in the minds of the living, but under a widely recognized and firmly established branch of tort law,

4. Javier Panzar, *Cal State Fresno Professor Under Fire for Tweets Attacking Barbara Bush*, L.A. TIMES (Apr. 19, 2018, 4:00 PM), http://www.latimes.com/local/lanow/la-me-ln-fresno-state-barbara-bush-20180419-story.html.

5. Bustos v. A&E Television Networks, 646 F.3d 762, 763–64 (10th Cir. 2011) (quoting RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1976) and explaining that the doctrine is "about protecting a good reputation honestly earned.").

6. *See, e.g.*, Turner v. Wells, 198 F. Supp. 3d 1355, 1365 (S.D. Fla. 2016), *aff'd*, 879 F.3d 1254 (11th Cir. 2018) ("[S]tatements of pure opinion are protected from defamation actions by the First Amendment."). A disparagement is not defamatory merely because the subject regards the statement as offensive or unpleasant; rather, an actionable claim for defamation must allege that the disparagement portrayed the plaintiff as "odious, infamous, or ridiculous." Franklin v. Pepco Holdings, Inc., 875 F. Supp. 2d 66, 74 (D.D.C. 2012).

defamation does not apply to statements about the dead even though a postmortem lie may deeply offend or insult a decedent's survivors.[7]

At least one leading scholar, however, claims that this doctrine of defamation law reflects a moral failure of society to protect against reputational harm after death.[8] In a recent notable monograph, *Defaming the Dead*, Professor Don Herzog articulates a layered theory of postmortem harm in which he argues that the law should provide a tort law remedy for defaming the dead, just as the law of wills protects testamentary intent and the attorney rules of professional conduct protect the confidentiality of deceased clients.[9] Herzog's thesis is persuasively tempting. Why shouldn't the law protect defenseless decedents rendered silent by the limits of mortality against false disparagement? Why shouldn't postmortem reputational interests receive the same legal protections as other rights that survive the decedent's death?

In this Review Essay, I evaluate Herzog's theory of postmortem harm and tort law reform proposal by focusing mainly on two counterarguments not addressed in the book: The first and primary counterargument is that, since the election of President Trump, the modern political discourse has become so distantly removed from the truth that it is now difficult to identify a societal consensus for honesty as a moral norm. How can a society in which the highest ranks of government betray facts and truth when speaking about the living invoke the moral authority of law to impose legal sanction for lying about the dead? The second counterargument seeks to distinguish the consequentialist doctrine of testamentary intent from Herzog's moral theory of postmortem defamation.

This Review Essay proceeds in five parts:

Part I situates postmortem harm and defamation in the context of unprecedented incivility and untruthfulness in civic discourse. Part II provides a more fulsome account of Herzog's praiseworthy theory of why tort law should recognize a claim for postmortem reputational injury.

Part III compares Herzog's moral theory of postmortem defamation with recent scholarship that explores the foundational purpose of tort law. In a collection of prominent works published contemporaneously and shortly after Herzog's book, notable scholars argue that the normative organizing principle of tort law is to remedy private wrongs, not to

7. *See* RESTATEMENT (SECOND) OF TORTS § 560 (AM. LAW INST. 1977) ("One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives.").

8. *See* DON HERZOG, DEFAMING THE DEAD 57–59 (2017).

9. *Id.* at 61–63.

maximize welfare or deter harmful conduct. Those theoretical contributions are consistent with and lend support for Herzog's claim.

Part IV considers Herzog's proposal in relation to inheritance law, the legal field with the greatest institutional experience in regulating posthumous interests. Part IV discusses the departure of Herzog's theory of postmortem defamation from the prevailing consequentialist rationales for testamentary freedom. It also considers inheritance law's rightly criticized doctrine of abatement for overly restricting the descendibility of claims at death. Finally, Part V turns to a question of infinitely greater difficulty: Can Herzog's theory of moral obligation to the dead, published before President Trump's election in 2016, withstand the subsequent decline of truthfulness in the modern political discourse?

I. DEFAMATION LAW IN A SOCIETY OF UBIQUITOUS FALSEHOOD

Ancient moral and religious codes condemn false representations and the "lying tongue."[10] In 2017, however, lies became the coin of the American sociopolitical realm. To confine our analysis to practical baseline, let us recall the first official White House press conference following the inauguration of President Donald J. Trump.

On January 21, 2017, then-incoming Press Secretary Sean Spicer began his prepared remarks with factually inaccurate statements about spectator attendance at President Trump's inauguration the day before:

> Yesterday, at a time when our nation and the world was watching the peaceful transition of power and, as the President said, the transition and the balance of power from Washington to the citizens of the United States, some members of the media were engaged in deliberately false reporting . . . .
>
> . . . .
>
> This was the largest audience to ever witness an inauguration — period—both in person and around the globe. . . . These attempts to lessen the enthusiasm of the inauguration are shameful and wrong.[11]

10. *Proverbs* 6:16-19 ("There are six things that the LORD strongly dislikes, seven that are an abomination to him: . . . a lying tongue . . . ."); *Exodus* 20:16 ("You shall not bear false witness against your neighbor.").

11. James S. Brady, *Statement by Press Secretary Sean Spicer*, WHITE HOUSE (Jan. 21, 2017, 5:39 PM), https://www.whitehouse.gov/the-press-office/2017/01/21/statement-press-secretary-sean-spicer.

Spicer, thus, not only recited a false statement about the number of inauguration attendees, but he then used that misrepresentation to falsely condemn what appeared to be accurate reporting by professional journalists.[12] Likewise, the public reaction seemed to exhibit a collective sense of bewilderment, not only in response to Spicer's off-putting tone, but to the spectacle of a White House Press Secretary invoking the gravitas and symbolism of his podium to boldly proclaim factual assertions that were so obviously false and politically inconsequential.[13] Reliable eyewitness accounts and contemporaneous photography proved that, sure enough, Spicer had lied in at least two material respects: (1) the spectators attending Trump's inaugural ceremony in Washington, D.C., were not the largest audience ever to witness an inauguration; and (2) news coverage concerning that fact was neither false nor deliberately untrue.[14]

One day later, White House Counselor Kellyanne Conway defended Spicer's remarks as "alternative facts,"[15] an inventive euphemism for falsehood that quickly achieved its own popular infamy.[16] Spicer resigned from office nine months later and, only then, appeared to concede (or, at least imply) that his statements about the inauguration were untrue: He made a surprise appearance at the Prime Time Emmy Awards to perform a comedic parody of the January 21st press conference ("This will be the largest audience to witness an Emmy's, *period*!"),[17] and he later expressed regret for berating journalists about the inauguration coverage.[18]

12. *See, e.g.*, Glenn Kessler, *Spicer Earns Four Pinocchios for False Claims on Inauguration Crowd Size*, WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/22/spicer-earns-four-pinocchios-for-a-series-of-false-claims-on-inauguration-crowd-size/?utm_term=.221702ac70fe.

13. In a comedic parody of Spicer's press briefing on Saturday Night Live, actress Melissa McCarthy announced from a mock podium, "I came out here to punch you in the face," referring to journalists in the White House briefing room. Saturday Night Live, *Sean Spicer Press Conference*, NAT'L BROAD. CO. (Jan. 26, 2017), https://www.nbc.com/saturday-night-live/video/sean-spicer-press-conference/3465162.

14. *See, e.g.*, Elle Hunt, *Trump's Inauguration Crowd: Sean Spicer's Claims Versus the Evidence*, THE GUARDIAN (Jan. 22, 2017, 4:36 PM), https://www.theguardian.com/us-news/2017/jan/22/trump-inauguration-crowd-sean-spicers-claims-versus-the-evidence.

15. *Conway: Press Secretary Gave 'Alternative Facts*,*'* NBC NEWS (Jan. 22, 2017), https://www.nbcnews.com/meet-the-press/video/conway-press-secretary-gave-alternative-facts-860142147643.

16. *See, e.g.*, Randy Rainbow, *Alternative Facts*, YOUTUBE (Jan. 24, 2017), https://www.youtube.com/watch?v=OdV_8TGswRA (parody performed to the music of Jellicle Songs from Andrew Lloyd Webber's Broadway musical, *Cats*).

17. Glenn Thrush & Dave Itzkoff, *Sean Spicer Says He Regrets Berating Reporters Over Inauguration Crowds*, N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/2017/09/18/arts/television/sean-spicer-emmys.html?_r=0.

18. *See id.*

This highly visible telling and re-telling of a lie by high ranking government officials was not an isolated incident, but rather, one of innumerable falsities that later would be asserted by President Trump himself.[19] False statements by President Trump embellished his record by accepting credit for the accomplishments of others,[20] misrepresented facts to advance a political agenda,[21] and falsely disparaged truthful news coverage of his presidency as "fake news."[22] President Trump also nominated political appointees with a similar penchant for factual misrepresentation: Examples include the Secretary of Commerce, who reportedly lied about his personal net worth to Forbes Magazine,[23] and a U.S. ambassador who falsely denied making Islamophobic statements and then falsely denied the denial.[24]

19. *See* David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html (last updated Dec. 14, 2017) (cataloguing false statements by President Trump during his first six months in office).

20. *See, e.g.*, Michelle Ye Hee Lee, *Trump's Claim Taking Credit for Cutting $600 Million from the F-35 Program*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/31/trumps-claim-taking-credit-for-cutting-600-million-from-the-f-35-program/?utm_term=.0f4fc0ef74e1; *see also* Lee et al., *President Trump Has Made 1,318 False or Misleading Claims over 263 Days*, WASH. POST (Oct. 10, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/10/10/president-trump-has-made-1318-false-or-misleading-claims-over-263-days/?utm_term=.53793167a5b1.

21. *See, e.g.*, Michelle Ye Hee Lee, *President Trump's Claim Medicaid Spending in Senate Health Bill 'Actually Goes up,'* WASH. POST (June 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/30/president-trumps-claim-medicaid-spending-in-senate-health-bill-actually-goes-up/?utm_term=.6877b64fe620.

22. *See, e.g.*, Steve Coll, *Donald Trump's "Fake News" Tactics*, NEW YORKER (Dec. 11, 2017), https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics.

23. Forbes Magazine recently removed Wilbur Ross, Secretary of the United States Department of Commerce, from its list of richest Americans after concluding that Secretary Ross had lied to the publication for years about his net worth (in particular, reporting assets managed on behalf of clients as his own). Dan Alexander, *The Case of Wilbur Ross' Phantom $2 Billion*, FORBES (Nov. 7, 2017, 6:00 AM), https://www.forbes.com/sites/danalexander/2017/11/07/the-case-of-wilbur-ross-phantom-2-billion/#689a962b7515. When confronted with questions about why his financial disclosures reported (only) $700 million in personal assets, a fraction of his claimed net worth of $3.7 billion, Ross told Forbes that he had transferred $2 billion into family trusts not subject to government disclosure requirements between the 2016 election and his confirmation in 2017 as Commerce Secretary. *Id*. The Department of Commerce, however, issued a statement disputing Ross's story about the trusts: "Contrary to the report in Forbes, there was no major asset transfer to a trust in the period between the election and Secretary Ross's confirmation." *Id*. Forbes, in turn, concluded that the $2 billion in personal assets never actually existed. *Id.*

24. Jamie Ducharme, *U.S. Ambassador to Netherlands Apologizes After Bizarre 'Fake News' Exchange*, TIME MAGAZINE (Dec. 23, 2017), http://time.com/5078452/pete-hoekstra-fake-news/.

