

# Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes

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## INTRODUCTION

Although criminal statutes have long outlawed publication of statements that “blacken the memory of the dead”<sup>1</sup> common law courts have steadfastly refused to provide a private cause of action for defamation of the dead.<sup>2</sup> This refusal arguably made sense in an age when states prosecuted the criminal statutes and thus an effective remedy existed against the publication of defamatory statements concerning the dead.<sup>3</sup> But with criminal libel laws falling into “virtual desuetude” in recent decades, there now exists a gap in the law where those wronged by the defamation of the dead unjustly have no remedy in court.<sup>4</sup>

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1. See NEV. REV. STAT. ANN. § 200.510 (Michie 1998); IDAHO CODE § 18-4801 (1998); COLO. REV. STAT. § 18-13-105 (1998).

2. See *Carlson v. Dell Publ'g Co.*, 65 Ill. App.2d 209 (App. Ct. 1965); *Eagles v. Liberty Weekly, Inc.*, 244 N.Y.S. 430 (Sup. Ct. 1930); *Rose v. Daily Mirror, Inc.*, 284 N.Y. 335, 337 (1940).

3. See Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1054 (1995). Some states retain the offense of blackening the memory of the dead in their criminal libel laws. See *id.* See, e.g., COLO. REV. STAT. § 18-13-105 (1998) (making it a felony to “knowingly publish or disseminate, either by written instrument, sign, picture, or the like, any statement or object tending to blacken the memory of one who is dead”); GA. CODE ANN. § 16-11-40 (1998) (same); IDAHO CODE § 18-4801 (1998) (same); NEV. REV. STAT. ANN. § 200.510 (Michie 1998) (same); N.D. CENT. CODE § 12.1-15.01 (1995) (same); 12 OKL. ST. § 1441 (1995) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 1998); UTAH CODE ANN. § 45-2-2 (1998).

4. See Newton, *supra* note 3, at 1054 n.169; see also Lisa Brown, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV.

Courts can—and should—step in to fill in this gap by implying a private cause of action for defamation of the dead to that decedent's representative and survivors. Courts have long used this discretion to imply private causes of action from various statutes, ranging from criminal to regulatory.<sup>5</sup> Courts have already implied a private cause of action from criminal libel to shape civil defamation law.<sup>6</sup>

Both courts and the *Restatement (Second) of Torts* have set forth several factors for when a court should imply a private cause of action from a statute.<sup>7</sup> These factors, which largely concern legislative intent and the effectiveness of the statute given its statutory

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1525, 1525 & n.2 (1989). Generally, in the United States and England, no civil action will lie for defamation of a deceased person. *See, e.g.*, *Bradt v. New Nonpariel Co.*, 79 N.W. 122, 122 (Iowa 1899) (explaining that a rule allowing recovery for defamation of the deceased has not “gained a foothold in this country, and we know of no principle that will sustain such an action.”); *Fasching v. Kallinger*, 510 A.2d 694, 700-01 (N.J. App. Div. 1986) (noting that at common law even a defamation action brought while the plaintiff was alive did not survive the plaintiff's death).

5. *See, e.g.*, Stephen J. Mchugh, *The Intergration of State Private Law in Federalized Fields of Law: The Case for Federal Common Law*, 74 DENV. U.L. REV. 207, 258 (1996) (offering that the Supreme Court has generally created private rights of action as supplements to either federal administrative action or to causes of action explicitly established by federal statutes).

6. *See Brown, supra* note 4, at 1532. Although in a majority of states, defamation suits do not survive a plaintiff who dies while the suit is pending, some state statutes either explicitly allow survival of defamation actions or have been interpreted to allow survival. *See, e.g.*, ALASKA STAT. § 09.65.050 (Michie 1998); CONN. GEN. STAT. § 52-599 (1998); FLA. STAT. ANN. § 46.021 (West 1998); IOWA CODE § 611.20 (1998); ME. REV. STAT. ANN. tit. 18-A, § 3-816 (1998); MICH. COMP. LAWS § 600.2921 (1998); MISS. CODE ANN. § 15-169 (1998); MONT. CODE ANN. § 27-1-501 (1998); N.H. REV. STAT. ANN. § 556.9 (1998); N.J. STAT. ANN. § 2A:15-3 (West 1998); N.Y. C.P.L.R. 210 (McKinney 1998); OR. REV. STAT. § 115.305 (1987); 20 PA. CONS. STAT. ANN. § 3371 (West 1998); S.D. CODIFIED LAWS § 15-4-1 (Michie 1998); UTAH CODE ANN. § 78-11-7 (1998); VT. STAT. ANN. tit. 14, § 1453 (1998); VA. CODE ANN. § 8.01-25 (Michie 1998); WASH. REV. CODE § 4.20.046 (1998); WIS. STAT. § 895.01 (1983). *See Brown, supra*.

7. *See* RESTATEMENT (SECOND) OF TORTS § 874A (1977). Section 874A provides:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

*Id.*

purpose, suggest that an implied private cause of action for defamation of the dead from a criminal libel statute would be appropriate.

Implying such a private cause of action would be particularly appropriate today, considering the recent Supreme Court decision of *Swidler & Berlin v. United States*.<sup>8</sup> There, the nine justices of the high court explicitly rejected an assumption that underlies the common law courts' refusal to provide a cause of action for defamation of the dead.<sup>9</sup> Namely, the Supreme Court rejected the notion that an individual's interest in his reputation ends upon that individual's death.<sup>10</sup>

This Note argues that courts should imply a private cause of action for defamation of the dead from criminal libel statutes, in light of the Supreme Court's rejection of the notion that an individual's interest in his reputation ends upon his death. Part I of this Note discusses the common law rule barring an action for defamation of the dead, despite the injustice that the rule has caused. Part I also discusses the Supreme Court's recent pronouncement on the reputation rights of decedents. Part II focuses on the history—and decline—of criminal libel statutes and analyzes the law on implying a private cause of action from statutes. Part III argues that courts can—and should—imply a private cause of action for defamation of the dead from state criminal libel statutes that have fallen into “virtual desuetude”. This Note concludes that implying the private cause of action for defamation of the dead is the appropriate remedy for the harsh results that the common law rule forbidding a cause of action for defamation of the dead has caused.

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8. 524 U.S. 399, 118 S.Ct. 2081 (1998) (holding that the attorney-client privilege survives the death of the client).

9. *See id.* at 2086.

10. *See id.* at 2086.

## I. COMMON LAW AND DEFAMATION OF THE DEAD

### A. *Common Law Defamation*

Defamation is a cause of action that the common law affords to victims of an attack upon their reputation.<sup>11</sup> Although during the past thirty-five years, the Supreme Court has set forth certain constitutional elements for defamation,<sup>12</sup> a plaintiff seeking to recover for defamation must still establish that the defendant published a defamatory statement that caused harm to the plaintiff's reputation.<sup>13</sup> More specifically, the statement must be concerning the plaintiff;<sup>14</sup> further, the statement must be communicated to some third party<sup>15</sup> and, of course, tend to harm the reputation of the defamed person in some way.<sup>16</sup> The harm element of common law defamation can have several aspects. Under certain circumstances, some courts will require that the plaintiff establish so-called "special damages."<sup>17</sup> But, most courts will not require proof of special damages.<sup>18</sup>

A defamation defendant has several possible defenses. In a sense, truth is a defense,<sup>19</sup> though early common law did not provide such a defense.<sup>20</sup> Also, a defendant may have a privilege to publish the defamatory statement.<sup>21</sup> There exist two types of defamation. Where the defamatory statement is published in writ-

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11. See ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* § 1.1 (2d ed. 1994).

12. See *id.* § 2.1.

13. See *id.* § 2.5.

14. See *id.* § 2.1.

15. See *id.* § 2.5.

16. See *id.* § 2.4.1. There are several definitions of a defamatory statement. See *id.*

17. See SACK & BARON, *supra* note 11, § 2.7.3 (noting that Delaware, Iowa, Minnesota, Mississippi, New Jersey, Pennsylvania, Tennessee, Texas, Vermont, Washington, and Wisconsin courts have required the plaintiff to prove special damages in cases of libel per se).

18. See *id.* (noting that some thirty-five jurisdictions do not require proof of special damages in cases of libel per se).

19. But more accurately, truth is not a defense; rather falsity is now an element of the plaintiff's case for prosecution. See SACK & BROWN, *supra* note 11, at § 3.1.

20. See Lord Campbell's Act, 6 & 7 Vict., ch. 96 (1843).

21. See SACK & BROWN, *supra* note 11, § 7.1.

ing, it is generally known as libel.<sup>22</sup> However, where the defamatory statement is published orally, it is generally known as slander.<sup>23</sup>

### B. *Constitutionalization of Defamation*

Beginning in 1964, the Supreme Court constitutionalized the civil action of defamation and set forth several new aspects to defamation law.<sup>24</sup> In *New York Times v. Sullivan*,<sup>25</sup> the Court held that in order for a public official to prevail for defamation (in relation to the plaintiff's official capacity) the public official must establish that the defendant published the defamatory statement with "actual malice."<sup>26</sup> The *Sullivan* Court defined actual malice, not as some indication of ill-will as common law courts had suggested,<sup>27</sup> but as recklessness as to the veracity of the statement.<sup>28</sup>

Since *Sullivan*, the Supreme Court has elaborated on the constitutional elements of defamation. For example, the Court has extended the *Sullivan* "actual malice" standard beyond public officials to all public figures<sup>29</sup> and to prosecutions for criminal libel against public figures.<sup>30</sup> The Court has also extended the "actual malice" standard to so-called private figures where the subject of the defamation was a matter of public interest and the plaintiff sought punitive or "presumed" damages.<sup>31</sup>

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22. *See id.* § 2.3.

23. *See id.*

24. *See id.* § 1.2.2.

25. 376 U.S. 254 (1964).

26. *Id.* at 279-280; SACK & BROWN, *supra* note 11, § 1.2.2.

27. *See* SACK & BROWN, *supra* note 11, § 1.3.1.

28. *See Sullivan*, 376 U.S. at 279-80.

29. *See* *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967); *see also* SACK & BROWN, *supra* note 11, § 1.2.4.

30. *See* *Garrison v. Louisiana*, 379 U.S. 64 (1964) (extending *Sullivan*'s actual malice requirement to criminal libel prosecutions); *see also* SACK & BROWN, *supra* note 11, §§ 1.2.4, 1.3.1.

31. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *see also* SACK & BROWN, *supra* note 11, § 1.2.6.

### C. *Defamation of the Dead*

Despite the Supreme Court's constitutionalization of defamation law, the underlying aspects of common law defamation—including its rule on defamation of the dead remain unaffected. Specifically, as in the pre-*Sullivan* days, a defamation plaintiff must still establish that the allegedly defamatory statement concerned the plaintiff.<sup>32</sup> Thus, as in pre-*Sullivan* days, common law courts have routinely refused to provide a cause of action to a decedent's survivor—or the decedent's estate—for the defamation of the decedent.<sup>33</sup>

While the rule on defamation of the dead is consistent throughout common law jurisdictions,<sup>34</sup> the same is not true of civil law<sup>35</sup> jurisdictions. For instance, Louisiana, a civil law jurisdiction, has adopted the common law rule that forbids an action for defamation of the dead.<sup>36</sup> Louisiana adopted this rule for the same reasons that common law courts have articulated—the practical difficulties of

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32. See SACK & BROWN, *supra* note 11, § 2.1.

