The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives

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I. TORT LAW AND THE TRADITIONAL APPROACH TO PERSONALITY RIGHTS

Within the conceptual framework adopted by private-law scholars the protection of personality is generally considered a province of tort law. Such an attitude is shared not only by the common law tradition,

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which has traditionally preferred the language of remedies, but also by the civil law tradition, more at ease with the lexicon of rights.[1]

In the Anglo-American context, privacy and defamation—the closest equivalents of the Continental category of "personality rights"[2]—are topics which are usually taught in "advanced torts" courses. Some of the most important essays and books written on the subject have been authored by experts of tort law.[3] The contemporary law on personality protection has its roots in the writ of trespass and other actions that evolved around the writ of trespass on the case (for defamatory words).[4]

Likewise, on the Continent, the first general basis for the recognition of personality rights has been—in modern times[5]—art. 1382 of the *Code Napoléon*.[6] The German Civil Code (*Bürgerliches Gesetzbuch—BGB*) expressly refers to the protection of the life, body and health of an individual in § 823, the fundamental provision on extra-

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1. On the civilian category of "subjective right" (*droit subjectif / subjektives Recht*), see H. COING, F.H. LAWSON & K. GRÖNFORS, DAS SUBJEKTIVE RECHT UND DER RECHTSSCHUTZ DER PERSÖNLICHKEIT (Frankfurt am Main-Berlin 1959); H.P. GLENN, LEGAL TRADITIONS OF THE WORLD 129 (Oxford 2000); G. Samuel, *"Le droit subjectif" and English Law*, 46 CAMBRIDGE L.J. 264 (1987).

2. The concept of "personality rights" is generally used to denote the bundle of rights aimed at the protection of the integrity and inviolability of the individual (*see* E.C. Reid, *Personality Rights: A Study in Difference*, *in* V.V. Palmer & E.C. Reid, eds., MIXED JURISDICTIONS COMPARED. PRIVATE LAW IN LOUISIANA AND SCOTLAND 387 (Edinburgh 2010). Art. 3 of the Quebec Civil Code provides the following (nonexhaustive) list of personality rights: "the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy" [*see* A. Popovici, *Personality Rights—A Civil Law Concept*, 50 LOY. L. REV. 349, 351, 353 (2004)]. For a comparative overview, see G. Brüggemeier, *Protection of Personality Interests in Continental Europe: The Examples of France, Germany and Italy, and a European Perspective*, *in* N.R. Whitty & R. Zimmermann, eds., RIGHTS OF PERSONALITY IN SCOTS LAW. A COMPARATIVE PERSPECTIVE 313 (Dundee 2009); F. RIGAUX, LA PROTECTION DE LA VIE PRIVÉE ET DES AUTRES BIENS DE LA PERSONNALITÉ (Bruxelles-Paris 1990); F. Kübler, *Rechtsvergleichendes Generalreferat*, *in* G. Dworkin et al. eds., DIE HAFTUNG DER MASSENMEDIEN, INSBESONDERE DER PRESSE, BEI EINGRIFFEN IN PERSÖNLICHE ODER GEWERBLICHE RECHTSPOSITIONEN 123 (Frankfurt am Main 1972); S. STRÖMHOLM, RIGHT OF PRIVACY AND RIGHTS OF THE PERSONALITY. A COMPARATIVE SURVEY (Stockholm 1967).

3. It is sufficient to mention the name of William Prosser [*see* W. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960)]. On the relationship between privacy and American tort law, see J.A. Page, *American Tort Law and the Right to Privacy*, *in* G. Brüggemeier, A. Colombi Ciacchi & P. O'Callaghan eds., PERSONALITY RIGHTS IN EUROPEAN TORT LAW 38 (Cambridge 2010).

4. *See* R. ZIMMERMANN, THE LAW OF OBLIGATIONS. ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1074 (Oxford 1996); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 438 (London 2002).