Yet another category of Trump's false statements may arguably be described as defamatory because they targeted individual living people and subjected them to reputational harm. For example, on March 4, 2017, at 3:35 A.M., Trump tweeted, "Terrible! Just found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found. This is McCarthyism!"[25] Approximately half an hour later, Trump tweeted again: "How low has President Obama gone to tapp [sic] my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!"[26] A spokesman for former President Barack Obama maintained that Trump's statements were "simply false" and, to date, Trump has yet to substantiate them.[27] The March 2019 Special Counsel Report on the Investigation into Russian Interference in the 2016 Presidential Election, without revealing details about law enforcement surveillance of Trump Tower, refuted Trump's claim of "[n]othing found": "The Office [of Special Counsel] identified multiple contacts . . . between Trump Campaign officials and individuals with ties to the Russian government."[28] Assuming for the sake of argument that Trump's tweets were indeed false, then they would have unfairly sullied Obama's

In a bizarre exchange caught on camera, Pete Hoekstra, the newly appointed U.S. ambassador to the Netherlands, denied making Islamophobic statements and then denied making the denial. *Id.*

25. Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), https://twitter.com/realdonaldtrump/status/837989835818287106?lang=en.

26. Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), https://twitter.com/realDonaldTrump/status/837996746236182529?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F03%2F04%2Fus%2Fpolitics%2Ftrump-obama-tap-phones.html.

27. Michael D. Shear & Michael S. Schmidt, *Trump, Offering No Evidence, Says Obama Tapped His Phones*, N.Y. TIMES (Mar. 4, 2017), https://www.nytimes.com/2017/03/04/us/politics/trump-obama-tap-phones.html.

28. Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, DEP'T. OF JUSTICE, Volume I at 66 (March 2019), https://www.justice.gov/storage/report.pdf.

reputation by falsely accusing him of abusing his law enforcement powers for a corrupt purpose.[29]

* * *

As a general matter, most lies may be told with legal impunity because the First Amendment broadly protects the freedom of speech.[30] The law does, however, regulate false statements in certain narrowly prescribed contexts. For example, it is a crime to lie under oath,[31] to file a false police report,[32] and to make a materially false, fictitious, or fraudulent statement in the context of an administrative or investigative proceeding.[33] When lying constitutes a fraud or misrepresentation that interferes with reasonable expectations of third parties, such conduct can implicate civil liability and other legal remedies under the laws of contracts and donative transfers.[34] Defamation, the primary focus of this

29. To cite another recent example of political misrepresentation, during the 2016 Republican primary, Trump claimed that Rafael Cruz, father of U.S. Senator Ted Cruz, was with Lee Harvey Oswald shortly before Oswald assassinated President John F. Kennedy in 1963. Louis Jacobson & Linda Qiu, *Donald Trump's Pants on Fire Claim Linking Ted Cruz's Father and JFK Assassination*, POLITIFACT (May 3, 2016, 5:59 PM), http://www.politifact.com/truth-o-meter/statements/2016/may/03/donald-trump/donald-trumps-ridiculous-claim-linking-ted-cruzs-f/ ("What was he doing—what was he doing with Lee Harvey Oswald shortly before the death? Before the shooting? It's horrible," said Trump.). This claim—vehemently denied by Mr. Cruz—at best, strains credulity and, at worst, is plainly false and defamatory: "We're asked to believe, then, that Oswald ran into a Rafael Cruz at an employment office in a city where Cruz may not have been living. That Cruz then agreed to join Oswald in passing out fliers, despite their advocating a position that Cruz himself vehemently opposed. That he may or may not have been photographed doing so—and that a witness at the scene thought the other guy passing out fliers was a lot taller than Cruz." Philip Bump, *The 50-Year-Old Mystery Behind That Photo of Lee Harvey Oswald*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/03/the-50-year-old-mystery-behind-that-photo-of-lee-harvey-oswald/?utm_term=.8228160098dd.

30. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

31. *See, e.g.*, 18 U.S.C. § 1621 (2018) (prohibiting perjury).

32. *See, e.g.*, FLA. STAT. § 837.05 (2012) (prohibiting false reports to law enforcement authorities).

33. *See, e.g.*, 18 U.S.C. § 1001 (2018) (prohibiting false statements or entries generally).

34. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.3(d) (AM. LAW INST. 2003) ("A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made."); RESTATEMENT (SECOND) OF CONTRACTS § 162 (AM. LAW INST. 1981) (titled "When a Misrepresentation Is Fraudulent or Material").

Review, is a private right of action under tort law for reputational injury caused by the publication of a false factual statement.[35]

President Trump, hardly unacquainted with this aspect of tort law, has been a defamation plaintiff in multiple unsuccessful libel lawsuits filed during his career as a private businessman.[36] Indeed, Trump campaigned on the issue of defamation, arguing that public figures should enjoy the same defamation rights as non-public figures and that, if elected, he would "open up our libel laws so when [news reporters] write purposely negative and horrible and false articles, we can sue them and win lots of money."[37]

Trump most likely intended his critique of defamation law as a rhetorical flourish, not as a serious call for law reform. But defamation law's delicate balance between private harm and free speech interests implicates several legitimate and controversial questions. For example, how, if at all, should the defendant's state of mind factor into defamation liability? Should it matter whether the defamed person suffered emotional harm or embarrassment, or is economic injury the only relevant measure of damage? Should the estate of a decedent who was defamed during life have a right to sue for defamation after the decedent's death? And what about postmortem defamation that takes places entirely after the decedent's death?

35. *See* RESTATEMENT (SECOND) OF TORTS §§ 558–59 (AM. LAW INST. 1977).

36. *See* Makaeff v. Trump Univ., LLC, 26 F. Supp. 3d 1002 (S.D. Cal. 2014) (dismissing counterclaim for defamation and awarding counterclaim defendant attorney's fees for the cost of defending the counterclaim); Trump v. Chi. Tribune Co., 616 F. Supp. 1434 (S.D.N.Y. 1985) (dismissing defamation claim on First Amendment grounds); Trump v. O'Brien, 29 A.3d 1090, 1097 (N.J. Super. Ct. App. Div. 2011) (dismissing libel claim against author who allegedly underestimated Trump's net worth and describing confidential sources' notes as "significant, in that they provide remarkably similar estimates of Trump's net worth, thereby suggesting the accuracy of the information conveyed.").

37. *See* Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866. However, given that the actual malice standard was imposed by the Supreme Court on First Amendment grounds, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), it is unclear precisely how the President could alter this aspect of defamation law unilaterally.

This critique of libel law was an unmistakable reference to the leading case of *N.Y. Times Co. v. Sullivan*, in which the Supreme Court held that the freedom of speech requires public figures (like Trump), when suing for defamation, to prove that the defendant made the challenged statement with actual malice, a higher threshold for liability, but one that avoids chilling constitutionally protected speech about matters of public concern. *Id.* at 279–80. When a defamation plaintiff is a public figure, like Trump himself, there is no liability for publication of a false statement of fact, absent clear and convincing evidence that the defendant did so with actual malice. *See O'Brien*, 29 A.3d at 1095 ("There is no doubt that Trump is a public figure.").

In *Defaming the Dead*, a delightful and thought-provoking book written just before Trump's election, Professor Don Herzog argues that tort law should expand the scope of defamation liability,[38] but not in the manner proposed by Trump. Instead, Herzog contends that defamation law should provide a tort remedy for reputational injury inflicted during life, as under current law, and, in a notable departure from current law, *after death*.[39]

At a casual first glance (and, before reading Herzog's book), the protection of postmortem reputational interests on utilitarian grounds has intuitive appeal: Tort law could maximize social welfare by discouraging and providing a remedy for defamatory speech about the dead which, in turn, would comfort living people who worry about their legacy and reputation after death. In other words, by protecting the reputational interests of the dead, tort law can indirectly confer valuable benefits upon the living. But Herzog, a doctrinal purist, believes that the primary function of tort law is to remedy private wrongs, not to promote the public interest through the general deterrence of socially undesirable behavior, and certainly not to conscript an army of private attorneys general to suppress defamatory statements by standing ever-ready to sue would-be defamers.[40]

Herzog rejects such a "consequentialist" approach. Instead, he argues that society has a moral obligation to protect the reputational interests of decedents, that postmortem defamation liability aligns with the survivability doctrine that governs other types of claims, and that a decedent's state of incapacity is irrelevant because defamation law does not require proof of emotional pain or suffering.[41] Drawing from an impressive historical assembly of legal, anthropological, and sociological authorities, Herzog provides deep historical context for the recognition of postmortem interests and explains why defamation law should protect the dead from reputation harm.

II. HERZOG'S THEORY OF POSTMORTEM DEFAMATION

Herzog's central argument is that a person who defames the dead should be subject to defamation liability.[42] Herzog believes that society owes a moral obligation to the dead to protect postmortem reputational

38. HERZOG, *supra* note 8, at ix.

39. *Id.* at 136; *see* RESTATEMENT (SECOND) OF TORTS § 560 (AM. LAW INST. 1977) ("One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives.").

40. *See* HERZOG, *supra* note 8, at 45–47.

41. *Id.* at 46, 57–59.

42. *Id.* at 40–41.

interests that, by reason of the decedent's death, cannot be adequately protected by the defamation victim herself. Herzog's classical argumentation stages a stylized debate between a proponent of postmortem defamation and a skeptic who would limit such liability to false statements about the living. Speaking in the first person, Herzog casts himself as the indefatigable proponent in an intellectual volley with a keenly rivalrous skeptic.[43]

Chapter 1 ("Embezzled, Diddled, and Popped") orients the reader—and provokes the skeptic!—by conjuring up a spooky hypothetical: Imagine that you have died, but that you are somehow able to observe your own funeral.[44] After hearing a eulogy extolling your lifetime virtues, a funeral-goer mutters to a nearby mourner, "Bullshit. Try this: Embezzled money at work. Diddled children in the park. Popped kittens in the microwave for fun."[45] The declarant's allegations are false and, had they been communicated to a third party during your life, the declarant would almost surely be liable for slander.[46] However, since the declarant uttered his statements after your death, he is not liable for damages because tort law does not recognize a cognizable claim for defamatory statements concerning a person who is already dead.[47] Herzog disagrees with this doctrine of defamation law. He contends that tort law *should* provide a remedy for postmortem reputational injury because defamatory statements, even when made posthumously, harm the decedent's interest in protecting the memory of her good name.[48]

Herzog then introduces the rivalrous skeptic, who responds with a wholesale rejection of postmortem interests:

> I'm dead. It's over. I no longer have any interests at all, so I can't have any reputational interests. I don't have any welfare, don't enjoy any utility or preference satisfaction, don't have any plans or projects I can advance or that can be set back. So there's nothing for the concept of injury to get a grip on. I don't believe

43. In this regard, Herzog's style evokes Alan Cumming's 2013 Broadway stage tour de force performance of Shakespeare's *Macbeth* as a one-man show. *See* Charles Isherwood, *One Mad Power Grab, Many Dramatic Roles*, N.Y. TIMES (Apr. 21, 2013) https://www.nytimes.com/2013/04/22/theater/reviews/macbeth-with-alan-cumming-at-the-barrymore-theater.html ("The real novelty of this production lies elsewhere: Mr. Cumming does not just play Macbeth but also all of the other significant roles in what is essentially a one-man, one-act hurtle through this Shakespearean tragedy of ambition, murder and soul-corroding guilt, here set in the chilly chamber of a mental institution.").