33. See *Gonzales v. Times Herald Printing Co.*, 513 S.W.2d 124, 124-5. (Tex. Civ. App. 1974) (holding that decedent's wife could not recover for defamation of the decedent in a newspaper article, because the article did not directly upon her); *Curtis v. The Evening News Assoc.*, 135 Mich. App. 101,103. (Ct. App. 1984) (holding that the plaintiff could not recover for defamation arising out of an article that falsely stated that plaintiffs dead son had a criminal character); *Hughes v. The New England Newspaper Publ'g Company* 43 N.E.2d 657,657-8 (Mass. 1942) (holding that the decedent's wife could not recover against a newspaper for defamation arising out of an article on the suicide of the decedent because the article was not directed against her even though it identified her as the decedent's spouse); *Lee v. Weston*, 402 N.E.2d 23,26 (Ind. Ct. App. 1980) (holding that the decedent's parents could not recover for defamation of their son for defendant medical examiner's statement that their son died of "overdose" because the statement did not reflect upon them, even though their son did live with them.); *Lambert v. Garlo*, 484 N.E.2d 260,262 (Ohio Ct. App. 1985) (holding that decedent's relatives could not recover for defamation against coroner and newspaper publisher for the statement that the former made in the latter's newspaper that the decedent was clearly a "pusher" because the plaintiffs were not directly injured by the statements that did not name or refer to them).

34. See *id.*

35. "Civil law" is defined as: "[t]he system of jurisprudence held and administered in the Roman empire . . . as distinguished from the common law of England." BLACK'S LAW DICTIONARY 246 (6th ed. 1990).

36. See *Gugliuzza v. K.C.M.C., Inc.*, 606 So. 2d 790, 791 (La. 1992) (holding that the decedent's surviving family could not recover for defamatory statements against the decedent because the statements do not reflect upon the family's reputation).

an alternate rule and First Amendment concerns of the chilling effect that an alternate rule would have.<sup>37</sup> But despite Louisiana's adoption of the common law rule, other civil law jurisdictions, such as Quebec, do provide a cause of action for the defamation of the dead.<sup>38</sup> The civil law rule had its origins in Roman law.<sup>39</sup>

#### D. No Relief for the Decedent's Estate or Survivors

##### 1. No Cause of Action

Representatives of a decedent's estate have invariably failed to convince courts to allow the estate to recover for defamatory statements against the decedent. In *Carlson v. Dell Publ'g Company, Inc.*,<sup>40</sup> an Illinois court affirmed the dismissal of a complaint for damages brought by a decedent's survivors and administrator against the publisher of a magazine for an article on the decedent, a rape-murder victim.<sup>41</sup> The defendant had described the gruesome crime, the condition of the victim's body, and suggested that the alleged murderer had repeatedly used a brick to smash the "thin skull" of the victim, a sixty-two-year old, woman "in the gay red slippers."<sup>42</sup> Without analyzing the merits of the rule, the court simply followed the statute that had codified the common law rule on defamation of the dead.<sup>43</sup>

The common law rule on defamation of the dead extends be-

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37. See *id.* at 792.

38. See *Gonzales v. Times Herald Printing Co.*, 513 S.W.2d 124, 124-5. (Tex. Civ. App. 1974) (holding that decedent's wife could not recover for defamation of the decedent in a newspaper article, because the article did not directly upon her). The *Gonzales* Court noted the civil law rule as a contrast to the applicable common law rule. Germany, another civil law jurisdiction, provides an interesting criminal cause of action for defamation of the dead. Volkhard Knigge, director of Buchenwald Foundation, the organization that administers the former concentration camp, faced such a prosecution for publicly disputing long-standing beliefs on the nature of the prisoners at the camp. The charges were dropped after a 10-month investigation because the prosecution found that the alleged defamatory statements "had the sole purpose of contributing to historical dialogue." Colleen Barry, *Where Postwar Germans Perished*, RECORD (N.J.), Dec. 25 1996, at A9.

39. See *Gonzales*, 513 S.W.2d at 125.

40. 65 Ill. App. 2d 209 (Ill. App. Ct. 1965).

41. See *id.* at 210.

42. *Id.* at 210-11.

43. See *id.* at 213-214.

yond barring an action for damages. A New York court applied the rule to deny the relatives of a decedent an injunction against the publication of allegedly defamatory material concerning the decedent.<sup>44</sup>

Courts have inflexibly barred attempts by the survivors of a defamed decedent to circumvent the rule against defamation of the dead.<sup>45</sup> The New York Court of Appeals refused to allow the survivors of a defamed decedent to recover against a newspaper because the newspaper's admittedly defamatory statements concerning the deceased made "no direct reflection" upon the surviving plaintiffs.<sup>46</sup> The case had arisen out of an article in which the defendant erroneously identified the recently deceased Jack Rose with "Baldly Jack Rose" a "self-confessed murderer."<sup>47</sup> Presumably because of the rule on the defamation of the dead, Jack Rose's survivors—whom the article had named—sued the newspaper on their own behalf.<sup>48</sup> But the court held that to allow the survivors to recover for defamation of the dead in this situation would be a "far-reaching" departure from New York's long-standing law.<sup>49</sup>

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44. See *Eagles v. Liberty Weekly, Inc.*, 244 N.Y.S. 430 (Sup. Ct. 1930). The case did not address whether the result would be different if the estate of the decedent, and not the decedent's survivors, had filed the motion for an injunction.

45. See *Brown*, *supra* note 4, at 1554-55.

46. See *Rose v. Daily Mirror, Inc.*, 284 N.Y. 335,337 (1940); Other jurisdictions have adopted a similar test relating to the direct reflection on surviving plaintiffs. See, e.g., *Curtis v. The Evening News Assoc.*, 135 Mich. App. 101,103. (Ct. App. 1984) (holding that the plaintiff could not recover for defamation arising out of an article that falsely stated that plaintiffs dead son had a criminal character); *Hughes v. The New England Newspaper Publ'g Co.*, 43 N.E.2d 657,657-8 (Mass. 1942) (holding that the decedent's wife could not recover against a newspaper for defamation arising out of an article on the suicide of the decedent because the article was not directed against her even though it identified her as the decedent's spouse); *Lee v. Weston*, 402 N.E.2d 23,26 (Ind. Ct. App. 1980) (holding that the decedent's parents could not recover for defamation of their son for defendant medical examiner's statement that their son died of "overdose" because the statement did not reflect upon them, even though their son did live with them); *Lambert v. Garlo*, 484 N.E.2d 260,262 (Ohio Ct. App. 1985) (holding that decedent's relatives could not recover for defamation against coroner and newspaper publisher for the statement that the former made in the latter's newspaper that the decedent was clearly a "pusher" because the plaintiffs were not directly injured by the statements that did not name or refer to them).

47. *Rose*, 284 N.Y. at 336-7.

48. See *id.* at 337.

49. See *id.* at 338. It is possible that these named survivors would fare better under

Under New York law, a spouse of a defamed person would not have a cause of action against the wrongdoer, even if the spouse could establish that the defamation resulted in the spouse suffering pecuniary damage.<sup>50</sup>

The *Rose* court was divided, four to three, on the merits of the rule and its result.<sup>51</sup> The majority in *Rose* said that neither justice nor expediency requires that the survivors be allowed to recover, because the article did not damage the plaintiffs' reputation, even though the article did name them.<sup>52</sup> The dissent, however, argued that the distinction does not make the article any less libelous or damaging.<sup>53</sup> Noting that the newspaper could have easily avoided the mistake, the dissent reasoned that as the plaintiffs were not the survivors of the despicable criminal, as the article falsely alleged, they should be allowed to recover against the newspaper.<sup>54</sup> The dissent also focused on the plaintiff's plight.<sup>55</sup> "A respectable family whose husband and father has just passed away awakes the next morning to find blazoned forth in a morning newspaper that decedent was a notorious criminal, thus blackening the family and all its members."<sup>56</sup> The dissent further noted that with courts failing to provide a remedy for such a wrong, the legislature should step in.<sup>57</sup> But, thus far, that call has largely gone unheeded.<sup>58</sup>

The only state that does provide a cause action for defamation

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Michigan's rule. See *Curtis*, 135 Mich. App. at 103 (noting that the plaintiffs were not named in the article).

50. See *Cregin v. Brooklyn Crosstown R.R. Co.*, 75 N.Y. 192,193 (1878).

51. See *Rose v. Daily Mirror, Inc.*, 284 N.Y. 335,335 (1940).

52. See *id.* at 337.

53. See *id.* at 339.

54. See *id.*

55. See *id.*

56. *Id.*

57. See *id.* Despite their failure to deviate from stare decisis, some courts have expressed sympathy for the plaintiffs because of the emotional distress that they have suffered. See, e.g., *Coulon v. Gaylord Broad.*, 433 So. 2d. 429,430-31 (La. Ct. App. 1983) (holding that father could not sue for defamation of deceased son); see also *Fasching v. Kallinger*, 211 N.J. Super. 26,38 (Super. Ct. App. Div. 1986) ("Although there may be a need for a legislative solution that would permit defamation actions to be filed by representatives of decedents where the decedent is alleged to have been defamed. . . [t]his court will not legislate otherwise.").

58. The one exception appears to be Rhode Island. See R.I. GEN. LAWS § 10-7.1-1 (1997).

of the dead is Rhode Island.<sup>59</sup> In 1974, Rhode Island enacted a statute that provides a cause of action for defamations against the dead but only under limited circumstances.<sup>60</sup> The defamation must be published as part of an obituary or similar account within three months of the victim's death.<sup>61</sup> Also, the statute sets forth a one-year statute of limitation for potential plaintiffs,<sup>62</sup> typically the decedent's estate.<sup>63</sup>

In *Rose*, the court applied the common law rule on defamation of the dead to deny relief to the survivors of the decedent.<sup>64</sup> But courts have not hesitated to apply the common law rule to deny relief to the estate of the decedent.<sup>65</sup> Following the rationale that courts have used to rule against survivor actions, a Massachusetts court refused to provide a private cause of action to a decedent's estate.<sup>66</sup> The court held that a father of a decedent—also the administrator of her estate—could not recover for defamation of his dead daughter arising out of a newspaper article stating that the daughter “had a long history of involvement with drugs.”<sup>67</sup> The

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59. See *Brown*, *supra* note 4, at 1526.

60. See R.I. GEN. LAWS § 10-7.1-1. (1998).

61. See *id.*

62. See R.I. GEN. LAWS §§ 10-7.1-2, 10-7.1-3 (1998).

63. See *id.* § 10-7.1-2. Although the Rhode Island statute provides an explicit cause of action, the concept of implying a limited private cause of action from a statute, including its own implied statute of limitation is an established aspect of law. An example is the federal securities anti-fraud law, a jurisprudence that has developed based on the *Cort v. Ash* doctrine. The Securities Act of 1934 did not provide an explicit private cause of action for victims of securities fraud. But relying on *Cort v. Ash*, the Supreme Court has since implied an elaborate mechanism for such private actions. For instance, the mechanism has limited potential plaintiffs to actual sellers (or buyers) who file the action within three years of the fraud or one year since the time when the plaintiff should have discovered the fraud. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (implying a statute of limitations); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (limiting the implied private cause of action to actual sellers and purchasers).

64. See *Rose v. Daily Mirror, Inc.*, 284 N.Y. 335,337 (1940).

65. See, e.g., *Casamasina v. Worcester Telegram & Gazette Inc.*, 307 N.E.2d 865 (Mass. App. Ct. 1974) (holding that “one who defames the memory of the dead is not liable civilly to the estate of the decedent.”).