5. On the historical relevance of the Roman law of injuries (*actio iniuriarum*), see J. GORDLEY, FOUNDATIONS OF PRIVATE LAW. PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 217 (Oxford 2006); ZIMMERMANN, *supra* note 4, at 1050.

6. *See* G. Brüggemeier, *Protection of Personality Rights in the Law of Delict/Torts in Europe: Mapping Out Paradigms*, *in* PERSONALITY RIGHTS IN EUROPEAN TORT LAW, *supra* note 3, at 10; H. Coing, *Die Entwicklung der Persönlichkeitsrechte im 19. Jahrhundert*, *in* FESTSCHRIFT FÜR WERNER MAIHOFER ZUM 70. GEBURTSTAG 75, 76-78 (Frankfurt am Main 1988).

contractual liability.[7] The Swiss Civil Code (*Zivilgesetzbuch—ZGB*) adopted the famous general clause, according to which "celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participe" (art. 28).[8] On a doctrinal level, delictual concepts and categories have shaped the approach to personality rights and have strongly influenced its dogmatic rationalization.[9]

The predominance of extra-contractual perspectives in contemporary legal discourses on personality rights is clearly a legacy of history. The protection of personality emerged as an autonomous "problem" only in the nineteenth century.[10] The introduction of free press, the increase in the use of commercial advertisements, and the diffusion of new technologies (such as photography) enabled new and more subtle invasions of the personal sphere, which raised serious concerns in the ruling classes and triggered a growing number of lawsuits.[11] Called upon to deal with such conflicts, courts and scholars faced the challenge of "opening up" the law of extra-contractual liability to encompass new types of interests and harms beyond economic assets,

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7. In the text drafted by the First Commission, "honour" was also mentioned as a protected interest (D. Klippel & G. Lies-Benachib, *Der Schutz von Persönlichkeitsrechten um 1900*, *in* U. Falk & H. Mohnhaupt eds., DAS BÜRGERLICHE GESETZBUCH UND SEINE RICHTER. ZUR REAKTION DER RECHTSPRECHUNG AUF DIE KODIFIKATION DES DEUTSCHEN PRIVATRECHTS (1896-1914) 343, 352 (Frankfurt am Main 2000).

8. In the original wording of this provision, the notion of "personality" ("*personnalité*") was absent; in its place was used the expression "personal interests" ("*intérêts personnels*"). *See* A. Meili, *Sub art. 28*, *in* H. Honsell, N.P. Vogt & T. Geiser eds., ZIVILGESETZBUCH I, ART. 1-456 ZGB. BASLER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT 247 (2d ed., Basel-Genf-München 2002).

9. Several scholars have even criticized the use of the concept of *droit subjectif*, arguing that the protection of personality is carried out by the legal system in a purely "objective" manner. *See* P. ROUBIER, DROITS SUBJECTIFS ET SITUATIONS JURIDIQUES 73, 135, 364 (Paris 1963); P. ANCEL, L'INDISPONIBILITÉ DES DROITS DE LA PERSONNALITÉ. UNE APPROCHE CRITIQUE DE LA THÉORIE DES DROITS DE LA PERSONNALITÉ, THÈSE 7 (Dijon 1978); D. Messinetti, entry *Personalità (diritti della)*, *in* ENC. DIR., XXXIII, at 355 (Milano 1983).

10. On the distinction between the "fact" and the "problem" of protection of personality see S. Strömholm, *La protection de la vie privée—Essai de morphologie juridique comparée*, *in* MÉLANGES DE DROIT COMPARÉ EN L'HONNEUR DU DOYEN Å. MALMSTRÖM 185, 186 (Stockholm 1972).