44. HERZOG, *supra* note 8, at 1–2.

45. *Id.* at 2.

46. *Id.*

47. *Id.*

48. *Id.* at 3.

> my soul is peering down—or up—wondering what happens after my funeral. When I die, I really die, all the way.[49]

Herzog later distills two core arguments from this skeptical view: (1) the "oblivion" thesis, holding "that once you're dead, you have no interests[, so] . . . it's nonsensical to think that defaming the dead injures them;" and (2) the "hangover" thesis, holding that we should reject attempts to cognize postmortem interests because "our lingering regard for the dead is best regarded as a [debunked] remnant of religious beliefs about the afterlife, on which the dead are aware of what we're up to, possibly vengeful about it."[50] In the lively narrative that follows, Herzog responds to both of the skeptic's claims while seamlessly interspersing legal history and social context in support of his argument that the law should recognize postmortem defamation liability on moral rather than consequentialist or superstitious grounds.

In Chapter 2 ("Tort's Landscape"), Herzog responds to the skeptic's "seductive attack" by situating postmortem defamation within the broader context of tort law and other legal protections of postmortem interests.[51] The primary purpose of tort law, he argues, should be to provide a private law remedy for "illegitimate invasions of one person's interests by another."[52] Herzog then outlines the essential elements of the tort of defamation: the "[w]rongful publication of a false and defamatory[53] statement of fact about you."[54] He then swiftly dispenses with the skeptic's initial objection that a dead person cannot be defamed simply because decedents are incapable of suffering pain associated with emotional harm.[55] True, the dead do not suffer emotional harm, but defamation law provides a remedy for injury to one's reputation and, therefore, does not require proof of emotional pain or suffering.[56]

Herzog then expands upon the book's central normative claim—that the law should recognize liability for postmortem defamation because

49. *Id.*

50. *Id.* at 244.

51. *Id.* at 67.

52. *Id.* at 46–47 (distinguishing competing views that the primary function of tort law should be to maximize efficiency or promote general welfare).

53. Herzog defines "defamatory" as "tend[ing] to lower your reputation in at least some reputable segment of the community." *Id.* at 51.

54. *Id.* at 55.

55. *Id.* at 57–58.

56. *Id.* (noting that a defamation plaintiff may recover damages for pain and suffering but need not prove such harm as an element of the tort). Herzog also notes later that "it would be captious to deny that your reputation survives you." *Id.* at 100. Herzog also notes previously that other areas of the law recognize injury even where a victim is unaware of the harm. *Id.* at 13.

society has a moral obligation to respect the dead, and *not* because recognizing such a claim would be beneficial to individuals during life or to the decedent's survivors.[57] Rejecting the latter rationale as "badly engineered" consequentialism,[58] Herzog looks for support in other contexts in which legal rights survive after death: (1) wills law recognizes postmortem interests by enforcing preferences for the distribution of property at death;[59] (2) the rules of evidence and professional conduct generally hold that the attorney-client privilege and duty of confidentiality, respectively, survive the client's death;[60] (3) many states recognize a postmortem right of publicity and, along similar lines, federal copyright law recognizes moral rights that survive the death of an artist;[61] and (4) sunshine laws that would otherwise compel production of government records often recognize postmortem privacy rights by exempting certain records belonging to a decedent from public access.[62]

Herzog argues that the only consistent justification for the law's diverse assortment of postmortem rights is a theory of moral obligation and respect for the dead.[63] To illustrate his distinction between moral obligation and consequentialism, Herzog rejects the widely-held consequentialist view that inheritance law recognizes testamentary freedom to promote socially desirable behavior among the living.[64] Herzog counters that "wills also let people jerk around potential beneficiaries by dangling alluring rewards or nasty denials."[65] He therefore concludes that "[i]t's hard to see why the allegedly sophisticated consequentialist stance is more appealing than sticking with the

57. *Id.* at 59.
58. *Id.* at 60–61.
59. *Id.* at 59.
60. *Id.* at 61–63.
61. *Id.* at 64.
62. *Id.* at 65–66.
63. *Cf. id.* at 59 ("The straightforward interpretation of this practice [of enforcing wills] relies on what we say and think all the time: we owe it to the dead to respect their wishes. Shrugging at the will and deciding we know better what to do with the property would seem downright contemptuous.").
64. Herzog states as follows:

> First, . . . we serve the interests of the living by cultivating excessive regard for testamentary intentions, enforcing them even in cases where no living persons are served. By being overinclusive in this way, we strengthen living people's security that we will adhere to the terms of their wills. Second, . . . it's efficient . . . to enforce valid wills across the board, because the error and transaction costs of trying to figure out which individual wills aren't optimal are too high. . . . Third, . . . by letting people write enforceable wills, the law saves them from having to distribute their property while they're still alive, which could corrupt their relationships with friends, loved ones, charitable agencies, and so on.

Id. at 60.
65. *Id.*

everyday intuition that we owe it to [decedents] to enforce [their] will."[66] For Herzog, the consequentialist rationale for recognizing postmortem interests simply "has too many rickety moving parts."[67]

Chapter 3 ("Speak No Evil") examines the strong and universal cultural norm against exhibiting disrespect for the dead, an ancient custom coined by the Latin maxim, *de mortuis nil nisi bonum* ("speak no ill of the dead").[68] The religious derivation of this concept come from views about the afterlife, but Herzog expressly disclaims any reliance on theology or the supernatural to justify his theory of postmortem interests.[69] Herzog is more readily persuadable by the secular notion of *de mortuis*, which holds that it is cowardly and unjust to defame the reputation of a decedent whose death precludes self-defense.[70] Herzog notes, however, that the secular norm against speaking ill of the dead is consistent with defamation's focus on falsity. The public interest in developing an accurate account of human history often requires publishing true facts about the dead even if those facts are unflattering:[71] "[T]ruth is not defamatory . . ., whether the target of the attack is alive or dead."[72] Herzog, thus, agrees that any moral obligation to protect postmortem reputation interests could not justify imposing liability for truthful but unflattering statements.[73] Such liability would, in effect, imply a posthumous right of reputational rhinoplasty.

Chapter 4 ("Legal Dilemmas") surveys the legal history of defamation, from the outdated 17th Century English offense of *scandalum magnatum* (criminal liability for scornful speech, true or false, about "great men" and public officials, alive or dead)[74] to the

66. *Id.*
67. *Id.* at 61.
68. *Id.* at 72.
69. *See id.* at 73.
70. *Id.* at 75. Herzog offers historical context for this rationale by recounting public condemnation of the posthumous publication of Nathanial Hawthorne's private papers, which remarked unkindly about then-deceased feminist Margaret Fuller: "I think the dominant intuition motivating the claim that Julian [Hawthorne] acted wrongly in publishing this excerpt [by his father, Nathanial] is the thought that he harmed Margaret. Even though she was dead: indeed, partly *because* she was dead and couldn't defend herself." *Id.* at 102.
71. *Id.* at 77–78.
72. *Id.* at 78.
73. *Id.* at 80.
74. *See id.* at 107–08. *Scandalum magnatum* punished scornful speech because such statements inflicted harm upon the Crown or Church, a harm implicating the public interest. *Cf. id.* at 108. However, Herzog later explains that "First Amendment law has flipped *scandalum magnatum* on its head. Today it is harder, not easier, for public figures to win libel suits." *Id.* at 124. And, "as far as [Herzog] can tell, we no longer criminally prosecute defaming the dead." *Id.* at 127.

common law doctrine of *actio personalis moritur cum persona* ("a personal action dies with the person"), the latter of which forms the basis for modern tort law's limitation of defamation to statements about living plaintiffs.[75] Herzog rejects the *scandalum magnatum* as a constitutionally infirm relic and he mounts a searing critique of the theoretical derivation of *actio personalis*.[76] Historically, *actio personalis* was invoked to justify extinguishing tort claims at death based "on a conception of tort as a substitute for private violence," a theory that, if followed to its logical conclusion, would limit tort law damages to plaintiffs capable of physical retaliation.[77] Herzog colorfully attacks that absurdity: "[W]anna defend the thesis that quadriplegics ought to be disqualified from tort actions?"[78] When, then, disqualify decedents?

Herzog's answer explains why the surviving family of a defamed decedent almost never recovers for postmortem defamation under current law.[79] According to the chestnut case of *Palsgraf v. Long Island Railroad* (1928),[80] "a wrong to one party that harms but does not wrong a second isn't a tort against the second" (the *Palsgraf* principle, as coined by Professors John Goldberg and Robert Sitkoff).[81] In short, the *Palsgraf* principle precludes recovery of tort damages for wrongful conduct that breached a duty owed to someone aside from the plaintiff.[82] For example, as Goldberg and Sitkoff explain, "A plaintiff who is not himself defamed, but who suffers economic loss owing to the defamation of a relative or friend, has no claim for defamation."[83] Here, the harm to the relative or friend is derivative of the person defamed and is therefore too remote to justify a claim for liability, lest tort law open the floodgates of litigation.

75. *Id.* at 127.
76. *Id.* at 157–58.
77. *Id.* at 133.
78. *Id.*
79. *Id.* at 133–34.
80. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).
81. HERZOG, *supra* note 8, at 157. John C. P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 382 (2013).
82. *Id.* at 381.
83. *Id.* Goldberg and Sitkoff elaborate: "The rule against derivative claims also serves the important prudential function of limiting the scope of tort liability. Almost every wrongful injuring of a person has negative effects on persons other than the directly injured victim: the victim's family, his neighbors, emergency responders, taxpayers, and so on. The more remote the plaintiff is from the wrongful act, the less plausible is the plaintiff's claim to have been wronged personally. The interests of remote victims become difficult to distinguish from the interest of all members of the community, undermining the case for allowing a lawsuit for private redress of a personal mistreatment. By categorically rejecting second-, third-, and higher-order claims, the *Palsgraf* principle sets a principled boundary on tort liability." *Id.* at 382.

Herzog, however, seems to equivocate slightly when applying this limitation on derivative claims to postmortem defamation: Toward the end of the book, Herzog states, "I'm inclined to think that in the ordinary run of cases, members of the dead person's immediate family should be granted the right to bring such actions."[84] But to avoid the type of derivative injury that would violate the *Palsgraf* principle, the decedent's surviving family members would have to be barred from recovering individually on their own behalf. Legal standing in a postmortem defamation case would have to reside in the decedent's estate, which represents all of the surviving legal interests of the decedent. As a practical matter, however, the decedent's closest family members are usually both personal representatives and beneficiaries of the estate, so Herzog's suggestion probably identifies the right plaintiff most of the time.