66. See *id.*

67. *Id.*; see also *Gruschus v. Curtis Publ'g Co.*, 342 F.2d 775,776 (10th Cir. 1965) (applying New Mexico law and prohibiting an estate to recover for defamation of the dead); cf. *Carabajal v. UTV of San Antonio, Inc.*, 961 S.W.2d 628 (Tex. App. 1998). (al-

court simply held that defaming the memory of the dead does not give rise to a civil cause of action to the decedent's estate.<sup>68</sup>

Despite the general rule prohibiting a cause of action for defamation of the dead, courts can find defendants liable for defamation if the newspaper mistakenly believed a person to be dead.<sup>69</sup> One court reasoned that the erroneous distinction that the person is not dead does not diminish the reputational injury that he may suffer.<sup>70</sup>

## 2. No Relief in the Media

As illustrated above, there exist many reported cases where courts have refused to allow recovery for defamation of the dead.<sup>71</sup> Undoubtedly, the harsh common law rule has left many more disgruntled survivors who have not even brought a cause of action in court.<sup>72</sup> News reports provide a glimpse at the frustrations of the

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lowing the parents of a decedent to proceed for defamation against a television station for suggesting that the decedent, 13 when fatally wounded in a gun accident, had broken into the house where the gun was located). That the parents may not have a cause of action for the defamation was apparently not addressed before the court. Nor does the decision clarify whether the parents are suing as a representative of the child's estate. Also, the decision favored the parents, even though Texas has refused to imply a private cause of action for defamation of the dead. *See Gonzales v. Times Herald Printing Co.*, 513 S.W.2d 124, 124 (Tex. Civ. App. 1974).

68. *See Casamasina*, 307 N.E.2d at 866.

69. *See Quinn v. The Sun Printing and Publishing Co.*, 105 N.Y.S. 1092, 1093 (Sup. Ct. 1907).

70. *See id.* at 1094.

71. *See supra* Part I.D.1.

72. While immediate survivors of the decedent are likely to be the most outspoken group, former colleagues of a decedent have also acted to defend the decedent's reputations. Daniel Ellsberg, a reporter, objected to what he felt were a negative portrayal of his friend, Lt. Col. John Paul Vann in a planned television script. *See Irene Lacher, Sunday Brunch: Out & About A 'Bright Shining' Dilemma*, L.A. TIMES, May 24, 1998, at E1. In a letter to the television executives, Mr. Ellsberg wrote, "[y]ou are safe from a libel suit from a dead man. . . . But if you persist in presenting this false and defamatory impression of John Vann, you can be sure of eliciting feelings of rage and contempt from many living people who knew him, starting with me." *Id.* The letter worked and the names of the characters were changed. *See id.* As the television program also depicted living people, whose character names were also changed, it may be that the changes were made to protect the television producers from a libel action from a living person. *See id.* The general public has also criticized possible defamation of the dead. *See, e.g., Letter from Eamonn O'Connell, Cheap Shot*, SOUTH CHINA MORNING POST, Apr. 21, 1997, at 18, *available in*

family and friends of defamed decedents.<sup>73</sup> The family of Thomas E. Dewey, the former presidential candidate and New York Governor who died in 1971, was reportedly unhappy about the portrayal of Mr. Dewey “as a dishonest district attorney” in a Hollywood movie when, in fact, Mr. Dewey was “one of the most honest public officials there ever was.”<sup>74</sup>

Public figures like Mr. Dewey are not the only ones to be subject to defamation of the dead. Consider the recent publicity given to the case of William Murdoch, the man, who, in 1912, served as “First Officer” on the Titanic.<sup>75</sup> According to the blockbuster motion picture, “Titanic” Officer Murdoch, in the face of disaster, suddenly pulls out his gun, shoots someone, and then commits suicide.<sup>76</sup> But that account harms the reputation of the true Officer

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LEXIS, News Library, South China Morning Post File (“You might be able to hide behind the legal [defense] of it not being possible to libel a dead person but you really have scraped the bottom of the journalistic barrel by taking such a cheap shot.”). According to the letter writer, the newspaper had referred to alleged past drinking problems of two women who died in a fire. *See id.*; Letter from Colleen O’Donnell, *Letters* PHOENIX NEW TIMES, Oct. 2 1997, available LEXIS, News Library, Phoenix New Times File (“How easy and cowardly it is to slander the dead! Boo to New Times for printing such a trendy and self-serving tirade against someone who deserved to be laid to rest with dignity and honor.”). For a prediction that the same tabloids who engaged in “deification” of Princess Diana in the immediate aftermath of her death will later engage in character assassination and defamation, *see* Jimmy Reid, *As One Youngster Stands In For Diana Fears Raised About The Expressions Of Public Grief*, HERALD (GLASGOW) Sep. 5 1997, at 11.

73. But necessarily, media outlets report on the more prominent instances. Presumably, many other instances do not warrant media coverage. Ironically, it is in those instances that the need for change in the defamation rule is the greatest. Arguably, those plaintiffs who do succeed in obtaining media coverage do succeed in part in correcting the record and perhaps restoring, at least in part, any damage to a decedent’s reputation. Those decedents who are defamed in the absence of widespread media attention never get that chance. *See supra* note 57.

74. Andy Rooney, *Some People Aren’t Famous Enough*, CHARLESTON DAILY MAIL, Jan. 6, 1998, at 4A; Taki, *Truth Dies when Hollywood Shoots*, TIMES (LONDON), Oct. 19, 1997, available in LEXIS, News Libray, The Times and Sunday Times (UK) File (“[Dewey] has been libeled from thoroughly despicable opportunists who know very well that what they’re saying is false. Something is very rotten in the Home of the Depraved.”).

75. *See* Charlie English, *Arts: Dear Mr. Cameron; You Can’t Libel a Dead Man. But You Can Upset His Relatives, as Titanic’s Director is About to Find Out*, GUARDIAN FEATURES, Mar. 2, 1998, at 11.

76. *See id.*

Murdoch, who according to his survivors, was actually a hero.<sup>77</sup> The film apparently outraged the residents of the Scottish town of Dalbeattie where Officer Murdoch grew up, prompting a member of the British Parliament to seek relief from Hollywood.<sup>78</sup> In a letter to Twentieth Century Fox, MP Alasdair Morgan provided a starkly different version of the facts surrounding Officer Murdoch's activities on the Titanic: "Eyewitness accounts relate how William Murdoch spent his last hours shepherding women and children on to lifeboats. He even gave away his own lifejacket to a passenger, and went down with the ship."<sup>79</sup> According to a press report, MP Morgan did not receive a response to his letter.<sup>80</sup>

Media reports provide other possible examples of defamation of the dead. In 1997, the widow of Sir Billy Butlin complained that a television program's portrayal of Sir Butlin, the founder of a holiday camp empire, as a strong-arm gangster<sup>81</sup> was untrue.<sup>82</sup> She added that the program would destroy the reputation of a man who reportedly donated millions of dollars to charities during his lifetime.<sup>83</sup> The television station reportedly went ahead with the broadcast despite the widow's objections.<sup>84</sup>

E. *Using the Courts and the Media to Seek a Remedy for Defamation of the Dead*

The facts underlying the landmark Supreme Court case of *Hustler Magazine, Inc. v. Falwell*<sup>85</sup> illustrate the importance of a decedent's reputation to the decedent's survivors. Hustler published a parody of an advertisement that suggested Rev. Falwell had his first sexual experience with his mother (in an outhouse).<sup>86</sup> The

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77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See* Michael Burke, *Butlin Profile is 'Lies'*, MAIL ON SUNDAY, Nov. 23, 1997, at 28.

82. *See id.*

83. *See id.*

84. *See id.* According to the article, the television station would not even allow the widow to preview the show. *See id.*

85. 485 U.S. 46 (1988).

86. *See Larry King Live* (CNN television broadcast, Jan. 10, 1997) (transcript on

*Hustler* case is most significant for its re-affirmation of the *Sullivan* test.<sup>87</sup> But plaintiff Jerry Falwell stated that he sought legal action against the magazine, because the article ridiculed his mother who had died shortly after it published the parody.<sup>88</sup> According to Rev. Falwell, he sued, in part, because his mother being dead, no longer had a cause of action.<sup>89</sup>

Reverend Falwell is not the only son who sought to protect—or restore—the reputation of a dead parent after a defamatory media report. The son of W.E. Gladstone, a nineteenth-century British Prime Minister, creatively (but risking incurring civil damages) circumvented the rule against defamation of the dead.<sup>90</sup> The story began with a man named Peter Wright who alleged in writing that although the senior—and deceased—Gladstone maintained a moral public posture, he had an interest in prostitutes in private.<sup>91</sup> Apparently knowing that he could not successfully sue Mr. Wright for defamation of the dead, the junior Gladstone sought to get his day in court—to clear his dead father’s reputation—by inducing Mr. Wright, the man who made the allegedly defamatory statements, to initiate a court action against the junior Gladstone.<sup>92</sup> To that end, Mr. Gladstone authored a series of letters that alleged that Mr. Wright was a liar.<sup>93</sup> Mr. Gladstone got his wish. Mr. Wright sued Mr. Gladstone for defamation arising from the letters.<sup>94</sup> At trial, Mr. Gladstone apparently relied on truth as a defense—that Mr. Wright was indeed a liar, presumably as evidenced that Mr. Wright lied about the senior Mr. Gladstone’s alleged interest in prostitutes.<sup>95</sup> The jury apparently accepted that argument and found for

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file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*) [hereinafter *Larry King Live*]; Carlos Santos, *Flynt, Falwell Square Off*, RICHMOND TIMES DISPATCH, Nov. 2, 1997 at C-1.

87. See SACK & BROWN, *supra* note 86, § 1.2.4.

88. See *supra* note 86.

89. See *Larry King Live*, *supra* note 86.

90. See Michael Beloff, *Why the Mail Should Make Us All Uneasy*, TIMES (LONDON), Feb. 15 1997, available LEXIS, News Library, The Times and Sunday Times (UK) File.

91. See *id.*

92. See *id.*

93. See *id.*

94. See *id.*

95. See *id.*

the defendant, the junior Mr. Gladstone, who risked civil penalty but managed to circumvent the rule on defamation of the dead.<sup>96</sup>

The junior Mr. Gladstone is not the only survivor to successfully induce a wrongdoer to initiate a defamation action to restore the reputation of a deceased relative. In 1997, actor Carroll O'Connor induced<sup>97</sup> to suit by Harry Perzigian, the man who supplied cocaine to Mr. O'Connor's adult son, a drug addict who committed suicide during a binge.<sup>98</sup> Mr. O'Connor subsequently asserted that Mr. Perzigian was a "partner in murder", a statement that resulted in a \$10 million defamation action against Mr. O'Connor.<sup>99</sup> At trial the defense successfully argued that the statement merely reflected a non-actionable opinion.<sup>100</sup> But, as important to the O'Connor family, the trial gave the family to restore the decedent's reputation as "a gifted, talented, adorable man who was also addicted."<sup>101</sup>

The common law rule that prohibits a cause of action for defamation of the dead is analogous to its rule for invasion of privacy upon the dead.<sup>102</sup> Courts and authorities have long assumed that one's legal interest in privacy ends upon death.<sup>103</sup> As one court put it, "It would seem to be undisputed law that the right of privacy, the right of the individual to be left alone, is personal in nature, and may not survive the death of the injured party."<sup>104</sup> One court ex-

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96. *See id.*

97. *ABC World News This Morning: Slander Suit Against Carroll O'Connor Suit Stems from Remarks about Alleged Drug Dealer* (ABC television broadcast July 14, 1997), available in 1997 WL 15392093.

98. *See* Ann W. O'Neill & Joe Mozingo, *O'Connor Cleared Of Defamation; Suit: Jury Says He Had A Right To Speak Against Son's Drug Supplier* LOS ANGELES TIMES July 26, 1997, at A1.