11. For an overview of French case law on *droit à l'image*, see C. Derobert-Ratel, *Le droit de la personne sur son image à l'aube de la photographie*, R.R.J. DROIT PROSPECTIF 89 (2005); *see also* J.Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1175 (2004); R.P. Bezanson, *The Right of Privacy Revisited: Privacy, News and Social Change 1890-1990*, 80 CAL. L. REV. 1133 (1992); D.W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769 (1991); R.E. Mensel, *"Kodakers Lying in Wait": Amateur Photography and the Right to Privacy in New York, 1885-1915*, 43 AM. QUART. 24 (1991).

which, consistent with the "social model" of the classical codifications,[12] it had mainly been designed to protect.[13] The obstacles encountered were not marginal and in some experiences, such as those of the Germans or the Italians, the last barriers to recovery for nonpecuniary losses have been overcome only relatively recently.[14]

It is not surprising, therefore, that legal scholarship has strived to develop a theory of personality rights that could easily fit into the general framework of the law of torts. The weight accorded by German scholars to the paradigm of the "general right of personality" (*allgemeines Persönlichkeitsrecht*), for example, has been to a significant extent dictated by the need to circumvent the limitation of interests protected by tort law under § 823 *BGB*.[15] Similarly, the emphasis put by Warren and Brandeis[16] on the intrinsic worth of the inviolate personality and on the nonproprietary nature of the "right to privacy" can also be explained in light of the necessity to make damages available for distress and anguish.[17]

This has led to the widespread acceptance of a dogmatic model built around the following ideas: the 'defensive' structure of personality

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12. F. WIEACKER, DAS SOZIALMODELL DER KLASSISCHEN PRIVATRECHTSGESETZBÜCHER UND DIE ENTWICKLUNG DER MODERNEN GESELLSCHAFT (Karlsruhe 1953).

13. *See* P. Tercier, *Der Entwicklungsstand des Persönlichkeitsschutzes in Kontinentaleuropa*, *in* AA.VV., DAS PERSÖNLICHKEITSRECHT IM SPANNUNGSFELD ZWISCHEN INFORMATIONSAUFTRAG UND MENSCHENWÜRDE. VORTRAGSVERANSTALTUNG VOM 6. UND 7. MAI 1988 71, 73 (München 1989); H. Coing, *Europäisches Privatrecht*, Band II, 19. JAHRHUNDERT. ÜBERBLICK ÜBER DIE ENTWICKLUNG DES PRIVATRECHTS IN DEN EHEMALS GEMEINRECHTLICHEN LÄNDERN 513 (München 1989). For a detailed historical analysis, see U. WALTER, GESCHICHTE DES ANSPRUCHS AUF SCHMERZENSGELD BIS ZUM INKRAFTTRETEN DES BÜRGERLICHEN GESETZBUCHES (Paderborn-München 2004).

14. With regard to Germany, the landmark case is BGH, 14-2-1958, *Herrenreiter*, in JURISTENZEITUNG 571 (1958), and in B. MARKESINIS & H. UNBERATH, THE GERMAN LAW OF TORTS. A COMPARATIVE TREATISE 418 (4th ed., Oxford-Portland 2002); on this development, see N. WITZLEB, GELDANSPRÜCHE BEI PERSÖNLICHKEITSVERLETZUNGEN DURCH MEDIEN 44 (Tübingen 2002); C. von Bar, *Moderne Deliktsrechtspflege in den Zwängen einer wilhelminischen Kodifikation*, *in* 50 JAHRE BUNDESGERICHTSHOF. FESTGABE AUS DER WISSENSCHAFT, vol. I, BÜRGERLICHES RECHT 595, 598 (München 2000); Brüggemeier, *supra* note 6, at 23-24. With regard to the Italian experience, see Cass., 31-5-2003, n. 8827 and n. 8828, *in* FORO IT., 2003, I, 2272; G. ALPA & G. RESTA, LE PERSONE FISICHE E I DIRITTI DELLA PERSONALITÀ, IN TRATTATO DI DIRITTO CIVILE 547-51 (R. Sacco ed., Torino 2006); F.D. Busnelli & G. Comandé, *Non-Pecuniary Loss Under Italian Law*, *in* W.V. Horton Rogers ed., DAMAGES FOR NON-PECUNIARY LOSSES IN A COMPARATIVE PERSPECTIVE 135 (Wien-New York 2001).