In Chapter 5 ("Corpse Desecration"), Herzog examines cultural norms and legal prohibitions against corpse desecration. In this fascinating detour, Herzog observes that, throughout history, strong cultural and moral norms have consistently condemned the mistreatment of dead bodies.[85] Herzog explains that corpse desecration devalues the intrinsic worth of human dignity in ways that could erode society's respect for human life and bodily integrity.[86] Herzog accepts this consequentialist rationale for criminal corpse desecration laws because, unlike tort law, a primary purpose of criminal law is to deter wrongful conduct.[87] By contrast, Herzog believes that civil liability for corpse desecration reflects tort law's concern for the decedent rather than the general deterrence of misconduct:[88] "The next of kin's tort claim for corpse desecration . . . seems to hang on the thought that they've become aware of a grievous injury to someone else: not, again, to the corpse; rather to the person whose corpse it is."[89] Herzog therefore surmises that civil liability for corpse desecration, in fact, implicitly protects the decedent's right to be free from harmful contact after death, even though as a practical matter, the damages for such an injury are recovered by the

84. HERZOG, *supra* note 8, at 262. But to avoid the type of derivative injury that violates the *Palsgraf* principle, standing to assert postmortem defamation liability would have to reside in the decedent's estate rather than the surviving members of the decedent's immediate family. As a practical matter, however, personal representatives are usually close family members of the decedent.

85. *Id.* at 167–74 (social condemnation); 175 (criminal offense); 195–209 (civil liability).

86. *Cf. id.* at 175–76.

87. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5(a)(4) (3d. ed. 2018).

88. HERZOG, *supra* note 8, at 209.

89. *Id.* at 213.

decedent's survivors.[90] This, in turn, supports Herzog's broader theory of postmortem interests based on moral obligation to the dead.

In Chapter 6 ("This Will Always Be There"), Herzog ties everything together in service of his ultimate conclusion:

> Your reputation after death is a final settling of accounts, unlike your reputation while alive, ordinarily in flux as you continue to act. When that account is damaged by defamation, it's all too likely to stay that way. "This will always be there." Ordinarily, that's the most pressing injury to reputation a dead person can suffer. It isn't illusory. Offering a legal remedy for it isn't a mask behind which we find the face of incentives to the living or good consequences or the public interest or anything like that. Like any other cause of action in tort, it provides a remedy for one party wronged by another. Sometimes what you see is what you get.[91]

Herzog advocates tort reform, but instead of proposing a model statute authorizing a claim for postmortem defamation, he begins the task of identifying implementation considerations, such as who should have standing to bring a claim, how would the plaintiff establish the required proofs given the decedent's unavailability to testify, and how long after death should tort law protect a decedent's reputational interests.[92]

III. POSTMORTEM DEFAMATION WITHIN THE BROADER CONTEXT OF TORT LAW THEORY

Perhaps the most distinctive feature of Herzog's theory of postmortem defamation liability is his rejection of the conventional utilitarian rationale—namely, the notion that tort law imposes private law sanctions for the purpose of deterring harmful conduct and efficiently allocating compensatory obligations. Herzog believes that any organizing

90. *Id.* at 217–18 ("I do think it's hard to unpack the injury to the survivors without invoking the claim that corpse desecration is an injury to their dead loved one.").

91. *Id.* at 264–65.

92. Herzog asks, but does not fully answer, the following questions:

> [H]ow long after death should defamation be actionable? (And that's both how long after death is the actual defamation, and how long after that does the estate have to file an action?) Should tort law notice the possibility that celebrities' reputational interests last longer than those of the rest of us? . . . What sort of relief should be available? What evidentiary rules make sense when the plaintiff can't be deposed and can't appear on the stand?

Id. at 265.

principle of tort law must, first and foremost, provide a remedy for private wrongs,[93] and not, as other leading scholars have argued, maximize social welfare.[94] Herzog departs from the conventional wisdom on this point, but he's in good company.[95] To settle the seemingly age-old search unifying theory of tort law, a recent burst of notable scholarship now appears to favor individual fairness over social welfare as the organizing principle of tort law.[96]

In his recent monograph on "Private Wrongs," for example, Professor Arthur Ripstein develops a normative theory of defamation liability as qualitatively distinct from other torts because of the externalized nature of the harm, and because, unlike the more conventional tort of negligence, "the defendant's conduct need not have been careless or otherwise defective, and the plaintiff need not have suffered a loss through the defendant's action."[97] Ripstein's general theory of tort law holds that all individuals have a private right to exclusive use of their own means (including the use of one's own body and property), and tort law protects that right by imposing liability whenever someone else uses

93. *Id.* at 46.

94. *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1097 (2001); *see also* Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517, 1532–33 (2016) (describing Justice Oliver Wendell Holmes as the "grandfather of compensation-deterrence theory" that predominated tort theory for much of the 20th Century, but criticizing the rationale because the "functions of compensation and deterrence are not mutually dependent and can be decoupled.").

95. *See, e.g.*, Goldberg & Sitkoff, *supra* note 81, 339–40 (criticizing the "'Realist' conception of tort law," which views "tort law [as] a general grant of power to courts to shift losses from victims to antisocial actors when doing so might serve the goals of deterrence or compensation," because that conception "strips away . . . the core tenet that the plaintiff must establish that the defendant's conduct infringed a right personal to the plaintiff.").

96. *See, e.g.*, ARTHUR RIPSTEIN, PRIVATE WRONGS 8, 144–45 (2016) ("A wrong is an action that is inconsistent with another person's right to body, property, or reputation, and a remedy restores the consistency to the extent that it is possible to do so." "If you injure another by doing something that carries a greater than background risk of injury to the person or property of others, you are liable because you have wronged that person by interfering with what he or she already has."); Geistfeld, *supra* note 94, at 1521 (arguing that the normative organizing principle of tort law is based on reciprocity norms of compensation); John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 976, 978 (2010) ("[P]art of what gives tort law value is that it is a system of rules contained in common law that articulates legally enforceable norms about how one is obligated to treat others. . . . We have argued that it is a huge mistake to depict tort law as law for allocating accidentally caused losses."); Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law Private Wrongs*, 130 HARV. L. REV. 942, 968 (2017) (criticizing Ripstein for oversimplifying the organizing principle of tort law, but agreeing that economic efficiency is not "the key to understanding the institution" of tort law).

97. RIPSTEIN, *supra* note 96, at 185–232, 189.

those means without permission.[98] However, Ripstein concedes that this general theory fits awkwardly when applied to defamation because, while one may have a right to protect herself from wrongful reputational injury, the law cannot directly police the thoughts of others whose collective opinion constitutes a reputation. Thus, Ripstein defines the wrong of defamation in relation to the defamed victim's affirmative right: You have a right to protect the integrity of "your own good name," so "nobody is entitled to besmirch your name, [and] no other person can put you under an obligation to clear your name."[99] Yet this right exists in an endlessly precarious state because, unlike one's body or property, over which a person may exercise physical control or at least some degree of deliberate precaution, one's reputation exists only in the minds of others: Thus, "you do not need to do anything to acquire your own good name, but you can lose it through the actions of others."[100] Ripstein views the remedial function of tort law as a way to "make it as if a wrong had never happened,"[101] but the "ideal remedy for defamation" (namely, "something that [would make] it as if the defamatory statement had never been published") will almost always prove elusive because one cannot un-ring the bell after publication of a defamatory statement.[102] At best, a defamation plaintiff must settle for imperfect substitutes, such as a public record of exoneration and monetary damages.[103]

Ripstein argues that, because defamation law does not impose liability solely to prevent or compensate for loss (recall, proof of economic harm is not an element of defamation), the "right against being wrongly defamed" must be understood "in terms of the legal structure that protects it."[104] In this regard, the right to sue for defamation is not a quantifiable and transferrable property interest, but rather, more like a right to summon a squad of reputation paramedics[105] to administer life support (in the form of a legal process) to revive the plaintiff's good

98. *Id*. at 9.
99. *Id*. at 192.
100. *Id*. at 198.
101. *Id*. at 233. *But see* Hershovitz, *supra* note 96, at 963 (describing this idea as "crazy" because damages are often insufficient to erase the tort victim's injury).
102. RIPSTEIN, *supra* note 96, at 186.
103. *Id*.
104. *Id*. at 196.
105. This is my own metaphor, loose though it may be.

name.[106] Since the defamer's wrongful conduct precipitated the victim's need to summon the reputation paramedics, the defamer, once hailed into court, should be placed in the position of either justifying his conduct or bearing responsibility. So, rather than requiring a defamed plaintiff to clear her name beyond establishing the fact of the defamatory statement, the law holds the alleged defamer accountable for the wrong by assigning the defendant the burden of proving that the defamatory statement was either factually true or legally privileged from liability.[107] The availability of nominal damages in the absence of actual economic harm[108] confirms that one of the core functions of defamation law is to provide a public forum for the defamed plaintiff to correct the record, a remedy that, in turn, helps return the plaintiff closer to the status quo ex ante: almost, although not exactly, "as if the defamatory statement had never been published."[109]

Professor Mark Geistfeld, another recent commentator, argues that the normative source of tort law can be traced to ancient reciprocity norms of compensation that have long remained hidden in plain sight.[110]

106. RIPSTEIN, *supra* note 96, at 194. Ripstein rejects the notion that reputational rights constitute legal interests akin to transferable assets under property law because such treatment would hopelessly overextend the scope of defamation liability to the point of practical absurdity. Third parties, such as the defamed person's family or business partners, could claim that they were also injured by the reputational harm to the defamation plaintiff, and if such third-party claims were cognizable, we would all live in fear of ubiquitous defamation liability, where ordinary well-meaning people would become hyper-vigilant about their everyday statements and undertake unreasonable precautions against misspeaking.

But in this regard, Ripstein's characterization of reputational interests as qualitatively distinct from property interests may undercut Herzog's theory of postmortem defamation. As I discuss in Part III, inheritance law grants owners broad powers of testation to control the disposition of property at and after death, so a doctrinal account of reputational interests as distinct from property interests might undermine a claim that postmortem defamation claims fall within the scope of dead hand control. The rejection of reputational interests as property or quasi-property may also implicate the amorphous and often condemned doctrine of abatement, which holds that claims personal to the plaintiff are extinguished by the plaintiff's death. At least one scholar has conceptualized privacy rights as quasi-property because, like property rights, privacy rights constitute "a relational entitlement to exclude." Lauren Henry Scholz, *Privacy as Quasi-Property*, 101 IOWA L. REV. 1113, 1115 (2016). This conceptualization might also apply to defamation rights to the extent that a plaintiff enjoys the right to exclude third parties from defaming the plaintiff's good name.

107. RIPSTEIN, *supra* note 96, at 201.

108. *See, e.g.*, Funk v. Lincoln-Lancaster Cty. Crime Stoppers, Inc., 885 N.W.2d 1, 13 (Neb. 2016) ("In an action for defamation, the damages which may be recovered are (1) general damages for harm to reputation; (2) special damages; (3) damages for mental suffering, and (4) if none of these are proved, nominal damages.").