99. *See id.*

100. *See id.*

101. *See id.* Presumably, the restoration of the decedent's reputation was necessary because of the widespread media reports on the life and death of the decedent, following his suicide.

102. *See, e.g.,* John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1447-48 ("[o]rordinarily, privacy rights expire with one's life, although certain interests in name and personality may survive death.").

103. *See* *Maritote v. Desilu Productions, Inc.* 230 F.Supp. 721 (N.D. Ill. 1964) (applying Illinois law).

104. *See id.* The facts of this case may have been particularly unattractive for the court. Plaintiff Mafalda Maritote was the administratrix of the Estate of Alphonse (Al)

plained the rationale that as the cause of action intends to protect feelings, any claim for damage to such “feelings” should logically end upon death.<sup>105</sup> As in defamation of the dead, some courts fear that delineating the boundaries of such a cause of action would be difficult.<sup>106</sup> In its *Restatement (Second) of Torts*, the American Legal Institute has endorsed the view that a person’s privacy interest ends upon his death.<sup>107</sup> According to the *Restatement*, there can be no cause of action for invasion of privacy by (or on behalf) of a dead person,<sup>108</sup> except for “appropriation of one’s name or likeness.”<sup>109</sup>

Courts often analogize between defamation and invasion of privacy<sup>110</sup> as both causes of action similar—though distinct—wrongs.<sup>111</sup> Whereas defamation protects reputation, invasion of

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Capone. *See id.* at 721. Also while more recent authorities have reached a different conclusion on the precise issue in this case—whether an invasion of privacy cause of action exists for the appropriation of a decedent’s name and likeness, many courts have endorsed the principle that the quoted statement of the Maritote court expressed. *See Gruschus v. Curtis Publ’g Co.*, 342 F.2d 775,776 (10th Cir. 1965) (applying New Mexico law); *Lambert v. Garlo*, 484 N.E.2d 260, 297-98 (Ohio Ct. App. 1985).

105. *See Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836,844 (S.D.N.Y. 1975).

106. *See Justice v. Belo Broad. Co.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (holding that parents of a murder victim do not have a cause of action for invasion of privacy arising from the defendant’s false statements in a broadcast that the decedent was involved in a homosexual relationship, because the defendant’s broadcast made no reference to the parents); *Loft v. Fuller*, 408 So. 2d 619, 623 (Fla. Dist. Ct. App. 1981) (holding that survivors of the relatives of captain of a commercial that crashed, did not have a cause of action for invasion of privacy against the defendant who had authored a book stating that the ghosts of a decedent had appeared to passengers); *Waters v. Fleetwood*, 91 S.E.2d 344,347 (Ga. 1956) (reviewing caselaw on the propriety of providing a cause of action for invasion privacy to the survivors of a decedent).

107. *See* RESTATEMENT (SECOND) OF TORTS § 652I. (“[e]xcept for the appropriation of one’s name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.”).

108. *See, e.g., Justice*, 472 F. Supp. 145 at 147 (“[t]he cause of action [for invasion of privacy] cannot be maintained by other persons such as members of the individual’s family, unless their own privacy is invaded along with his.”)

109. RESTATEMENT (SECOND) OF TORTS § 652I.; *Fasching v. Kallinger*, 510 A.2d 694, 700-01 (N.J. App. Div. 1986) (holding that survivors of a murder victim do not have a cause of action for invasion of privacy against the victim’s convicted murder who authored a book allegedly describing the murder); *Loft*, 408 So. 2d at 623.

110. *See Loft*, 408 So. 2d at 619,623; *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234,246 (Cal. 1986); *Gruschus*, 342 F.2d at 776; *Justice*, 472 F. Supp. at 147-8.

111. *See Fellows*, 42 Cal. 3d at 248-9. But the overlap between the interests that

privacy protects feelings and one's peace of mind.<sup>112</sup> Still, some invasion of privacy causes of action do primarily involve loss of reputation and may inevitably lead themselves into a defamation action.<sup>113</sup>

Despite the general rule, at least one court has allowed the possibility that a relative of a decedent could recover for an invasion of privacy that was directed at the decedent.<sup>114</sup> A Florida appellate court said that if a wrongdoer's conduct toward the decedent was "sufficiently egregious" the decedent's relatives could have a cause of action for invasion of privacy under such "unusual circumstances."<sup>115</sup> However, the court cautioned that such relatives would "shoulder a heavy burden"<sup>116</sup> and that the relatives did not have such a cause of action in the case before it—where the defendant had authored a book stating that the ghost of a decedent (the captain of a commercial airplane that crashed) had re-appeared to the airliner's future crew and passengers.<sup>117</sup> It is not clear how "unusual" the circumstances must be for the Florida court to allow the cause of action.

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defamation and invasion of privacy address may be greatest in a particular type of the invasion of privacy cause of action known as false light. Some courts have observed this overlap. *See Fellows*, 42 Cal. 3d at 248 n.12.

112. *See Fellows*, 42 Cal. 3d at 248. The same court, however, acknowledged that defamation may also injure feelings and peace of mind. *See id.* at 248-9; *but see Cabaniss v. Hipsley*, 114 Ga. App. 367,372 (Ct. App. 1966) (holding that invasion of privacy, like defamation protects reputation). The court provided:

The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth.

*Id.*

113. *See Fellows*, 42 Cal. 3d at 248-9.

114. *See Loft v. Fuller*, 408 So. 2d 619, 624 (Fla. Dist. Ct. App. 1981).

115. *See id.*

116. *Id.*

117. *See id.* at 621.

#### F. *Supreme Court Recognition for Decedents' Reputation*

The Supreme Court has recognized that a person's interest in protecting his reputation does not end upon his death.<sup>118</sup> This recognition came in the apparently unrelated case of *Swidler & Berlin v. United States*.<sup>119</sup> There, the Court held that lawyers may not be compelled to reveal communications with clients in a criminal proceeding, even after the death of the client.<sup>120</sup> But more significant for the law on defamation of the dead is a premise that both the majority and dissenting opinions explicitly adopted.<sup>121</sup> Chief Justice William Rehnquist, writing for the majority, stated that it is unreasonable to assume that a person's interest in his reputation ends upon his death.<sup>122</sup> Justice Sandra D. O'Connor, writing for the dissent, wanted to weigh the decedent's reputational interest against the law enforcement's need for information; but she explicitly agreed with the majority that a decedent may have such an interest.<sup>123</sup>

The case had arisen out of the Independent Counsel's investigation of "Travelgate" and the subsequent suicide of Vincent W. Foster, Jr., the Deputy White House Counsel<sup>124</sup> following the White House's dismissal of its Travel Office employees.<sup>125</sup> In July 1993, Mr. Foster had sought representation from the Swidler & Berlin law firm; a lawyer at the firm met with Mr. Foster for two hours and took three pages of notes.<sup>126</sup> Mr. Foster committed suicide nine days later and, at the request of the Independent Counsel, a grandjury subpoenaed the lawyer's notes.<sup>127</sup> The law firm sought

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118. *See Swidler & Berlin v. United States*, 524 U.S. 399, 118 S.Ct. 2081, 2083 (1998).

119. 524 U.S. 399, 118 S.Ct. 2081 (1998).

120. *See id.* at 2086.

121. *See id.*

122. *See id.*

123. *See id.* at 2088-89

124. *See Swidler & Berlin v. United States*, 524 U.S. 399, 118 S.Ct. 2081, 2082 (1998).

125. *See id.* at 2083.

126. *See id.*

127. *See id.*

to quash the motion citing the attorney-client privilege.<sup>128</sup>

The *Swidler* Court's view of a decedent's reputational interest is consistent with the view that another federal court has expressed.<sup>129</sup> To assume that "a man's defamed reputation dies with him is to ignore the realities of life and the bleak legacy which he leaves behind."<sup>130</sup>

### G. Negative Media Publicity

Not surprisingly, the rule on defamation of the dead has recently been the subject of negative publicity. The suit by the cattle industry against Oprah Winfrey, the television talk show host, for suggestions on her show that American beef "is highly dangerous because of Mad Cow Disease"<sup>131</sup> was, pardon the pun, a prime example.<sup>132</sup> The suit relied in part on Texas' "False Disparagement of Perishable Food Products Act."<sup>133</sup> The statute provides a private cause of action against anyone who distributes statements that he knows to be false that suggests that a perishable food product is not safe for public consumption.<sup>134</sup> Admittedly, the Texas legislature was probably more concerned about public confidence in the food supply than a cow's reputation.<sup>135</sup> Nevertheless, the cattle industry's suit against Ms. Winfrey prompted an editorial writer to say, "Yep. It's impossible to libel a dead person, but to speak ill of a dead cow is another, more serious matter entirely."<sup>136</sup>

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128. *See id.*

129. *See* MacDonald v. Time, Inc., 554 F. Supp. 1053,1054 (N.D.N.J. 1983).

130. *Id.*

131. Texas Beef Group v. Winfery, 11 F. Supp. 2d. 858, 862 (N.D. Tx. 1998).

132. The suit was apparently a Godsend for media punsters and headline writers. *See* Eric Mink, *Thrill-O in Amarillo: Oprah Talk of Texas Star Shines as She Chews on Beef Libel Law*, DAILY NEWS, Jan. 23 1998, at 121. The article also notes the irony that there is no cause of action for defamation of dead people while such an action does exist for disparagement of dead meat. However, the article sarcastically adds, helpfully, that the Texas law applies only to perishable food, and, thus, disparagement of processed food like Spam is lawful.

133. *See* TEX. CIV. PRAC. & REM. CODE § 96.002 (West 1998).

134. *See* Texas Beef Group v. Winfrey, 11 F. Supp. 858, 862 (citing the Texas Perishable Food Disparagement Statute).

135. *See* Sam Howe Verhovek, *Talk of the Town: Burgers v. Oprah*, NEW YORK TIMES, Jan. 21, 1998, at A10.

136. *See* *Food Libel Laws Are Rot*, ROANOKE TIMES & WORLD NEWS, Jan. 23, 1998,

In a newspaper article, “60 Minutes” commentator Andy Rooney criticized the rule against defamation of the dead.<sup>137</sup> He blamed the rule for allowing film producer Oliver Stone to “rearrange the facts of history to fit the dramatic needs of his story” for the movie, “JFK.”<sup>138</sup> In that movie, Mr. Stone portrayed Central Intelligence Agency officials as conspiring to assassinate President John F. Kennedy.<sup>139</sup>

#### H. *Reliance on Criminal Libel Laws*

Some early courts had justified the defamation of the dead rule on the basis of the availability of criminal libel as a remedy.<sup>140</sup> In upholding a defamation verdict for the defendants, a California court noted that, “[a]s a matter of sound public policy, the malicious defamation of the memory of the dead is condumens as an affront to the general sentiments of morality and decency, and the interests of society demand its punishment through the criminal courts.”<sup>141</sup> The court further stated that as the law did not contemplate that defamation of the dead could not cause a special damage to a third person, no such person should be allowed to recover against the wrongdoer.<sup>142</sup> While such a rationale could support subsequent rulings to bar claims for defamation of the dead by the decedent’s survivors, the rationale does not explain rulings that have barred claims by the decedent’s estate.

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at A8.

137. See Rooney, *supra* note 74, at 4A.

138. See *id.*

139. See Paul Neely, *Fiction Stranger Than Truth*, CHATTANOOGA TIMES AND FREE PRESS, Feb. 7, 1999, at I4.

140. See, e.g., Skrocki v. Stahl, 110 P. 957 (Cal. App. 3d 1910) (holding that defamatory statement that the decedent was an anarchist was not concerning the plaintiff, the decedent’s brother); Soresen v. Balaban, 11 A.D. 164, 167-8 (N.Y. App. Div. 1896); Eagles v. Liberty Weekly, Inc., 244 N.Y.S. 430 (Supp. Ct. 1930).