15. *See* K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 688 (transl. by P. Weir, 3d ed., Oxford 1998).

16. S.D. Warren & L.D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

17. On this, see R.C. Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647, 648 (1991).

rights;[18] the 'ideal' character and extra-patrimonial nature of such rights;[19] and their inalienability.[20] The interplay of these assumptions has contributed to the diffusion of a narrative of personality protection apparently very humanist in character, but in fact quite simplistic and reductionist.[21] Among the shortcomings of this approach are, on the one hand, the difficulty of coping with the evolution of social and economic reality (which has never conformed to such abstract and rigid assumptions)[22] and, on the other, disregard for a whole range of issues—among them, the protection of personhood within contractual relationships[23]—which, in the long run, has proven critical to safeguarding personality.

II. NEW DIMENSIONS OF PERSONALITY PROTECTION IN PRIVATE LAW

Recent codes and reform projects confirm the importance of tort law as one of the most important frontiers for the recognition and safeguard of personality interests in private law. In particular, concerns for the extra-contractual protection of human dignity, one of the founding values of post-war constitutionalism, have risen to prominence and tend to occupy the center of the stage.[24] Not surprisingly, the drafters of the *European Principles on Non-Contractual Liability* (now Book VI of the *Draft Common Frame of Reference*) have devoted a specific article to

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18. The personality rights are often referred to as "*droits de défense*" or "*Abwherrechte*," which means that they are not aimed at allocating wealth, but at enforcing norms of civility and respect in interpersonal relationships. *See* A. LUCAS-SCHLÖTTER, DROIT MORAL ET DROITS DE LA PERSONNALITÉ. ÉTUDE DE DROIT COMPARÉ FRANÇAIS ET ALLEMAND I, at 208 (Aix-en-Provence 2002); K.N. Peifer, *Eigenheit oder Eigentum—Was schützt das Persönlichkeitsrecht?*, *in* GRUR 495, 499 (2002).

19. *See* Popovici, *supra* note 2, at 353; D. Tallon, entry *Personnalité (Droits de la)*, *in* RÉP. CIV. DALLOZ 24 (1996); P. Kayser, *Les droits de la personnalité. Aspects théoriques et pratiques*, *in* REV. TRIM. DR. CIV. 492 (1971); H.P. GÖTTING, PERSÖNLICHKEITSRECHTE ALS VERMÖGENSRECHTE 4 (Tübingen 1995).

20. The principle of inalienability is, for instance, expressly stated by art. 3 of the Quebec Civil Code. On this, see A. Popovici, *La renonciation à un droit de la personnalité*, *in* CENTRE DE RECHERCHE EN DROIT PRIVÉ ET COMPARÉ, COLLOQUE DU TRENTENAIRE, 1975-2005. REGARDS CROISÉS SUR LE DROIT PRIVÉ 99 (Cowansville 2008).

21. *See* P. SCHWERDTNER, DAS PERSÖNLICHKEITSRECHT IN DER DEUTSCHEN ZIVILRECHTSORDNUNG. OFFENE PROBLEME EINER JURISTISCHEN ENTDECKUNG 81 (Berlin 1977).

22. A. Büchler, *Persönlichkeitsgüter als Vertragsgegenstand? Von der Macht des Faktischen und der dogmatischen Ordnung*, *in* FESTSCHRIFT FÜR HEINZ REY ZUM 60. GEBURTSTAG 177 (Zürich-Basel-Genf 2003).

23. *See* C.W. Canaris, *Grundrechte und Privatrecht*, *in* AcP 201, 240 (1984).