109. RIPSTEIN, *supra* note 96, at 186.

110. Geistfeld, *supra* note 94, at 1517.

According to conventional prehistorical accounts, the earliest origins of law emerged from a violent state of nature in which individuals resorted to self-help remedies of physical retaliation to resolve disputes.[111] The so-called "law of the talion" ritualized the barbaric exaction of revenge until civilization evolved to replace private violence with criminal laws to punish the most guilt-bearing wrongful acts and a system of monetary compensation for less blameworthy wrongs such as accidental harm.[112] But, as Geistfeld explains, those conventional accounts were not entirely accurate.[113] More recently unearthed records reveal that, rather than *evolving* from retaliation to compensation, rituals of revenge and compensation *co-existed* as substitutable alternatives for restoring the moral balance between an injured party and the injurer.[114] In cases of accidental injury, the injured party often opted for compensation rather than revenge because the wrong committed by the injurer was not sufficiently hostile to warrant a violent response in kind.[115]

Geistfeld argues that the co-existence of retaliation and compensation rituals, in turn, inculcated social norms of reciprocity that have long inhered in basic notions of justice, norms that likely derive from a human instinct to restore moral balance after experiencing injury resulting from someone else's harmful conduct.[116] Geistfeld argues further that such reciprocity norms, now long since divorced from their primitive and violent origins, supply a principled rationale for modern tort law (1) to impose negligence liability when a person fails to comply with the universally understood reciprocal obligation to exercise reasonable care, and (2) to impose strict liability when a person engages in unreasonably dangerous activity that creates nonreciprocal risks of harm to third parties who, themselves, confined their behavior to "[o]rdinary activities conducted in a reasonably safe manner."[117] Geistfeld concludes that, "[b]y enforcing the compensatory right, the tort system engages in a normative practice of reciprocity that can be justified by the liberal egalitarian principle that each person has an equal right to autonomy or self-determination, making each responsible for the costs of his or her autonomous choices."[118] That is, tort liability promotes reciprocity by restoring the moral balance disrupted by an actor's

111. *Id.* at 1524–25.
112. *Id.*
113. *Id.* at 1521–22.
114. *Id.* at 1541.
115. *Id.* at 1544–45.
116. *Id.* at 1553 (citing Ripstein for the proposition that "[t]he reciprocity conception views responsibility as a relation between persons with respect to expected consequences").
117. *Id.* at 1560.
118. *Id.* at 1594.

harmful voluntary conduct for which the actor otherwise fails to bear responsibility.

The contributions of Ripstein and Geistfeld tend to support Herzog's claims. Ripstein's observation about the accountability function of defamation law resonates particularly with Herzog's theory of postmortem defamation by validating the defamation victim's interest in a legal process to correct the record in the absence of provable damages or emotional harm.[119] If a defamer slanders or libels a decedent within a reasonable period of time after death, why should the defamer be absolved of accountability for inflicting reputational harm that will likely persist both *despite* and *because* of the decedent's death? As Herzog explains, if anything, the defamation victim's death presents a more compelling case for legal accountability because reputations tend to linger after death and the decedent's death precludes her from correcting the record herself.[120]

Likewise, Herzog's theory of moral obligation to the dead resonates in Geistfeld's account of tort law as a system for enforcing norms of reciprocity. Applying Geistfeld's theory to postmortem defamation, both the defamer and the defamed decedent have reciprocal rights (to a reputation unspoiled by someone else's false statements) and reciprocal duties (to refrain from making false statements that harm someone else's reputation).[121] By publishing a false statement about a decedent, a defamer disrupts the moral balance by imposing nonreciprocal risks upon the decedent, whose death precludes her from engaging in any offsetting risk-generating conduct against the defamer.[122] According to Geistfeld, "[n]onreciprocal risks justify a rule of strict liability" because the parties' competing risks do not offset each other, thereby causing an imbalance that, in turn, upsets the normative baseline of compensatory reciprocity.[123] The availability of postmortem defamation liability would therefore restore symmetry by compensating for the nonreciprocal risk of posthumous reputational harm and preventing the defamer from enjoying a windfall of liability immunity.

119. *See* RIPSTEIN, *supra* note 96, at 201.
120. HERZOG, *supra* note 8, at 75.
121. *See* Geistfeld, *supra* note 94, at 1572.
122. *See id.*
123. *Id.* at 1574.

IV. INHERITANCE LAW AND THE DESCENDIBILITY OF POSTMORTEM CLAIMS

Inheritance law, the legal field most closely tied to the regulation of postmortem interests, exists primarily if not almost exclusively to facilitate the disposition of property at and after death.[124] Inheritance law performs this function largely in accordance with the freedom of disposition, which holds that the "owner of property during life has the power to control its disposition at death."[125] Unlike Herzog's theory of moral obligation to the dead, however, most inheritance scholars subscribe to a consequentialist rationale of dead hand control: That is, inheritance law recognizes a broad freedom of disposition because doing so maximizes the social welfare gains from private property and creates economic incentives to engage in socially desirable behavior, such as

124. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §10.1 cmt. c (AM. LAW INST. 2003). Under a strand of older common law doctrine still recognized in some jurisdictions, postmortem property interests acquired by a decedent's estate pass by intestacy rather than by will based on the conclusory rationale that the power of testation does not reach the disposition of property not owned at death. *See, e.g.*, *In re* Van Winkle's Will, 86 N.Y.S.2d 597, 600 (Sur. Ct. 1949) ("[U]nder no circumstances, in the absence of a valid power, can any amount of testamentary intent produce the effect of subjecting property not owned by a testator at the date of his death to any disposition whatever."); *In re* Estate of Braman, 258 A.2d 492, 494 (Pa. 1969) ("[A] person [cannot] make a post-mortem disposition of property which at the time of his death he does not own or in which he has no right, legal or equitable."). However, the UNIF. PROBATE CODE § 2-602 (1990), which expressly rejects that common law view, states that a "will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death." UNIF. PROBATE CODE § 2-602 (1990).

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

accumulation of savings and care for the elderly.[126] Thus, while postmortem defamation rights are consistent with inheritance law's general recognition of postmortem legal interests, Herzog's underlying theory of moral obligation differs starkly from the prevailing view of

126. *See, e.g.*, Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 333 ("Curtailment of testamentary freedom has been unpopular largely because of a belief that beneficial economic and social effects result from a policy of allowing nearly unrestricted transfers of wealth at death. The accumulation of property and control of its transfer at death is thought to breed ingenuity, initiative, creativity, and self-reliance."); Goldberg & Sitkoff, *supra* note 81, at 341 (noting that "the economic reasons for allowing inheritance are viewed in terms of proper rewards and socially valuable incentives to the *donor*" (quoting Edward C. Halbach, Jr., *Introduction* to Chapters 1–4, in DEATH, TAXES AND FAMILY PROPERTY 3, 6 (Edward C. Halbach, Jr. ed., 1977))); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1247 (1968) (arguing that testamentary freedom is necessary to preserve the system of private property); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–8 (1992) (summarizing traditional rationales for testamentary freedom); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 171 (2008) ("[S]ociety should tolerate freedom of testation because it allows parents to reward children for lifetime services."). *But see* Lawrence W. Dixon, WILLS, DEATH AND TAXES 3–11 (Rowman & Littlefield rev. ed. 1977) (1968) (describing testamentary freedom as a sacred privilege). Other scholars reject the principle of dead hand control altogether. *See, e.g.*, Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73 (1990) ("My proposal views inheritance as something we should tolerate only when necessary—not something we should always protect. My major premise is that all property owned at death, after payment of debts and administration expenses, should be sold and the proceeds paid to the United States government [subject to six exceptions].").

inheritance law scholars as to *why* the law recognizes postmortem interests.[127]

Perhaps these contrasting rationales can be explained by the different legal functions served by tort and inheritance law: Tort law (in Herzog's view) is primarily concerned with righting private wrongs while inheritance law is primarily concerned with implementing donative intent. Likewise, whereas tort law generally remedies private wrongs by imposing liability, inheritance law generally implements donative intent by enforcing gratuitous transfers of property.

Consequentialism therefore works well as an inheritance law rationale for regulating property interests because most decisions concerning property are forward-looking and deliberate,[128] such that individuals dealing in property usually have an opportunity to ascertain the governing law and respond rationally to its economic incentives.[129] Stated another way, individuals are highly responsive to incentives created by property and inheritance laws because the forward-looking nature of property-related conduct heightens the salience of legal rules. By contrast, the legal apparatus of tort law is generally backward-looking

127. At first glance, Herzog's theory of postmortem defamation might seem analogous to another prominent intersection of tort and inheritance law—namely, tortious interference with an inheritance expectancy—but upon closer consideration, the claims are fundamentally different. The tort of wrongful interference allows a plaintiff to sue a beneficiary on the theory that the plaintiff would have received an inheritance but for the beneficiary's wrongful interference with the decedent's exercise of testamentary freedom. *See* RESTATEMENT (SECOND) OF TORTS § 774B (AM. LAW INST. 1979) ("One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."). Professors John Goldberg and Robert Sitkoff sharply criticize the tort on multiple grounds. *See generally* Goldberg & Sitkoff, *supra* note 81 (arguing the tort, *inter alia*, violates the *Palsgraf* principle, promotes forum shopping by giving plaintiffs a choice of remedy between probate and tort litigation, and facilitates litigation of posthumous interests in a tort law context that is procedurally ill-equipped to deal with the decedent's unavailability as a witness). Postmortem defamation would certainly require the development of procedural rules to address the unique nature of posthumous litigation. But unlike the doctrine of tortious interference, which allows a disappointed third party to assert a derivative claim against a beneficiary for wrongful conduct committed against the decedent, postmortem defamation would not violate the *Palsgraf* principle because the claim would belong to the decedent's estate whose personal representative would serve as plaintiff. Likewise, unlike tortious interference, which allows a plaintiff to sue in tort for conduct that would otherwise be litigated under probate law, postmortem defamation does not arise under inheritance law, so probate law would lack any claim of jurisprudential exclusivity.

128. It is rare for individuals to initiate a transaction in or transfer of property by accident.

129. However, when individuals are mistaken about or ignorant of the law, they often make decisions contrary to their own self-interest. *See* Reid K. Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 132 (2015).

because parties typically invoke it only after a harmful event has already occurred. The existence of tort law may tend to deter harmful behavior at the margin, but the economic incentives of tort law are less salient than those of property law because most people do not deliberately contemplate tort liability rules when going about their everyday business.[130] This is particularly true of tort law incentives to avoid causing accidental harm, which, by definition, involves conduct that is not deliberately harmful.

And yet, while most inheritance law doctrines may be soundly justified on consequentialist grounds, there are inevitably occasional exceptions. As Professors Adam Hirsch and William Wang explain, normative justifications for testamentary freedom often require a qualitative and nuanced understanding of the context in which the law allows the proverbial dead hand to assert control.[131] So, although Herzog's theory of moral obligation departs from most normative consequentialist theories of inheritance law, it may offer useful insight in contexts where consequentialist justifications for enforcing postmortem interests break down.