141. See Skrocki, 110 P. 957 at 960; see also Lee v. Weston, 402 N.E.2d 23, 27 (Ind. Ct. App. 1980) (“[o]ne who defames the memory of the dead, whatever his responsibility may be under the criminal law [] is not liable civilly to the estate of the decedent or to his relatives.”)

142. See Skrocki, 110 P. at 960.

## II. DECLINE OF CRIMINAL LIBEL STATUTES: HOLDING DEFENDANTS ACCOUNTABLE FOR DEFAMING THE DEAD

This section discusses the law of criminal libel as a potential remedy for defamation of the dead. While common law prohibited a civil action for defamation of the dead, the common law allowed the state to prosecute those who published such defamatory statements.<sup>143</sup> This section discusses the history of criminal libel, and its decline that has now freed defendants of any constraint against defaming the dead, given the common law's rule that forbids a civil cause of action for defamation of the dead

The origin of criminal libel dates back more than 2,000 years to the Babylonian Code of Hamurabi.<sup>144</sup> Under that code, it was a "punishable offense for a man to point a finger at a priestess or the wife of another man unless he could justify it."<sup>145</sup> Under Roman law, the criminal action was restricted to allow criticism of historic figures; thus, the state could no longer initiate the action once the generation contemporaneous with the defamed decedent had passed away.<sup>146</sup>

### A. *Criminal Libel at Common Law*

Most of the reported cases on defamation of the dead involve a survivor seeking to recover for the harm to reputation, arguing that the slander or libel allegedly defamed the living plaintiff as well.<sup>147</sup> As illustrated above, the common law rule does not allow for a plaintiff to bring such an action. However, common law did provide an effective remedy against defamation of the dead. At common law, it was a misdemeanor to publish statements that tend to blacken the memory of the dead.<sup>148</sup>

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143. See MARTIN L. NEWELL, *THE LAW OF SLANDER AND LIBEL* § 825 (4th ed. 1924).

144. See *New Jersey v. Stults*, 86 N.J. Super. 217, 224 (Super. Ct. 1965).

145. See *id.*

146. See *State v. Haffer*, 162 P. 45,46 (Wash. 1916) (upholding a conviction for criminal libel of George Washington, even though the generation contemporaneous with Washington had passed away). The *Haffer* court rejected the argument that its rule would adversely affect scholastic research, because its rule includes a good faith exception. *Id.*

147. See *supra* Part I.D.

148. See NEWELL, *supra* note 143, § 825.

Criminal libel, under common law, had several aspects. The requisite state of mind for the commission of crime was malice, “the malevolent purpose” to injure the decedent’s family and posterity.<sup>149</sup> This common law notion of malice, reflecting an ill-will is quite distinct from the constitutional element of “actual malice” in modern civil defamations that the *Sullivan* Court adopted.<sup>150</sup> There, actual malice reflects not ill-will but a reckless disregard by the defendant for the veracity of the published statement.<sup>151</sup>

In setting forth its rule on criminal libel, the courts were typically concerned about breach of peace.<sup>152</sup> Libels that blackened the memory of the dead were thought to induce the decedent’s family, or even members of the community-at-large, to seek revenge, thus breaching the peace.<sup>153</sup> But defamations of the dead were not the only targets of criminal libel. Any publication that had the tendency to breach the peace constituted criminal libel, at common law. Thus, libels against government, God, and religion were similarly punishable.<sup>154</sup>

However, the breach of peace requirement was not a strict one.<sup>155</sup> It was not necessary to show that the libel resulted in a breach of peace.<sup>156</sup> Rather, courts considered the effect of the statement on the memory of the decedent.<sup>157</sup> Thus, the defendant could be found guilty of criminal libel, if the “natural effect” of the published words would “vilify the memory of the deceased” making a breach of peace imminent or probable.<sup>158</sup>

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149. *See id.*

150. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

151. *See id.*

152. *See* NEWELL, *supra* note 143, § 825.

153. *See id.* § 804.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *See* NEWELL, *supra* note 143, § 825.

### B. *Criminal Libel Statutes and Prosecutions*

In England, libel was first made a crime more than 700 years ago; but the rationale underlying it has shifted in a significant way.<sup>159</sup> Originally, the rationale was to help maintain order and loyalty to feudal rulers<sup>160</sup> and to make sure that no contempt was brought on the family of the dead.<sup>161</sup> However, with the enactment of Lord Campbell's Act in 1843, which made truth a defense,<sup>162</sup> the rationale became to protect the decedent's reputation.<sup>163</sup>

The English criminal libel statute—and prosecutions under it—were not limited to libels against feudal rulers; in 1607, the law was used to prosecute a person for the defamation of the dead Archbishop of Canterbury.<sup>164</sup> Originally, ecclesiastical courts had jurisdiction over such crimes, but royal courts assumed the jurisdiction in the thirteenth century.<sup>165</sup> Such trials, on the defamatory nature of the given statement, were not heard by a jury until the common law courts adopted the crime of libel.<sup>166</sup> Truth was not a defense<sup>167</sup> at trials for seditious libel in the Star Chamber,<sup>168</sup> a royal court “designed to eliminate political and religious rivals of the monarchy through treason trials.”<sup>169</sup> That truth was not a de-

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159. See Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM & ENT. L.J. 235, 239 (1994); Sean Thomas Prosser, *The English Libel Crisis: A Sullivan Appellate Review Standard is Needed*, 13 N.Y.L.SCH. J. INT'L & COMP. L. 337, 339-340 (1992).

160. See *New Jersey v. Stults*, 86 N.J. Super. 217, 224 (Super. Ct. 1965) (discussing history of criminal libel).

161. See *State v. Haffer*, 162 P. 45,46 (Wash. 1916) (discussing history of criminal libel).

162. See Mark P. Denbeaux, *The First Word Of The First Amendment*, 80 NW. U.L. REV. 1156, 1199 (1986).

163. See *Regina v. Stevens* [1995] Man. Ct. App. 78.

164. See *Stults*, 86 N.J. Super. at 224 (discussing the history of criminal libel).

165. See *Fitts v. Kolb*, 779 F.Supp. 1502, 1506 (D.S.C. 1991) (discussing history of criminal libel).

166. See *id.* at 1506-7.

167. See *Fitts*, 779 F.Supp. at 1506 (noting the role of truth as defense); *Beauharnais*, 343 U.S. at 254-55 (noting the role of truth as defense); *Garrison v. Louisiana*, 379 U.S. 64, 67-8 (1964) (noting the role of truth as defense).

168. See *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952). (Black, J., dissenting) (discussing history of criminal libel).

169. Douglas J. Brocker, *Survey of Developments in North Carolina Law, Indelible*

fense reflected the original rationale for the law—maintenance of peace and order.<sup>170</sup> Because defamatory statements tended to cause quarrels, fights, and incite revenge with ensuing bloodshed,<sup>171</sup> truth was irrelevant, as society presumed that true defamatory statements could cause as much—and perhaps even more—violence than false ones.<sup>172</sup> Truth became a defense to criminal libel as per the 1843 Lord Campbell’s Act.<sup>173</sup>

Criminal libel also had a notable role in Colonial America and the subsequent early years of the Republic.<sup>174</sup> In 1735, a New York jury defied a judge’s instruction on the irrelevance of truth to criminal libel and acquitted publisher John Peter Zenger for publishing critical statements of the British Crown.<sup>175</sup> The state had charged Mr. Zenger with criminal libel for publishing articles that were critical of the appointed governor, William Cosby.<sup>176</sup> The jury of colonial men ignored the judge’s instruction that sought to limit the juries to its fact-finding role, and found that the critical statements, as a matter of law, were not libelous.<sup>177</sup>

Criminal libel also had a prominent role in American legal his-

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*Ink in the Milk: Adoption of the Inclusionary Approach to Uncharged Misconduct Evidence in State v. Coffey*, 69 N.C.L. REV. 1604, 1613 (1991).

170. See *Garrison*, 379 U.S. at 68 (discussing rationale for criminal libel); Georgia’s “Criminal Defamation” statute reflects the original rationale:

A person commits criminal defamation when, without privilege to do so and with intent to defame another, living or dead, he communicates false matter which tends to blacken the memory of any one who is dead or which exposes one who is alive to hatred, contempt, or ridicule, and which tends to *provoke a breach of the peace*.

*Id.* (emphasis added), quoted in *Porter v. Kimzey*, 309 F. Supp. 993,994 (N.D. Ga. 1970). The statute is now codified at GA. CODE ANN. §§ 16-11-40 (1998).

171. See *Fitts v. Kolb*, 779 F.Supp. 1502, 1507 (D.S.C. 1991) (discussing rationale for criminal libel).

172. See *Regina*, [1995] Man. Ct. App. 78, at 108 (quoting the maxim “the greater the truth, the greater the libel.”).

173. See *id.*

174. See *Beauharnais v. Illinois*, 343 U.S. 250, 254-5 (1952) (discussing the history of criminal libel).

175. See *Fitts*, 779 F.Supp. at 1507 (discussing the traditional rationale for criminal libel); see SACK & BROWN, *supra* note 11, § 1.2.2.

176. See R. Alex Morgan, Comment, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won’t Be*, 29 ARIZ. ST. L.J. 1127,1130 (1997).

177. See *id.*

tory at the turn of the nineteenth century. Chiefly as a political tool against the opposition party, the Federalist Congress enacted the Sedition Act of 1798,<sup>178</sup> a federal criminal libel statute that outlawed (false) defamatory speech against the United States government, Congress or the President, then Federalist John Adams.<sup>179</sup> Not surprisingly, opposition leaders, including Thomas Jefferson and James Madison attacked the law's constitutionality on the ground that it violated the First Amendment, which had been ratified in 1791.<sup>180</sup>

Despite its ancient roots, criminal libel has undergone two important changes in the United States from the early English common law. First, while truth was not a defense to criminal libel as originally enacted in England, the United States Supreme Court held that truth is a defense to any defamation action.<sup>181</sup> Indeed some American states even incorporated such a requirement into their state constitutions.<sup>182</sup> Second, while to the extent that the original rationale for the law was maintenance of order, modern courts and legislatures have focused instead on defamation's danger to one's reputation and not its potential for causing violence.<sup>183</sup> Arguably, all American jurisdictions codified the common law of criminal libel.<sup>184</sup>

Although there are two common types of criminal statutes,

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178. Act of July 14, 1798, ch. 74 § 3, 1 Stat. 596 (1798).

179. See *Fitts v. Kolb*, 779 F.Supp. 1502, 1507-08 (D.S.C. 1991).

180. See *id.*

181. See *Garrison v. Louisiana*, 379 U.S. 64, 70 (1964).

182. See *New Jersey v. Stults*, 86 N.J. Super. Ct. 217, 225. (Super. Ct. 1965); *Fitts*, 779 F.Supp. at 1508; *Garrison*, 379 U.S. at 70, n7.

183. See *Stults*, 86 N.J. Super. at 225; *Regina*, [1995] Man. Ct. App. 78 at 24.

184. See Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 973 (1955).

One Commentator states:

The states themselves since the beginning of the Republic had sustained statutes and applied common law directed against criminal libel, contempt by publication, inciting to riot, disturbance of the peace, obscenity and slander, all of which involved limitations on speech. It was not until the forties that these exercises of power were even seriously called into question by the Supreme Court. The state and federal sedition laws had been more controversial but even these had been for the most part sustained.