24. *See* G. Resta, *Dignità*, *in* S. Rodotà—P. Zatti eds., TRATTATO DI BIODIRITTO, vol. I, AMBITO E FONTI DEL BIODIRITTO 259 (Milano 2010); C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT. L. 655 (2008); P. Fraisseix, *La sauvegarde de la dignité de la personne et de l'espèce humaines: de l'incantation à la 'judiciarisation,'* *in* R.R.J. DROIT PROSPECTIF 1133 (1999).

privacy and dignity,[25] transposing into private law a precept solemnly proclaimed by art. 1 of the European Charter of Fundamental Rights.[26] At the same time, however, these texts suggest that, other dimensions of the protection of personality, outside the domain of tort law are gradually emerging and gaining importance on a global scale.

A. From 'Reactive' to 'Preventive' Strategies

First of all, it is worth pointing out a gradual shift from an *ex-post* "individual" approach to an *ex-ante* "collective" protection model. Whereas in the past the intervention of the law was basically aimed at repairing the consequences of an infringement (through the award of damages) and at avoiding the prosecution of violations (through injunctive reliefs), the techniques currently adopted combine traditional *ex-post* reactions with *preventive* strategies.[27] The developments in the field of data protection—where the shift from the "individual" to the "collective" dimension is immediately apparent—are illustrative of this trend.[28] The strategy adopted by the European directive 95/46/EC[29] tends to "anticipate" the protection of the individual: (a) by imposing far-reaching information duties and security measures (independently of any

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25. Sect. VI.—2:203:

> (1) Loss caused to a natural person as a result of infringement of his or her right to respect for his or her dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant damage. (2) Loss caused to a person as a result of injury to that person's reputation and the injury as such are also legally relevant damage if national law so provides.

For a comment, see C. VON BAR, NON-CONTRACTUAL LIABILITY ARISING OUT OF DAMAGE CAUSED TO ANOTHER 418 (Oxford 2009).

26. The Draft Common Frame of Reference I. 1:102 states that these provisions "are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms." According to Art. 1 of the Charter, which is clearly derived from art. 1 of the German Constitution (*Grundgesetz*), "[h]uman dignity is inviolable. It must be respected and protected" (on this provision, see F. Schorkopf, *Persönlichkeits-und Kommunikationsgrundrechte*, *in* D. Ehlers ed., EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN 410 (2d ed., Berlin 2005).

27. For a critique of the "defensive" character of the traditional private-law model of personality protection in private law, see S. Rodotà, *Ipotesi sul diritto privato*, *in* IL DIRITTO PRIVATO NELLA SOCIETÀ MODERNA 15 (Bologna 1971); for a detailed description of the 'delictual' approach, see A. DI MAJO, LA TUTELA CIVILE DEI DIRITTI 132 (4th ed., Milano 2005).

28. *See* S. Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 738 (1987).

29. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, *in* OFFICIAL JOURNAL L. 281, 23/11/1995, 31. For an analysis of the European approach to data protection, see S. Simitis, *From the Market to the Polis: The EU Directive on the Protection of Personal Data*, 80 IOWA L. REV. 445 (1995); F. Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211, 225 (2008).

'concrete' danger of violation of the personal sphere) on the "controller" of personal data;[30] (b) by subjecting all processing of personal data to the control and supervision of a data protection authority with strong enforcement powers;[31] (c) by granting to the "data subject" rights of access, rectification, erasure and blocking (art. 12).[32] A similar model of regulation is followed by the Quebec Civil Code.[33] Rather than intervening *ex-post* to redress the consequences of a violation (the traditional delictual approach), the law resorts to a set of techniques aimed at avoiding, or at least minimizing, the risks of violations of the personal sphere.[34] This evolution is consistent with the developments in the theory and practice of fundamental rights, and in particular with the doctrine of the State's positive obligations (*obligations positives, Schutzpflichten*),[35] and reflects the overcoming of the old liberal model of private law enshrined in the liberal codifications of the nineteenth century. Whereas in the past the "free development of personality" was essentially left to civil society and the market, with the State accomplishing a mere "coordination-function", the legal system nowadays has been assigned a more proactive role.[36] It is not only called upon to grant rights and remedies for wrongs, but also to provide the institutional and material conditions which allow for effective exercise of fundamental liberties. Accordingly, it should not refrain from interfering in private-law relationships, whenever the imposition of positive duties of action on private actors appears proportionate to the aim of protecting the personality interests of other citizens. It may be argued, for example, that