Consider, for example, perpetual naming rights imposed by a donor as a condition precedent for making a charitable gift. The law of charitable trusts strongly favors dead hand control by enforcing donor-imposed restrictions on the use of a charitable gift, including perpetual naming rights exempt from the Rule Against Perpetuities that would otherwise limit the duration of enforceability.[132] But the consequentialist rationale for enforcing perpetual charitable naming rights—a policy that seeks to induce charitable giving—breaks down when a donee charity can attract a new charitable gift from a living donor by renaming an asset

130. *Cf.* Anderson v. BNY Mellon, N.A., 974 N.E.2d 21, 31 (Mass. 2012) ("'There is usually little danger of defeating reasonable expectations' when new tort rules are applied retroactively because changes in tort law 'would not precipitate changes in behavior even if they were widely known.'" (citations omitted)).

131. Hirsch & Wang, *supra* note 126, at 4.

132. *See* John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 380 (2005). The federal tax code further induces charitable naming gifts by treating them as tax deductible notwithstanding the real market value of the naming right enjoyed by the donor in exchange for the charitable gift. *See* John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 663 (2001); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430 (1998).

still governed by a prior deceased donor's naming condition.[133] Here, while the right to impose perpetual naming rights might generally induce charitable giving in the first instance, enforcement of such rights in perpetuity can discourage charitable giving in the long run by deterring future donors willing to accept lifetime rather than perpetual naming rights in exchange for a significant new contribution. The enforceability of perpetual charitable naming rights (to the extent perpetual rights should be enforced at all) might, therefore, be justified more sensibly on grounds aside from the consequentialist goal of promoting charitable gifts. Herzog's theory of moral obligation to the dead supplies one possible rationale and does so in a particularly apt context because, like postmortem defamation, posthumous (even if not perpetual) charitable naming rights implicate the donor's interest in controlling reputation after death.

Herzog's critique of *actio personalis* also contributes to inheritance law theory in the vexing context of abatement, an unprincipled doctrine regulating the postmortem descendibility of legal claims for "personal wrongs."[134] Professor David Horton, a leading commentator on the topic, explains that the ancient doctrine of abatement extinguished at death all outstanding and pending claims that fell into the hard-to-define category of "personal wrongs:" "The idea was that lawsuits for physical injuries were intimately tied to the plaintiff and thus should not enrich her loved ones."[135] Horton rightly criticizes the abatement doctrine for lacking "an acknowledged animating principle," and for drawing a purportedly bright line rule prohibiting the descendibility of personal claims without clearly enumerating which claims are "personal" or articulating a principle for distinguishing such claims from those that may descend at death.[136]

Horton explicates the abatement doctrine's incoherence with a keenly astute observation: Courts generally hold that defamation claims abate because of the intimate personal nature of reputational injury, but at least nineteen jurisdictions now recognize a postmortem right of publicity allowing a decedent's estate to exploit the commercial use of the

133. *See* Eason, *supra* note 132, at 449–50 (discussing the dispute over the re-naming of Avery Fisher Hall at Lincoln Center in New York). In 2015, Avery Fisher Hall was renamed David Geffen Hall following Geffen's $100 million donation and the payment of $15 million to the surviving family of Avery Fisher. Robin Pogrebin, *David Geffen Captures Naming Rights to Avery Fisher Hall with Donation*, N.Y. TIMES (Mar. 4, 2015), https://www.nytimes.com/2015/03/05/arts/david-geffen-captures-naming-rights-to-avery-fisher-hall-with-donation.html.

134. *See generally* David Horton, *Indescendibility*, 102 CAL. L. REV. 543, 581 (2014).

135. *Id.* at 547.

136. *Id.* at 558 ("Judges repeated the mantra that claims for 'personal wrongs' died with the plaintiff. However, they did not explain why causes of action for physical injury were more 'personal' than other claims, or even why 'personal' claims were indescendible.").

decedent's name or likeness.[137] So, in many jurisdictions, *injury* to the reputation of a dead person is not cognizable under defamation law, but commercial *exploitation* of the same decedent's reputation infringes the postmortem right of publicity. Why should the law extinguish postmortem reputational interests in one context (defamation) but protect them in the other (publicity)?

One explanation is that the infringement of publicity rights inflicts a pecuniary loss that survives the death of the personality whereas reputational injury inflicts emotional harm that is too "subjective and ephemeral" to protect posthumously.[138] Horton finds this explanation unpersuasive because financial loss and emotional harm are often inextricably intertwined, and because extinguishing supposedly "personal" claims at death undermines the deterrence power of tort law.[139] Thus, Horton argues that the abatement doctrine should be abolished for defamation claims accruing during life but, aligned with the consequentialist approach, he remains skeptical of wholly postmortem defamation claims because decedents do not suffer emotional harm and he questions the "social value of remedying harm to decedents."[140]

Having liberated himself from the constraints of consequentialism, Herzog goes further than Horton in arguing that we should abolish abatement for wholly postmortem defamation claims. Like Horton, Herzog also remarks on the inconsistency between the legal recognition of postmortem publicity rights and the abatement of postmortem defamation claims.[141] I am prepared to agree that we should resolve this inconsistency by aligning the legal treatment of postmortem reputational injury (defamation) with that of postmortem reputational appropriation (publicity). But before we invoke the legal recognition of postmortem publicity rights in support of postmortem defamation, we must consider *why* the law recognizes publicity rights in the first instance.

Toward the end of the 19th century, inter vivos publicity rights emerged from a branch of tort law privacy doctrine that, in its simplest

137. *Id.* at 560–63.

138. *Id.* at 583 ("Compared to the concrete, demonstrable injury of property loss, 'compensating' the dead for the shame of a ruined reputation or even the private agony of physical wounds seems hazy and metaphysical.").

139. *Id.* at 583–84.

140. *Id.* at 594 ("[A] deceased defamation 'victim' suffers a more attenuated kind of damage than a living person who has been slandered or libeled and then dies before the verdict.").

Horton also notes the administrability problems associated with litigating postmortem defamation long after the victim's death and the issue of default rules (whether individuals who do not want their estates to pursue postmortem defamation claims should be required to opt-out during life). *Id.* at 595–96.

141. HERZOG, *supra* note 8, at 64.

form, sought to protect against the emotional harm associated with unwanted publicity, thereby giving rise to the then-novel right "to be let alone."[142] However, as public figures began to successfully invoke publicity rights to recover damages for the unauthorized appropriation of their name and likeness, it became clear that publicity rights did not truly regulate privacy, but rather, a property-like interest in one's own identity.[143] The proprietarian justification for publicity rights ultimately prevailed,[144] as did the view that publicity rights serve the consequentialist purpose of creating economic incentives to pursue socially useful activities that enhance the market value of one's name and likeness.[145]

To some, the normative source of modern publicity rights remains contested but, at a minimum, we can discern that publicity rights function more like property rights than a codification of moral obligation.[146] By treating publicity rights as a species of property, the law recognizes a principled rationale for rendering such rights not only descendible at death but transferable by will:[147] All property owned by the decedent, whether tangible or intangible, whether acquired by the decedent during life or after death, is owned by the decedent's estate

142. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

143. *See* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 554 (1960) (arguing that the doctrine "became confused" when public figures began resorting to privacy rights to redress appropriation of one's persona for commercial purposes); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 406 (1960) (characterizing "appropriation" as "not so much a mental as a proprietary [interest], in the exclusive use of the plaintiff's name and likeness as an aspect of his identity"); Reid K. Weisbord, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2810 (2016).

144. *See* CAL. CIV. CODE § 3344.1(b) (West 2012) ("The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument . . . ."); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. L. REV. 891, 897 (2017); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1210 (2004) ("As critics complain, the 'right of publicity' has tended to lose all of its moorings in the Warren and Brandeis idea of privacy, becoming essentially a vehicle for protecting the enterprises of celebrities like Bette Midler and Vanna White.").

145. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) ("Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."); Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) ("Protecting one's name or likeness from misappropriation is socially beneficial because it encourages people to develop special skills, which then can be used for commercial advantage.").

146. Johnson, *supra* note 144, at 897.

147. CAL. CIV. CODE § 3344.1(b) (West 2018).

because the estate is the legal entity that represents all of the decedent's postmortem interests.[148] American inheritance law, in turn, operates as an extension of inter vivos property law by allowing decedents to control the disposition of their estate at death for many of the same consequentialist reasons that we recognize property rights during life.[149]

Even though Horton and Herzog ultimately disagree on whether to recognize wholly postmortem defamation rights, I find myself in partial agreement with both scholars. Strongly influenced by the consequentialist orientation of inheritance law, I agree with Horton that the social value of protecting decedents from harm is relevant in determining whether the law should recognize postmortem claims. And yet, I am also persuaded by Herzog's analogy to postmortem publicity rights because postmortem defamation and postmortem publicity rights are two sides of the same coin—both claims, if recognized, would allow a decedent's personal representative to regulate the use (publicity) or abuse (defamation) of the decedent's reputation after death. So I arrive at Herzog's ultimate conclusion favoring recognition of postmortem defamation rights but for the consequentialist rationale articulated by Horton.

Aligning postmortem defamation with postmortem publicity rights, then, helps to answer some of Herzog's unresolved questions. For instance, Herzog asks but does not answer, "[H]ow long after death should defamation be actionable?"[150] Once brought in sync with postmortem publicity rights, the answer is simple: In California, for example, an action for postmortem publicity must be brought within 70 years of the personality's death.[151] A consistent and symmetrical regulation of postmortem reputational interests would require an equivalent statutory period for postmortem defamation claims. Such a limitation would avoid the absurd possibility of a modern day plaintiff asserting a postmortem defamation claim for the distantly departed, such as Julius Caesar, William Shakespeare, or Abraham Lincoln.

148. *See* UNIF. PROBATE CODE § 2-602 (amended 2010) (1990).

149. *See* Horton, *supra* note 134, at 576. *Cf.* Hodel v. Irving, 481 U.S. 704, 705 (1987) ("[T]he right to pass on property to one's heirs . . . has been part of the Anglo-American legal system since feudal times"). To be sure, property law itself is also based on moral intuitions. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) ("Property can function as property only if the vast preponderance of persons recognize that property is a moral right, and this requirement has important consequences for the study of property.").

150. *See* HERZOG, *supra* note 8, at 265.

151. CAL. CIV. CODE § 3344.1(g) (West 2018).

V. THE MORALITY OF POSTMORTEM DEFAMATION AND THE NEW NORMALIZATION OF LYING

In *Defaming the Dead*, Herzog argues that the living owe a moral obligation to protect the reputational interests of decedents from defamatory statements published after death.[152] Since a rigorous philosophical inquiry of moral obligation theory lies beyond the scope of this law-oriented review, I defer such questions of philosophy to scholars with specialized expertise in the development and evolution of moral codes.[153] And yet, as a legal scholar focusing primarily on inheritance law, I am quite inclined to agree with Herzog on whether to recognize a postmortem interest—I very much *want* to live in a civilized society that manifests respect for the dead by providing a reasonably time-limited tort law remedy for postmortem reputational injury. But alas, as I sink deeper into the soft cushion of my philosopher's armchair, I find great difficulty justifying postmortem defamation law reform on grounds of moral obligation.