*Id.*; see also MODEL PENAL CODE § 250.7 cmt. 1 (Tentative Draft 1961) ("the offense of criminal libel [is] presently penalized in all American states.").

both types criminalize defamatory statements that “blacken” the memory of the dead.<sup>185</sup> The two types are substantially the same. The minor difference is that while one type focuses only on blackening the memory of the dead, the other also makes explicit the notion of provoking the decedent’s survivors to breach the peace.<sup>186</sup> Such statutes have also outlawed statements made against the government officials,<sup>187</sup> subjecting the entire statute to numerous constitutional attacks.<sup>188</sup>

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185. See *Beauharnais v. Illinois*, 343 U.S. 250, 254-7 (1952).

186. See MODEL PENAL CODE § 250.7 cmt. 1 (Tentative Draft 1961). American criminal libel legislation, substantially incorporating the common law in the first part of the Twentieth Century, usually took on the following forms, with minor variation:

A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, or virtue or reputation or publish the natural defects of one who is alive, and thereby expose him to public hatred, contempt, ridicule, or financial injury.

A libel is a malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of the public confidence and social intercourse; or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends.

*Id.* The American Law Institute in a draft of the Model Penal Code in 1961 proposed Section 250.7, which made criminal libel against anyone or against “any racial, national, or religious group” a misdemeanor. MODEL PENAL CODE § 250.7 (Tentative Draft 1961). The proposed Section 250.7 was never adopted.

187. See, e.g., LA. REV. STAT. ANN. §§ 14:47-14:51.1 (1998). Section 14:48 governs defamatory statements or publications which do not come within the “qualified privilege” rule in Section 14:49. See *id.* If the communication is false, malice is presumed and the accused must overcome this presumption by showing a justifiable motive. See *id.* If the communication is true, the state has the burden of proving actual malice. See *id.* This is a change from the former rule that, except in privileged communications, malice is presumed from the fact of publication. See *id.*; *State v. Lambert*, 178 So. 508 (La. 1938).

188. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 69 (1964) (holding that the Louisiana Criminal Libel statute was unconstitutional as interpreted to cover false statements against public officials); *Nevins v. Mancini*, No. Civ. 91-119-M, 1993 WL 764212, at \*1 (D.N.H. Sept. 3, 1993) (holding statute facially invalid); *Fitts v. Kolb*, 779 F.Supp. 1502 (D.S.C. 1991) (holding statute void for vagueness).

### C. Decline of Criminal Libel

Whatever its form, criminal libel has fallen into “virtual desuetude.”<sup>189</sup> There have been relatively few prosecutions for criminal libel in modern times,<sup>190</sup> even though as many as twenty-one American jurisdictions still have such statutes.<sup>191</sup> In fact, one count found only ninety-one reported cases of criminal libel in appellate courts in thirty-five years.<sup>192</sup> The Supreme Court has attributed this decline to the society’s preference for civil defamation and recovery of damages over criminal libel and the violence that the penal statute intended to prevent.<sup>193</sup> But times and mores changed and criminal libel could no longer be justified as a means to prevent violence that might have once arisen from the defamatory statement.

Reflecting the modern trend, the Model Penal Code has no provisions for criminal libel.<sup>194</sup> In contrast, earlier in this century, every jurisdiction in the United States had recognized criminal libel by case or statute.<sup>195</sup> The drafters of the Model Penal Code noted that victims of defamation already had an action for civil remedy and thus there was no justification for continued inclusion of criminal libel as such penal sanctions should be reserved for more harmful behavior.<sup>196</sup>

There have been several recent attacks on the constitutionality

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189. See *Garrison*, 379 U.S. at 69.

190. See *id.*; *Press Group Files Federal Suit*, LAS VEGAS REVIEW-JOURNAL, July 8, 1998, at 6B.

191. See Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 231, 237 (1995).

192. See *New Jersey v. Stults*, 86 N.J. Super. 217, 226-7 (Super. Ct. 1965); see, e.g., *State v. Haffer*, 162 P. 45, 46 (Wash. 1916) (upholding a conviction for criminal libel of George Washington because “we are quite unable to appreciate an argument which suggests that any one has a constitutional right to maliciously defame the memory of a deceased person, though such person’s memory lives in history, any more than to maliciously defame a living person.”).

193. See *Garrison*, 379 U.S. at 69-70.

194. See *Fitts v. Kolb*, 779 F.Supp. 1502, 1518 (D.S.C. 1991).

195. For a list of citations to the relevant statutes and cases, see *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952).

196. See MODEL PENAL CODE § 250.7 cmt. 1 (Tentative Draft 1961).

of state criminal libel statutes.<sup>197</sup> The results have been mixed. In *Colorado v. Ryan*,<sup>198</sup> the state charged the defendant for distributing a fictitious “Wanted” poster of an ex-girlfriend.<sup>199</sup> Because the criminal statute did not contain an “actual malice” standard,<sup>200</sup> the trial court had invalidated the entire statute, stating it was unconstitutional.<sup>201</sup> But the appeals court reversed the trial court and upheld the statute, at least as it applied to “private” figures on matters of public concern.<sup>202</sup> Similarly, a federal court invalidated South Carolina’s criminal libel statute on the ground that the statute lacked the requisite “actual malice” standard.<sup>203</sup> However, the court refused to hold criminal libel laws as per se unconstitutional,<sup>204</sup> arguing that such statutes, if properly drafted, would not chill speech.<sup>205</sup>

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197. See, e.g., *Eberle v. Municipal Court*, 55 Cal. App. 3d 423 (Ct. App. 1976) (holding that California’s criminal libel statute was unconstitutional).

198. 806 P.2d 935 (Colo. 1991).

199. See *id.* at 936-37.

200. The relevant portion of the Colorado criminal libel statute, which is typical of that in other jurisdictions, states “a person who shall knowingly publish or disseminate . . . any statement or object tending to blacken the memory of one who is dead . . . and thereby to expose him to public hatred, contempt, or ridicule commits criminal libel.” COLO. REV. STAT. § 18-13-105 (1998); see *Ryan*, 806 P.2d at 936; cf. *Porter v. Kimzey*, 309 F. Supp. 993, 996 (N.D. Ga. 1970) 996 (stating in dicta that Georgia’s criminal defamation statute does meet the “actual malice” standard).

201. See *Ryan*, 806 P.2d at 936. The United States Supreme Court established the actual malice standard in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

202. See *Ryan*, 806 P.2d at 940-1.

203. See *Fitts v. Kolb*, 779 F.Supp. 1502, 1514-15 (D.S.C. 1991). Like the Colorado Court, the *Fitts* court apparently left in tact the statute’s provisions relating to defamation of the dead, subject to the “actual malice” and other constitutional limits on defamation. *Id.* The court also held that the requisite “malice” implies a reckless disregard for the truth not ill-will toward the libel victim, as the common understanding of “malice” might suggest. *Id.* Finally, *Fitts* courts specifically stated that “the court declines to find the statute as unconstitutionally vague, except insofar as the statute does not distinguish between common-law malice and constitutional malice.” *Id.* Another federal court asserted, in dicta, that criminal libel laws are not per se unconstitutional. See *Porter*, 309 F. Supp. at 996, n.3. The court disposed of a constitutional challenge on the Georgia statute on procedural grounds. But having done so, it proceeded in the footnote to state that such laws could be constitutional. However, it noted that the Georgia statute presents a peculiar Free Speech problem as it appears to only criminalize those libels which tend to “provoke a breach of peace.” *Id.*

204. See *Fitts*, 779 F.Supp. at 1518.

205. See *id.*

The decline of criminal libel has coincided with the rise of civil defamation actions. One court even suggested that a defamed person should simply avail himself of his civil remedies and not seek a criminal prosecution.<sup>206</sup> The drafters of the Model Penal Code also assumed that the civil defamation cause of action was sufficient and thus, a criminal libel statute was no longer necessary.<sup>207</sup>

D. *The Restatement (Second) of Torts Allows for Implying a Private Cause of Action from Criminal Statutes*

Under the view that the American Law Institute set forth in its *Restatement (Second) of Torts*, courts have the authority and discretion to imply a private cause of action from a criminal statute, where the legislature has failed to provide a civil remedy.<sup>208</sup> The Restatement provides the following three-pronged general standard: (1) the criminal statute protects a class of persons (as opposed to the public at large); (2) the private remedy would further the legislative purpose of the statute; and (3) the private remedy would be necessary “to assure the effectiveness” of the criminal statute.<sup>209</sup> The commentary to the section further illustrates the section’s applicability to criminal libel. According to the *Restatement*, such traditional torts as battery, false imprisonment and trespass to real property developed in part from criminal statutes.<sup>210</sup>

Even the civil action for slander per se, a form of civil defamation, has been implied from criminal libel.<sup>211</sup> Under the doctrine of slander per se, a female victim of a defamatory statement alleging that she was unchaste need not prove special damages to recover for defamation.<sup>212</sup> The *Restatement* notes that a Texas court im-

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206. See *New Jersey v. Stults*, 86 N.J. Super. 217, 226-27 (Super. Ct. 1965).

207. See *id.* at 227-8; *Garrison v. Louisiana*, 379 U.S. 64, 69 (1964).

208. See RESTATEMENT (SECOND) OF TORTS § 874A.

209. See *id.* When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

210. See *id.* at cmt. f.

211. See *supra* note 184.

212. See SACK & BROWN, *supra* note 11, at § 272.

plied such a rule in a departure from common law—from a state criminal statute that outlawed the makings of such statements.<sup>213</sup>

According to the *Restatement*, the primary test for whether a court should imply a private cause of action from a statute is whether the private cause of action is “consistent with the legislative provision, appropriate for promoting its policy and needed to assure its effectiveness.”<sup>214</sup> The *Restatement* further provides six

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213. See RESTATEMENT (SECOND) OF TORTS § 874A cmt. f, illus. 5 (citing *Hatcher v. Range*, 81 S.W. 289 (Tex. 1904)).

214. See RESTATEMENT (SECOND) OF TORTS § 874A cmt. h. Comment h provides a list of factors affecting the determination of whether the court should provide a tort remedy:

(1) The nature of the legislative provision. How specific is the legislative provision in its regulation of conduct? Does it clearly let both the court and the actor know in advance what conduct is prohibited? Or is it posed in broad, general terms that will acquire specific meaning only if—and after—the court has determined to supply the tort remedy and expressed it for the benefit of the persons being affected? Criminal statutes are more likely to be utilized by a court for this purpose; generalized constitutional provisions are less likely to be utilized but may nevertheless be used if a fundamental right is involved. In the case of an administrative regulation, the court will also look with care at the text of the statute sanctioning or directing the promulgation of the regulation, to ascertain whether supplying the tort remedy will be in furtherance of the policy underlying that statute too. Utilization of rules of a private organization is still so much in the formative stage that comments are not warranted.

(2) The adequacy of existing remedies. Consideration is given first to the remedies provided for in the legislative provision itself. Are they sufficient to effectuate the policy of the legislation or do they require supplementation? What other remedies are available in the court’s repertoire and how effective will they be? Will a declaratory judgment or the granting of an injunction prove better than the damage remedy because it is easier to administer or more effective? Do several remedies need to be available to the plaintiff, either at his election or at the determination of the court in the light of the particular facts?