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30. Directive 95/46/EC, cit., arts. 10, 11, and 17.

31. Directive 95/46/EC, cit., art. 28; *see also* art. 8 of the European Charter of Fundamental Rights, providing that "[c]ompliance with these rules shall be subject to control by an independent authority."

32. Directive 95/46/EC, cit., art. 12.

33. *See* arts. 37-41. On the Quebec model of data protection, see E. DELEURY & D. GOUBAU, LE DROIT DES PERSONNES PHYSIQUES 200-10 (4th ed. 2008).

34. This *preventive* function of the right to control personal information is underlined by S. Simitis, *Sub* § 1, *in* S. Simitis ed., KOMMENTAR ZUM BUNDESDATENSCHUTZGESETZ 129 (5th ed., Baden-Baden 2003) ("Die informationelle Selbstbestimmung hat eine essentiell präventive Funktion: Sie soll vor allem potenzielle Verfälschungen der Kommunikationsvoraussetzungen verhindern und nicht etwa nur bereits eingetretene Verzerrungen korrigieren. Ihr eigentlicher und entscheidender Ansatzpunkt ist insofern nicht die Schädigung, sondern die Gefährdung des Einzelnen.").

35. *See* D. Grimm, *The Protective Function of the State*, *in* G. Nolte ed., EUROPEAN AND US CONSTITUTIONALISM 137 (Cambridge 2005); F. Sudre, *Les 'obligations positives' dans la jurisprudence européenne des droits de l'homme*, *in* PROTECTION DES DROITS DE L'HOMME: LA PERSPECTIVE EUROPÉENNE. MÉLANGES À LA MÉMOIRE DE ROLV RYSSDAL 1359 (Köln-Berlin-Bonn-München 2000).

36. On this shift and its impact on the theory of personality rights, see ALPA & RESTA, *supra* note 14, at 553.

only by establishing an effective system of data protection (which would grant the individual the right to know by whom, in what circumstances and for what aims his or her personal information is being collected and processed, as well as the right to stop unlawful or unfair uses of the data) would any person be really free to engage in social relationships, express her own thoughts and opinions and fully participate in the political life of the community.[37]

B. The Emergence of the Human Body as a Legal Object

Secondly, contemporary codes and constitutions strongly emphasize the importance of the corporeal dimension of personality.[38] Whereas in earlier codifications the human body was either ignored (*Code Napoléon*) or considered merely as an object of compensable injuries (*BGB*), more recent legal instruments have taken a different stance.[39] Due to scientific and technological developments, which have significantly shifted the boundaries between nature and artifice, constraint and freedom, private law has been faced with conflicts arising from incompatible (or ethically debatable) uses of body parts and tissues.[40] Art. 5 of the Italian Civil Code of 1942 represents one of the first provisions concerning the "disposal" of body parts[41] and has been followed in recent times by other codes, such as those of Quebec (arts. 19-25), France (art. 16-1 to 16-9, as amended in 1994), and Brazil (arts. 13-14). Lastly, the European Charter of Fundamental Rights, relying on the Oviedo Convention on Biomedicine,[42] has devoted a specific

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37. *See* Simitis, *supra* note 29, at 732-37.