The first challenge concerns the seemingly impossible nature of the underlying empirical question: *Is it actually immoral to defame a dead person?* Herzog's narrative offers much in the way of answers, but how could we ever ascertain a definitively conclusive accounting for morality when society so rarely reaches consensus on matters as contestable as the difference between right and wrong? Indeed, conduct prohibited under some moral codes is considered essential under others. Consider idolatry, to name but one example—prohibited by Judeo-Christian religions but an essential part of Buddhist and Hinduist traditions. To me, morality is as rickety as consequentialism for the purpose of identifying a normative rationale.

The second difficulty arises from new evidence, in light of current events subsequent to the publication of Herzog's book, shedding light on society's views about the morality of postmortem defamation. Since lying now abruptly seems to have become more widely acceptable today than ever before in recent memory, it strikes me as implausible that our society would regard one small subset of lies—defamatory falsehoods

152. HERZOG, *supra* note 8, at 245, 263–65.

153. One strand of moral philosophy, however, warrants at least brief mention. The question of postmortem defamation implicates inversely the problem of intergenerational justice, which addresses whether the current generation owes moral obligations to future generations. Postmortem defamation, by contrast, presents the inverse consideration of whether the current generation owes moral obligations to prior generations. *See generally Intergenerational Justice*, STANFORD ENCYCLOPEDIA OF PHILADELPHIA (last revised Aug. 10, 2015), https://plato.stanford.edu/entries/justice-intergenerational/.

about a decedent—as sufficiently morally condemnable to justify the tort law reform recommended by Herzog.

According to Professor Paul Robinson's well-known theory of criminal law and morality, the maintenance of civil order depends largely on voluntary compliance with the law, which in turn, requires that the law achieves moral credibility by aligning itself with society's "shared intuitions of justice."[154] In other words, people are unlikely to willingly abide by the law if the law itself departs from society's shared understanding of what is just.

Applying Robinson's concept to Herzog's question, would a civil cause of action for postmortem defamation be sufficiently aligned with society's shared intuitions of justice to pass the test of moral credibility, susceptible to confirmation by a high rate of voluntary compliance? Having observed a year of unprecedented political tumult, a year in which the American body politic appears to have significantly eroded the intrinsic value of truth-telling as well as reverence for the dead, I fear that a new tort law doctrine imposing postmortem defamation liability would likely fail the test of moral credibility in the post-Trumpian era.

Since January 2017, the recital of false statements by high ranking U.S. government officials has become so frequent that the overall volume of published falsehood is as difficult to quantify as its societal impact is qualitatively difficult to assess.[155] Let us, therefore, focus on a particular type of defamatory statement that has become seemingly *de rigueur* in the modern political discourse: the false accusation that a truth-teller has, himself or herself, told a lie. In this type of defamatory statement, each party accuses the other of lying, but only one party—the defamation plaintiff accused of lying—is actually telling the truth. By way of example, suppose that Person A correctly accuses Person B of plagiarism

154. *See* Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice As Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1107 (2011) ("[T]he crime-control power of the criminal law depends in some significant part upon how well it tracks the community's shared intuitions of justice."); Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1836 (2007) ("[T]he system's ability to stigmatize [violations of law] depends upon it having moral credibility with the community; for a violation to trigger stigmatization, the law must have earned a reputation for accurately assessing what violations do and do not deserve moral condemnation."). *But see* Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 80 (2013) (explaining a criminal code that does not radically depart from shared intuitions of blameworthiness "is unlikely to cause major dissatisfaction with the justice system, or more noncompliance with the law.").

155. *See* Glenn Kessler, Meg Kelly, & Nicole Lewis, *President Trump Has Made 1,628 False or Misleading Claims over 298 Days*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/11/14/president-trump-has-made-1628-false-or-misleading-claims-over-298-days/?utm_term=.a481d9141386.

and, in response, Person B falsely accuses Person A of lying about the plagiarism charge. Here, Person A has told the truth and Person B has lied in a way that could harm Person A's reputation. For shorthand, I will refer to this type of falsity as the "Hypocrisy Lie" because the alleged defamer (Person B, in the example above) claims to uphold a moral standard for truth-telling to which his own behavior does not conform.[156] The Hypocrisy Lie is defamatory because it injures the defamed person's reputation for trustworthiness in her community.[157]

Since assuming public office, President Trump and members of his Administration have routinized the Hypocrisy Lie as political refrain in response to the reporting of unfavorable facts.[158] Most of the Administration's Hypocrisy Lies have fallen by the wayside in the daily ebb and flow of a frenetic news cycle, but one significant exception is now winding its way through the New York state courts in a closely watched defamation case. In *Zervos v. Trump*, plaintiff Summer Zervos (represented by Gloria Allred) alleges that Trump sexually assaulted her, and that after she publicized her allegation of sexual assault during the presidential campaign, Trump then falsely accused her lying.[159] The exact language of the complaint, rendered particularly striking by the

156. Professor Stuart Green describes this type of lie as a "false[] den[ial]" and suggests that, "in some cases, we regard the false denial of accusations as morally 'excused.'" Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 168 (2001).

157. In *Davis v. Boeheim*, for example, two defamation plaintiffs publicly revealed that they were sexually molested by the former head basketball coach at Syracuse University and, in response, the then-current basketball coach accused the plaintiffs of lying about their molestation for the purpose of monetary gain. 22 N.E.3d 999, 1007 (N.Y. 2014). Lower courts dismissed the complaint on grounds that the coach's statements were nonactionable opinion, but the New York Court of Appeals reversed because the allegedly defamatory statements contained factual falsities. *Id.* at 1006–07.

158. The most common example of this rhetorical technique has been the use of the term "fake news" to falsely accuse the media of fabricating factual but unflattering news reports. A study by the non-partisan organization PolitiFact found that, as of October 18, 2017, President Trump had publicly used the term "fake news" at least 153 times in 2017. Angie Drobnic Holan, *The Media's Definition of Fake News vs. Donald Trump's*, POLITIFACT (Oct. 18, 2017, 2:11 PM), http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs/.

159. The plaintiff alleges:

> Ms. Zervos was ambushed by Mr. Trump on more than one occasion. Mr. Trump suddenly, and without her consent, kissed her on her mouth repeatedly; he touched her breast; and he pressed his genitals up against her. Ms. Zervos never consented to any of this disgusting touching. Instead, she repeatedly expressed that he should stop his inappropriate sexual behavior, including by shoving him away from her forcefully, and telling him to "get real." Mr. Trump did not care, he kept touching her anyway.

Complaint and Jury Demand at ¶ 2, Zervos v. Trump, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018) (No. 150522/2017).

fact that it refers to the conduct of a presidential candidate (and now-sitting president), perfectly exemplifies the Hypocrisy Lie:

> ¶ 8. Mr. Trump immediately lied [in response to the Plaintiff's allegation of sexual misconduct], saying that he "never met [the Plaintiff] at a hotel or greeted her inappropriately." He quickly went further, describing Ms. Zervos's experience, along with those of others, as "made up events THAT NEVER HAPPENED;" "100% fabricated and made-up charges;" "totally false;" "totally phoney [sic] stories, 100% made up by women (many already proven false);" "made up stories and lies;" "[t]otally made up nonsense." He falsely stated: "Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened." During the last presidential debate, he stated that these women were either being put forward by the Clinton campaign, or were motivated to come forward by getting "ten minutes of fame," and nothing more.
>
> ¶ 9. But it was Donald Trump who was lying when he falsely denied his predatory misconduct with Summer Zervos, and derided her for perpetrating a "hoax" and making up a "phony" story to get attention.
>
> ¶ 10. Donald Trump lied again, and again, and again, and again, and again.
>
> ¶ 11. In doing so, he used his national and international bully pulpit to make false factual statements to denigrate and verbally attack Ms. Zervos and the other women who publicly reported his sexual assaults in October 2016. Mr. Trump knew that his false, disparaging statements would be heard and read by people around the world, and that these women, including Summer Zervos, would be subjected to threats of violence, economic harm, and reputational damage.[160]

In his motion to dismiss, Trump argues that Zervos's allegations are politically motivated and that the freedom of speech allows him to "defend[] his character and qualifications for office from the false attacks Ms. Zervos leveled against him just a few weeks before the Presidential

160. *Id.* at ¶¶ 8–11.

election."[161] Trump argues that, under the First Amendment, "Political statements in political contexts are non-actionable political opinion."[162] He also claims that, because "the plaintiff solicit[ed] the allegedly defamatory statement," the tort of defamation provides no remedy for the resulting statements provoked by Zervos's solicitation,[163] and that the term "liar" must be evaluated for its defamatory effect in full context rather than treated as *per se* defamatory.[164]

The allegation that Trump recited these statements before the 2016 election is significant because the large minority of voters who elected Trump into office either believed his public denials of sexual misconduct or, more probably, voted for Trump notwithstanding the possibility that he engaged in sexual misconduct and then lied about it. This latter scenario reveals much about a widely—although not universally—shared moral standard for both sexual misconduct and lying. With respect to sexual misconduct, which in most cases is far more condemnable than lying, these events suggest that society does not, in fact, regard gender-motivated harassment and offensive conduct as morally condemnable enough to disqualify a candidate for public office. The groundswell of condemnation for sexual assault ushered in by the "me too" movement in 2017, however, offers hope that public tolerance for such behavior may be on the decline.[165] Likewise, with respect to conduct involving the publication of false statements, Trump's election in spite of repeated instances of false statements during (and before) the campaign suggests

161. Reply Memorandum of Law in Further Support of President Donald J. Trump's Motion to Dismiss and Strike the Complaint Pursuant to CPLR 3211 and Cal. Code Civ. P. § 425.16(B)(1) or, in the Alternative, For a Stay Pursuant to CPLR 2201 at 9, Zervos v. Trump, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018) (No. 150522/2017).

162. *Id.* at 2.

163. *Id.* at 11.

164. *Id.* at 12 ("[C]alling someone a 'liar' is not some talismanic utterance triggering an actionable defamation claim where the context dictates, as here, that the average listener would not understand the statement to be defamatory in nature.").

165. By way of recent example, Roy Moore, the leading candidate for United States Senate in the 2017 special election in Alabama, was accused by multiple women of sexual misconduct, including transgressions that occurred when the women were under the age of legal consent. *See, e.g.*, Richard Pérez-Peña, *Roy Moore Is Mired in a Sexual Misconduct Scandal. Here's How It Happened*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/us/roy-moore-alabama-coverage.html. Despite Moore's vehement denials, although widely disbelieved, he lost the election largely as a result of the scandal. *See* Sean Sullivan, David Weigel & Michael Scherer, *Doug Jones Declared Victor in Alabama Race for Senate; Roy Moore May Seek Recount*, WASH. POST (Dec. 13, 2017), https://www.washingtonpost.com/powerpost/voters-head-to-the-polls-in-contentious-senate-race-in-alabama/2017/12/11/26e36b56-deb7-11e7-8679-a9728984779c_story.html?utm_term=.7e99112d78cc.

that lying is also not sufficiently morally condemnable to disqualify such an offender from election to government service.