(3) The extent to which the tort action will aid or supplement or interfere with, existing remedies and other means of enforcement. If application of the legislation has been placed in the hands of an administrative agency, for example, this may have been done with the intent that the agency exercise a discretionary enforcement or treat the matter from an administrative standpoint. To a certain extent this may also be true of criminal law enforcement, with the prosecutor being able to exercise considerable discretion. In the case of a tort action, on the other hand, the plaintiff is concerned only with whether it is in his own interest to bring the action, and enforcement is more rigid in one respect and perhaps more haphazard in another. Is this good or bad in regard to the particular legislation? How far are prosecutors or administrative agencies likely to prove ineffective because of understaffing or apathy? Will the tort action provide a

factors to determine whether a private cause of action would be “appropriate” in light of the legislative policy and “needed” for its maximum effectiveness: (1) The nature of the legislative provision; (2) the adequacy of existing remedies; (3) The impact of a private cause of action on the existing mechanisms of enforcement

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greater deterrent and be more likely to insure compliance with the law? Is it likely to impose too heavy, or too erratic, a penalty, if the amount awarded depends upon the measure of the damage suffered by the particular plaintiff rather than the measure of fault on the part of the defendant? Will the deterrent effect of the tort action apply not just to the forbidden conduct but also to participation in the general activity at all? Are the damages objectively ascertainable in terms of measurable compensation for the loss or injury, or are they necessarily left to the unguided determination of a jury? Will the availability of an injunctive remedy in a civil action, as distinguished from a criminal prosecution, enable the court to exercise tighter control? Is relief in the form of compensation after the event adequate or should injunctive relief to prevent the injury be granted?

(4) The significance of the purpose that the legislative body is seeking to effectuate. How important is the policy behind the legislative provision? How important is the interest protected? Does it involve a fundamental right or a minor matter? Is it adequately protected by a remedy that merely attempts to prevent an interference with it, or is it of sufficient importance to require compensation when the attempt at prevention does not succeed

(5) The extent of the change in tort law. How drastic is the change from established law? How near is the factual situation before the court to an existing tort? Was the law already moving in this direction so that the step to include this factual situation in the scope of an existing tort has been merely accelerated or is the change radically inconsistent with traditional law? Would the change merely eliminate a historical anomaly or would it alter the fundamental nature of the established tort? Will the elements of the enlarged tort be difficult or easy to understand and apply? If the question is whether the federal courts will afford a federal right of action, how well established is it that the actor's conduct was sufficiently wrongful to constitute a tort at common law?

(6) The burden that the new cause of action will place on the judicial machinery. Will a heavy flow of litigation result? Will the trials be time-consuming? Are they likely to involve heavily contested fact issues? Will one or two suits, whether civil or criminal, be likely to inhibit violations of the legislation or will the factual issues vary so much that numerous cases are likely to continue? This factor, of course, does not carry weight if a fundamental right is being impaired or other remedies are not adequate to protect it; but the factor may be persuasive if the right involved is not consequential or other means of protecting it are also available. Within this factor comes the question of whether the federal courts should take it upon themselves to provide a federal action under a federal statute or treat the matter as adequately handled in the state courts by the tort remedies under the common law.

*Id.*

or remedies; (4) the significance of the purpose of the legislature in enacting the statute; (5) the extent of departure from current tort law; and (6) the burden of implying a private cause of action on the court system.<sup>215</sup>

E. *Precedent for Implying a Private Cause of Action from State or Federal Statutes Favors Implying a Private Cause of Action for Defamation of the Dead from State Criminal Libel Statutes*

Despite the *Restatement's* listing of the six factors, most of the cases that have considered the implication of a private cause of action from a state statute have focused on a set of three factors, somewhat similar to the six *Restatement* factors, that the Supreme Court has set forth: (1) whether the plaintiff is a member of a special class of beneficiaries under the statute (as opposed to the public at large); (2) whether the statute's legislative history provides any implicit or explicit evidence of a legislative intent to create or deny such a remedy; and (3) whether implying a private cause of action would be consistent with the underlying purposes of the legislative scheme.<sup>216</sup>

State courts have derived these three factors from *Cort v. Ash*,<sup>217</sup> the leading Supreme Court case on when a court should imply a private cause of action from a statute.<sup>218</sup> Applying the above factors, the *Ash* Court found that a federal criminal statute governing campaign contributions by corporations did not implicitly provide a private cause of action to a corporation's shareholder because a remedy was already available to the shareholder through state corporate law.<sup>219</sup> Specifically, the case had arisen out of advertisements by a steel corporation in fall of 1992 that challenged the veracity of statements made by George M. McGovern, the Democratic Party's Presidential nominee who had suggested that

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215. *See id.*

216. *See Fischer v. Metcalf*, 543 So. 2d 785,788 (Fla. Dist. Ct. App. 1989).

217. 422 U.S. 66, (1975).

218. Maureen Armour, *A Nursing Home's Good Faith Duty "To" Care: Redefining a Fragile Relationship Using the Law of Contract*, 39 ST. LOUIS L.J. 217, 259-60 (1994).

219. *See Cort v. Ash*, 422 U.S. at 84-5.

large corporations do not pay their fair share of taxes.<sup>220</sup> In the advertisements, the chairman of the corporations' board called such suggestions "rhetoric" and "baloney."<sup>221</sup> While the *Ash* Court found that the particular criminal statute in question did not give rise to a private cause of action to the given shareholder plaintiff, it did specifically hold that a federal criminal statute can give rise to an implied private cause of action.<sup>222</sup>

State courts have apparently found the *Cort v. Ash* analysis convincing. Many state courts have chosen to apply the case in considering whether to imply a private cause of action from their own state statutes.<sup>223</sup> State courts applied the analysis to state statutes even though *Cort v. Ash* involved only a federal statute.<sup>224</sup> Furthermore, state courts have continued to apply the *Cort v. Ash* analysis to state statutes, even after the Supreme Court itself arguably over-ruled *Cort v. Ash*, again in a case dealing only with a federal statute.<sup>225</sup> In *Transamerica Mortgage Advisors v. Lewis*, the Supreme Court held that the ultimate inquiry in such cases is whether the legislature, i.e. Congress, intended to create a private cause of action for the given plaintiffs.<sup>226</sup>

But nevertheless, state courts, when analyzing state statutes, have continued to follow the factors that the *Ash* Court set forth.<sup>227</sup> A recent Tennessee case is typical. In *Owens v. the University*

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220. *See id.* at 70. Although they did not name Mr. McGovern, the *Ash* Court presumed that he was the object of the advertisement's criticism. The advertisement simply referred to a "prominent presidential candidate" *See id.* at 70 n.2.

221. *See Cort v. Ash*, 422 U.S. at 70.

222. *See Cort v. Ash*, 422 U.S. 66,80 (1975).

223. Cases that, under *Cort v. Ash*, have concluded that the given state statute does imply a private cause of action include: *Bennett v. Hardy*, 784 P.2d 1258 (Wash. 1990); *United Steelworkers of America v. Tri-State Greyhound Park*, 364 S.E.2d 257 (W.Va. 1987); *Napoletano v. Cigna Healthcare of Connecticut, Inc.*, 238 Conn. 216 (Conn. 1996); *Ludlow Education Assoc. v. Town of Ludlow*, 644 N.E. 2d 227 (Mass. App. Ct. 1991). The cases that have concluded that, despite *Cort v. Ash*, the given state statute does not imply a private cause of action to the plaintiffs, include: *Greenlee v. The Board of County Commissioners of Clay County, Kansas*, 740 P.2d 606 (Kan. 1987); *McNeal v. F.F. Allen*, 621 P.2d 1285 (Wash. 1980); *Gardner v. Knights of Columbus*, 414 N.W.2d 706 (Mich. 1987).

224. *See Cort v. Ash*, 422 U.S. 66,80 (1975).

225. *See Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 15-16 (1979).

226. *Id.*

227. *See supra* note 223 and accompanying text.

*Club of Memphis*,<sup>228</sup> the Tennessee appellate court held that the state “Tip Statute” implicitly provided a private cause of action to certain banquet employees against a Club owner who the employees had alleged, withheld a portion of their gratuity in violation of the criminal statute.<sup>229</sup> In holding that the state criminal statute provided an implied private cause of action, the Tennessee court focused on whether: (1) the plaintiffs were members of a special class that the statute protected; (2) the legislature indicated on whether a private cause of actions should exist under the statute; and (3) providing an implied cause of action would be inconsistent with the purpose and enforcement of the criminal statute.<sup>230</sup>

Based on the above factors, the court found that the criminal statute did provide an implied private cause of action to the employees, because: (1) the plaintiffs were members of a special class that the statute protected; (2) the legislature was silent on the issue of private causes of action; and (3) a private cause of action would be consistent with the purpose and enforcement of the statute because it complements the criminal remedy.<sup>231</sup>

### III. COURTS SHOULD IMPLY A PRIVATE CAUSE OF ACTION FOR DEFAMATION OF THE DEAD FROM CRIMINAL LIBEL STATUTES

With criminal libel having fallen into virtual desuetude, court should imply a private cause of action for defamation of the dead from the criminal statutes. Such an implication meets the criteria that the *Restatement (Second) of Torts* and caselaw pursuant to *Cort v. Ash* have set forth for the propriety of implying a private remedy from criminal statute.<sup>232</sup> Furthermore, such an implication by the courts would be particularly appropriate now in light of a recent pronouncement by the Supreme Court on the reputational rights of decedents.

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228. No. 02A01-9705-CV-00103, 1998 WL 719616, at \*28 (Tenn. Ct. App. Oct. 15, 1998).

229. *See id.*

230. *See id.*

231. *See id.* at \*29-31.

232. *See supra* Part II.A.

A. *The Supreme Court Has Asserted That Decedents Do Retain an Interest in Their Reputations and Privacy*

Despite the adherence of common law courts to its rule on defamation of the dead and invasion of privacy upon the dead, a recent Supreme Court case casts some doubt on an underlying assumption of the common law courts.<sup>233</sup> Common law courts have long assumed that a person's interest in his reputation ends upon the person's death; thus, courts have held that the representative of a decedent's estate does not have a cause of action for either privacy or defamation, if the alleged torts occurred after the person's death.<sup>234</sup> However, in a case involving the impact of death of a client on the attorney-client privilege, the Supreme Court suggested that indeed, even when dead, a person does retain an interest in his reputation.<sup>235</sup>

That one's interest in reputation does not end upon death would only surprise those common law courts that have rigidly prohibited a cause of action to decedents' survivors or representatives.<sup>236</sup> If one's interest in his reputation truly ended upon his death, so many survivors would not have incurred so much trouble to restore or preserve a decedent's reputation.<sup>237</sup> The junior Gladstone would not have induced Peter Wright to sue him for defamation.<sup>238</sup> Actor Carroll O'Connor would have less reason to defame the drug supplier associated with the suicide of Mr. O'Connor's son.<sup>239</sup> Rev. Falwell may not have sought legal action against Hustler for suggesting that he had his first sexual experience with his mother, a woman who was dead when Rev. Falwell initiated the legal action against Hustler.<sup>240</sup> And certainly, Rhode Island would not have enacted a statute that provides a cause of action for defamations

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233. See *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S.Ct. 2081 (1998) (holding that the attorney-client privilege survives the death of the client).

234. See *supra* Part I.D.

235. See *Swidler & Berlin*, 118 S.Ct. at 2081.

236. See Part I.D.

237. See *id.*

238. See *supra* Part I.D.

239. See O'Neill, *supra* note 98, at A1.

240. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

upon the dead that arise from obituaries.<sup>241</sup>

B. *Courts Should Ensure that Decedents Can Protect Their Reputational Interest By Implying a Private Cause of Action for Defamation of the Dead from the Existing Criminal Libel Statutes*

Accepting the Supreme Court's pronouncement that decedents do have an interest in their reputation, courts should ensure protection of that reputation by implying a private cause of action for defamation of the dead from criminal libel statutes. Such a result would be consistent with the factors that the American Law Institute has set forth in its *Restatement (Second) of Torts*, and the jurisprudence of implying private causes of action from state criminal statutes, as guided by the Supreme Court's holding in *Cort v. Ash*.<sup>242</sup> Apparently, few survivors or representatives of a decedent have argued that a court should imply a private cause of action from a state's criminal libel statute.<sup>243</sup> When plaintiffs have made such an argument, courts have ignored or mis-interpreted the relevant caselaw and reached an erroneous result.<sup>244</sup>

In *Flynn v. Higham*, a California court upheld the dismissal of a defamation suit by the children of a decedent, actor Errol Flynn against the author and publisher of a book that stated that Errol Flynn was gay and a Nazi spy.<sup>245</sup> The court, without analyzing the established guidelines for implying a private cause of action, simply stated the widespread rule on there existing no private cause of action for defamation of the dead.<sup>246</sup>

Furthermore, the court's analysis was flawed. The cases that the court discussed as favoring the court's own refusal to provide an implied private cause of action for defamation actually undermine the court's conclusion.<sup>247</sup> It is true that the precedence in California was against a private cause of action for defamation of

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241. See R.I. GEN. LAWS § 10-7.1-1 (1998).

242. 422 U.S. 66, 80 (1975).

243. See Brown, *supra* note 4, at 1547-49.

244. See Flynn v. Higham, 149 Cal. App. 3d 677 (1983).

245. See *id.* at 679

246. See *id.*

247. See *id.*

the dead, but those precedents relied on facts that are no longer true.<sup>248</sup> Those earlier courts had, at least implicitly, relied on there being an alternate remedy for defamation of the dead—criminal libel.<sup>249</sup> But by the *Flynn* court's own account that remedy no longer exists as California courts had invalidated the state's criminal libel laws as unconstitutional.<sup>250</sup>

C. *Implying a Private Cause of Action for Defamation of the Dead Meets the Test that the Supreme Court Set Forth in Cort v. Ash*

Courts should, based on the *Cort v. Ash* factors, find that a state's criminal libel statute provides an implied cause of action to a decedent's estate (or the decedent's survivors) for defamation of the decedent.<sup>251</sup> Criminal libel statutes, beginning with Lord Campbell's Act, intended to protect the reputation of decedents and their survivors; the statutes were no longer concerned with the protection of the public at large.<sup>252</sup> Subsequent courts have focused on the statute's intent to protect reputation not on any tendency to breach peace.<sup>253</sup>

Furthermore, providing a private cause of action would be consistent with the legislative scheme and enforcement of criminal libel statutes. This factor weighs heavily in favor of implying a private cause of action for defamation of the dead. As courts have noted, criminal libel has fallen into "virtual desuetude"<sup>254</sup> and prosecutions for it have all but disappeared.<sup>255</sup> Such a result would

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248. *See id.*

249. In at least one of the cited precedents, the court spoke positively of criminal libel because defamation of the dead was "an affront to the general sentiments of morality and decency." *Skrocki v. Stahl*, 110 P. 957, 960 (Cal. App. 3d 1910). The other precedent that the *Flynn* court cited, *Saucer v. Giroux*, 54 Cal. App. 732 (1921), which noted that defamation of the dead was a crime punishable under the state penal code, also assumed that criminal libel was a valid remedy.

250. *See Flynn v. Higham*, 149 Cal. App. 3d 677, 680 n.1 (1983).

251. Criminal libel statutes do not explicitly indicate an intent to provide or withhold a private cause of action. Thus, that factor is not considered any further here.

252. *See Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952).

253. *See id.*

254. *See Commonwealth v. Armao*, 446 Pa. 325, 334-35 (1972).

255. *See id.*

have been tolerable if the wrong that the statute intended to protect against—blackening the memory of the dead—was no longer prevalent.<sup>256</sup> But that is not the case. Such otherwise-defamatory statements have continued to be published.<sup>257</sup> The only fact that has changed is that wronged parties—whether the decedent's estate or his survivors—no longer have the criminal remedy available to them.<sup>258</sup> Thus, providing a private cause of action would be particularly consistent with the underlying scheme of the statute.

D. *Implying a Private Cause of Action for Defamation of the Dead Meets the Guidelines that the American Law Institute Set Forth in Its Restatement (Second) of Torts*

Most of the *Restatement's* factors favor the implication of a private cause of action for defamation of the dead from the corresponding criminal libel statute.

*Nature of the legislative provision.* That the source of the implied private cause of action is a criminal statute, and not a constitutional provision, favors a court's implying the private cause of action.<sup>259</sup> The *Restatement* drafters distinguished between criminal statutes, which specifically delineate the targeted conduct from constitutional provisions, which only broadly outline its parameters.<sup>260</sup> The drafters were apparently concerned that affected parties should know that the given conduct is illegal before a court implies a private cause of action.<sup>261</sup> The drafters apparently believed that broad constitutional provisions are less likely to lend themselves to such knowledge as the broad constitutional provisions are likely to be particularly in need of interpretation by the courts.<sup>262</sup>

*The adequacy of existing remedies.* This factor also favors a court's implication of a private cause of action from criminal libel

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256. *See supra* Part I.D.

257. *See supra* Part I.D.

258. *See supra* Part II.

259. *See* RESTATEMENT (SECOND) OF TORTS § 874A cmt. h.

260. *See id.*

261. *See id.*

262. *See id.*

for defamation of the dead. Here, quite plainly, the *Restatement* drafters were concerned with whether existing remedies were sufficient to achieve the statutory policy.<sup>263</sup> The existing remedy of criminal libel of the dead has proven to be insufficient to achieve any policy.<sup>264</sup> In fact, there have been few prosecutions for criminal libel in recent decades, as criminal libel has fallen into a “virtual desuetude.”<sup>265</sup> Furthermore, in the absence of a criminal remedy, disgruntled survivors of a defamed decedent—as well as the decedent’s own representative—have consistently failed to convince courts to afford them any other remedy.<sup>266</sup> In earlier days, courts justified this because of the availability of criminal libel as a remedy.<sup>267</sup> Now, however, with criminal libel falling into a “virtual desuetude” courts are no longer justified to use the availability of an alternate remedy as a reason for not providing a private cause of action for defamation of the dead.<sup>268</sup>

The drafters of the Model Penal Code apparently ignored the common law’s rule prohibiting a civil action for defamation of the dead.<sup>269</sup> In justifying their omission of criminal libel, the drafters assumed that the civil law of defamation provides an effective remedy.<sup>270</sup> But the common law court’s refusal to provide a private cause of action for defamation of the dead undermines the validity of that assumption.

That there have been few prosecutions for criminal libel (of the dead) does not mean that there have been few defamations of the dead.<sup>271</sup> On the contrary, the media and the reported court cases reveal a significant number of instances of defamation of the dead.<sup>272</sup>

*The impact of a private cause of action on the existing mecha-*

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263. *See id.*

264. *See supra* Part II.C.

265. *See id.*

266. *See supra* Part I.D.

267. *See supra* Part I.H.

268. *See supra* Part II.

269. *See supra* note 187 and accompanying text.

270. *See supra* Part II.C.

271. *See supra* Part I.D.

272. *See supra* Part I.D.

*nisms of enforcement or remedies.* This factor is probably inconclusive on whether a court should imply a private cause of action for defamation of the dead from criminal libel statutes. But the analysis here is complicated by the vagueness of the drafters in articulating their concern. In elaborating on this factor, the drafters posed many questions.<sup>273</sup> The questions include, the adequacy of a private cause of action as a deterrent to the conduct targeted by the statute, the lack of constraints that a private party (as opposed to a prosecutor or administrative agency) may feel in bringing a private cause of action to the impact that the implication of a private cause of action would have on conduct that the criminal statute has not outlawed, and the extent to which factors such as prosecutorial understaffing or apathy limit the existing remedy.<sup>274</sup> The application of these factors to the implication of a private cause of action for defamation of the dead from criminal libel is inconclusive, as some of the factors point to opposite directions in this case.<sup>275</sup> For example, while, as noted above, that the existing remedy of criminal libel has proven to be limited favors an implication of a private cause of action under this factor. However, that a private cause of action may arguably discourage non-defamatory scholarly research into the a decedent's life would disfavor an implication of a private cause of action for defamation of the dead.<sup>276</sup>

*The significance of the purpose of the legislative purpose.* This factor favors a court's implication of a private cause of action for defamation of the dead from criminal libel statutes. The *Restatement* drafters were concerned here with the relative importance of the goal involved in the statute and whether, again, existing remedies were sufficient to achieve the goal.<sup>277</sup> Despite the courts' consensus in refusing to provide a private cause of action for defamation of the dead, courts have not based their refusal on the premise that one's reputation is a "minor" and not a "fundamental" right.<sup>278</sup>

*The extent of the change in tort law.* This factor somewhat fa-

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273. See RESTATEMENT (SECOND) OF TORTS § 874A cmt. h

274. See *id.*

275. See *id.*

276. See *id.*

277. See RESTATEMENT (SECOND) OF TORTS § 874A cmt. h.

278. See *id.*

vors a court's implication of a private cause of action for defamation of the dead from criminal libel statutes. Here, the *Restatement* drafters were concerned with how great a deviation providing a private a cause of action for defamation of the dead would be from existing law.<sup>279</sup> In a sense, providing such cause of action would be a significant deviation from current law, given the current number of cases that have adhered to the traditional common law rule.<sup>280</sup> But the *Restatement* drafters make it clear that such deviation is only one aspect of this factor.<sup>281</sup> The other aspects favor an implication of a private cause of action for defamation of the dead from criminal libel statutes. The facts underlying defamation of the dead would not be significantly different than those underlying the traditional defamation action. Arguably, not allowing for defamation of the dead is a historical anomaly and given the Supreme Court's language on the dead having a reputational interest,<sup>282</sup> the law is moving in the direction of a private cause of action for defamation of the dead. Finally, although some have argued—or more accurately, assumed—that providing a private cause of action for defamation of the dead would present practical problems, one state's experience belies those assumptions. In 1974, Rhode Island enacted a statute that provided a limited cause of action for defamation of the dead that apparently has not given rise to any practical problems.<sup>283</sup>

*The burden on the court system.* This factor favors a court's implication of a private cause of action for defamation of the dead from criminal libel statutes. Here, the *Restatement* was concerned with a “floodgates” scenario where providing the private cause of action would overburden the court with lawsuits. That there is not a single reported case involving Rhode Island's defamation of the dead statute in the twenty-five years since its enactment suggests that courts need not concern themselves about a possible floodgate scenario.<sup>284</sup> Any concerns on the impracticality or wisdom of pro-

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279. *See id.*

280. *See supra* Part I.A.

281. *See* RESTATEMENT (SECOND) OF TORTS § 874A cmt. h.

282. *See id.*

283. *See id.*

284. *See id.*

viding a private cause of action for defamation of the dead are unwarranted. Rhode Island's experience demonstrates that, if appropriately limited, a cause of action for defamation of the dead would not impede scholarly research or overburden the court system.

The Rhode Island statute has apparently proven effective. There are no reported cases on the statute in Rhode Island's appellate courts and no commentator has criticized its chilling impact of the Rhode Island law on speech or academic research.

#### CONCLUSION

There is no longer any justification for a court's adherence to the common law rule barring a private cause of action for defamation of the dead. The Supreme Court has recognized that criminal libel statutes that once provided a remedy for defamation of the dead no longer serve that purpose. The Court has further suggested that decedents do have a right to their reputation. Thus, courts should follow the established precedence on implying private causes of action from statutes and provide a private cause of action for defamation of the dead to a decedent's estate and survivors.