Society's newfound willingness to tolerate such conduct reflects a stark change of sentiment. Recall that, in 1998, President Bill Clinton was impeached for lying under oath about sexual misconduct with a White House intern,[166] yet in 2016, Trump was elected president after denying multiple credible claims of sexual misconduct.[167] Trump may be responsible for this changing sentiment and, at the very least, he seems fully aware of his ability to influence social norms of morality and standards of acceptable conduct.[168] If Trump has, indeed, lowered the standard of disapprobation for making false statements injurious to the reputation of living people—and it seems that he probably has, then presumably he has also lowered the bar for defamatory statements about the dead.

Trump seems to have undermined another core foundation of Herzog's theory of moral obligation justifying a claim for postmortem defamation—the social custom of exhibiting reverence and respect for the dead. In Herzog's detailed chapter on corpse desecration, he details "the exquisite care the U.S. military takes in repairing the corpses of dead soldiers":

> [O]nce cargo jets bring back the corpses [of fallen soldiers], every step is suffused with respect for these dead individuals. White-gloved men in uniform transfer the incoming coffins to white vans, which bring them back to the mortuary. Watch your tax dollars at work: morticians embalm the body, wash it, shampoo the hair, wire together broken bones, repair damaged tissue with stitches and suitably colored wax, even try to get the facial wrinkles right . . . . Not a single loose thread on the uniforms

166. H.R. Res. 611, 105th Cong. (1998) ("William Jefferson Clinton willfully provided perjurious, false and misleading testimony to the grand jury . . . .").

167. On October 22, 2016, Trump promised that, after the election, he would sue all women alleging that he engaged in sexual misconduct. As of April 2019, he has not initiated any such suit. *See* Sarah Waychoff, *Trump-O-Meter Update: Sue His Accusers of Sexual Misconduct*, POLITIFACT (Apr. 19, 2017, 2:44 PM), http://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1419/sue-his-accusers-sexual-misconduct/.

168. While campaigning for president, Trump infamously remarked, "They say I have the most loyal people—did you ever see that?—where I could stand in the middle of Fifth Avenue and shoot somebody, and I wouldn't lose any voters. Okay? It's like incredible." Jenna Johnson, *Donald Trump: They Say I Could "shoot somebody" and Still Have Support*, WASH. POST (Jan. 23, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/01/23/donald-trump-i-could-shoot-somebody-and-still-have-support/?utm_term=.a52598312d78.

> they'll be dressed in and every medal accurate, even if the coffin will remain resolutely shut in the funeral ceremony.[169]

Herzog explains that the military observes these formalities even for corpses that will never be seen, as in the case of fallen soldiers who have no close surviving relatives.[170] "This, thinks the military, is something we owe to the dead."[171] In notable contrast, Trump—both as presidential candidate and later as President—waged a series of politically charged attacks against families of fallen soldiers in which he exhibited a startling departure from the reverence and solemnity of longstanding military tradition.

The first of two notable incidents occurred during the 2016 presidential campaign following the Democratic National Convention speech of Khizr Khan, the Gold Star father of Army Captain Humayun Khan, a soldier slain in battle during the Iraq War.[172] Trump responded to Khizr Khan's critical remarks by belittling Khan's wife (Humayun's mother), who stood by Khizr's side onstage but did not speak:

> If you look at his wife, she was standing there, she had nothing to say, she probably — maybe she wasn't allowed to have anything to say, you tell me . . . . I'd like to hear his wife say something. . . . While I feel deeply for the loss of his son . . . Mr. Khan, who has never met me, has no right to stand in front of millions of people and claim I have never read the Constitution, (which is false) and say many other inaccurate things.[173]

While Democrats and some Republicans condemned Trump for attacking a Gold Star family, considering Trump's commentary an unsavory political tactic,[174] the controversy eventually subsided and Trump went on to win the presidential election. However, in addition to

169. HERZOG, *supra* note 8, at 179.

170. *Id.* at 180.

171. *Id.*

172. *See* Richard A. Oppel, Jr., *In Tribute to Son, Khizr Khan Offered Citizenship Lesson at Convention*, N.Y. TIMES (Jul. 29, 2016), https://www.nytimes.com/2016/07/29/us/elections/khizr-humayun-khan-speech.html (responding, in part, to Trump's proposed "Muslim ban" on entry into the United States, Mr. Khan described the patriotism of his own Muslim son and exclaimed, "You have sacrificed nothing and no one.").

173. Maggie Haberman & Richard A. Oppel, Jr., *Donald Trump Criticizes Muslim Family of Slain U.S. Soldier, Drawing Ire*, N.Y. TIMES (Jul. 30, 2016), https://www.nytimes.com/2016/07/31/us/politics/donald-trump-khizr-khan-wife-ghazala.html.

174. *See id.* ("'Memo to Trump supporters,' Peter Wehner, a speechwriter for President George W. Bush, wrote on Twitter. 'He's a man of sadistic cruelty. With him there's no bottom. Now go ahead & defend him.'").

failing to comport himself with the decorum expected of a presidential candidate when speaking about the family of a fallen soldier, lurking beneath Trump's comments were hints of a Hypocrisy Lie to the extent that Trump falsely accused Mr. Khan of making false and inaccurate statements.

The second incident occurred following the death of Sergeant La David T. Johnson, killed in action on October 4, 2017 in a military operation in Niger.[175] Two weeks later, Trump called Sergeant Johnson's widow, Myeshia Johnson, to offer his condolences while she was sitting in a limousine with her mother and Congresswoman Frederica S. Wilson, a longtime family friend, and waiting at Miami International Airport for the arrival of Sergeant Johnson's coffin.[176] Wilson later recounted publicly that the Johnson family was upset by Trump's call because he referred to Sergeant Johnson namelessly as "your guy" and because he appeared to trivialize the loss by stating that, "he knew what he signed up for."[177]

In response to Wilson's account of the call, Trump tweeted, "Democrat Congresswoman totally fabricated what I said to the wife of a soldier who died in action (and I have proof). Sad!"[178] Hours later, Trump repeated his denial in a verbal statement at the White House: "I didn't say what that congresswoman said . . . Didn't say it at all, she knows it."[179] White House Chief of Staff John Kelly later denounced Wilson's account of the call at an official White House press briefing and then shared his recollection of an unrelated event in which he and Wilson had attended the dedication ceremony of a federal building in 2015.[180]

175. Mark Landler & Yamiche Alcindor, *Trump's Condolence Call to Soldier's Widow Ignites an Imbroglio*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/us/politics/trump-widow-johnson-call.html.

176. *Id.*

177. *Id.*

178. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 18, 2017, 4:25 AM), https://twitter.com/realDonaldTrump/status/920611770775064576. One day later, Trump tweeted again: "The Fake News is going crazy with wacky Congresswoman Wilson (D), who was SECRETLY on a very personal call, and gave a total lie on content!" Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 19, 2017, 7:53 PM), https://twitter.com/realDonaldTrump/status/921207772233990144?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F10%2F19%2Fus%2Fpolitics%2Fjohn-kelly-son-trump.html.

179. Landler & Alcindor, *supra* note 175.

180. Kelly stated:

> And a congresswoman [referring to Wilson] stood up, and in the long tradition of empty barrels making the most noise, stood up there and all of that and talked about how she was instrumental in getting the funding for that building, and how she took care of her constituents because she got the money, and she just called up President Obama, and on that phone call he gave the money—the $20 million—to

Sergeant Johnson's widow later corroborated Wilson's account of the call in a live interview with ABC News (thereby contradicting Trump's account),[181] and video footage from the 2015 dedication ceremony described Mr. Kelly revealed that he had "misrepresented [Wilson's] remarks when he accused her of bragging about securing $20 million for a South Florida F.B.I. building and twisting President Barack Obama's arm."[182] As in the case of the Khan family, this controversy later subsided without consequence. And yet, once again, in addition to failing to comport himself with the decorum expected of a president when speaking to and about the family of a fallen soldier, lurking beneath Trump's and Kelly's comments were hints of another Hypocrisy Lie to the extent that they falsely accused Wilson and Johnson of making false and inaccurate statements about the condolence call.

To be sure, Trump never said anything defamatory directly about either Captain Khan or Sergeant Johnson,[183] but Trump's unwillingness to abide by the social custom of showing uncompromising empathy for a fallen soldier's family[184] suggests that, to the extent now tolerated by the public, our collective sense of reverence for the dead may have diminished as much as our reverence for the truth. With the added dimension of Hypocrisy Lies lurking in the background of both incidents without any corresponding call for law reform, it is hard to imagine public support for imposing legal liability for defaming the dead on grounds of moral obligation.

Taken together, how does all of this bear upon Herzog's reform proposal to expand the scope of defamation liability to protect a decedent's reputational interest from injuries occurring after death? If

build the building. And she sat down, and we were stunned. Stunned that she had done it. Even for someone that is that empty a barrel, we were stunned.

Press Briefing by Press Secretary Sarah Sanders and Chief of Staff General John Kelly, WHITE HOUSE (Oct. 19, 2017), https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-chief-staff-general-john-kelly-101917/.

181. *Transcript: Widow of Fallen Soldier La David Johnson Speaks Out*, ABC NEWS (Oct. 23, 2017, 8:10 AM), http://abcnews.go.com/US/transcript-widow-fallen-soldier-la-david-johnson-speaks/story?id=50655055.

182. Yamiche Alcindor & Michael D. Shear, *After Video Refutes Kelly's Charges, Congresswoman Raises Issue of Race*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/politics/trump-kelly-congresswoman-wilson-niger.html.

183. In the case of Sergeant Johnson, not only did Trump personally respond to Congresswoman Wilson's account of the sympathy call by accusing her of fabricating the story (possibly yet another Hypocrisy Lie), but Trump's chief of staff later enflamed the controversy by making false and wholly unrelated representations about Wilson dating back to 2015.

184. *Cf.* Dana Perino, *Why George W. Bush Let a Soldier's Mom Yell at Him*, DAILY SIGNAL (Apr. 21, 2015), http://dailysignal.com/2015/04/21/why-george-w-bush-let-a-soldiers-mom-yell-at-him/ ("That mama sure was mad at me. And I don't blame her a bit.").

asked this question before 2017, I would have agreed with Herzog that tort law should recognize a reasonably time-limited claim for postmortem defamation liability and that such a law would probably be aligned with the public's shared intuitions of justice. I would probably supplement this answer by appealing to the consequentialist rationales that Herzog so eloquently rejects: That is, we should recognize postmortem defamation because everyone wants to be remembered fondly after death and someone who makes a defamatory statement after the victim's death should not be immune from liability simply because the victim is no longer alive to file suit for defamation. Recognition of this postmortem interest could be easily justified by many of the same consequentialist rationales that underlie the broader legal framework governing private property, so I would welcome the corroborating support of an alternative rationale on grounds of moral obligation to the dead.

But we now find ourselves in a post-Trumpian era where public misrepresentations have become routine and respect for the dead no longer represents a moral consensus. A new tort of postmortem defamation would seem difficult to justify on moral grounds unless society first commits itself to truth-telling and respect for the solemnity of death. Once we restore those commitments, then we might begin to care about defaming the dead.