38. S. RODOTÀ, DAL SOGGETTO ALLA PERSONA (Napoli 2007).

39. On the limited attention devoted by the civil codes of nineteenth century to life's material needs, see L. Mengoni, *Le varie età dell'uomo*, *in* IL DIRITTO E I FATTI DELLA VITA MATERIALE 171 (Roma 1984); with specific regard to the human body, J.C. Galloux, *Le corps humain dans le code civil*, *in* 1804-2004. LE CODE CIVIL. UN PASSÉ, UN PRÉSENT, UN AVENIR 381 (Paris 2004); S. HENNETTE-VAUCHEZ, DISPOSER DE SOI? UNE ANALYSE DU DISCOURS JURIDIQUE SUR LES DROITS DE LA PERSONNE SUR SON CORPS 44 (Paris 2004).

40. S. Rodotà, *Ipotesi sul corpo 'giuridificato,' in* S. RODOTÀ, TECNOLOGIE E DIRITTI 179 (Bologna 1995); S. RODOTÀ, LA VITA E LE REGOLE. TRA DIRITTO E NON DIRITTO 9, 73 (Milano 2006); O. Tholozan, *La réification du corps humain en droit civil français*, *in* O. Tholozan ed., DE JURE CORPORIS, OU LA RÉIFICATION DU CORPS HUMAIN 11 (Aix-en-Provence 2004).

41. For a detailed account of the history of this provision and its relationship with the fascist legal thought, see ALPA & RESTA, *supra* note 14, at 480.

42. Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, signed at Oviedo, 4-4-1997; *see* P. Fraisseix, *La protection de la dignité de la personne et de l'espèce humaines dans le domaine de la biomédecine: l'exemple de la Convention d'Oviedo*, *in* REV. INT. DR. COMP. 371 (2000).

provision to the integrity of the person and the human body (art. 3).[43] The increasing "juridification" of the human body is not without consequences for the theory of personality rights. Whereas in the past the orthodox image of the legal subject was that of a "disembodied person", nowadays the human body is regarded as a constitutive part of the self.[44] Accordingly, decisions impacting on the corporeal dimension of personality tend to be perceived as integral to personal identity.[45] This leads not only to a significant strengthening of the principles of freedom of choice and self-determination, as testified by the multiplication of legal provisions concerning the "consent" to interferences in the personal sphere;[46] but also to a collapse of the traditional subject/object dichotomy and to an increasing extension of the regime of personality rights even to biological materials separated from the body.[47]

C. The Commercialization of Personality

Thirdly, the issue of "commodification" of personality interests has gained tremendous importance, both from a theoretical and practical point of view. Such a concept is generally employed by social scientists to describe the expansion of economic rhetoric and practices to spheres of social life which had been traditionally considered external to the market realm.[48] Given a situation in which the market reaches into basically all aspects of life,[49] it is no wonder that to an increasing extent

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43. *See* S. Calmels, *Le droit au respect de l'être humain*, *in* L. Burgorgue-Larsen ed., LA FRANCE FACE À LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE 123 (Bruxelles 2005).

44. Galloux, *supra* note 39, at 381 (contrasting the contemporary approach with the model of "personne désincarnée" originally adopted by the *Code Napoléon*).

45. P. Zatti, *Di là dal velo della persona fisica. Realtà del corpo e diritti "dell'uomo"*, *in* P. ZATTI, MASCHERE DEL DIRITTO, VOLTI DELLA VITA 53 (Milano 2009); R. Cabrillac, *Le corps humain*, *in* R. CABRILLAC, M.A. FRISON-ROCHE & T. REVET, LIBERTÉS ET DROITS FONDAMENTAUX 177 (16th ed., Paris 2010).

46. For a general overview, see S. Monnier, *La reconnaissance constitutionnelle du droit au consentement en matière biomédicale. Étude de droit comparé*, *in* REV. INT. DR. COMP. 383 (2001).

47. *See* C. ZERR, ABGETRENNTE KÖRPERSUBSTANZEN IM SPANNUNGSFELD ZWISCHEN PERSÖNLICHKEITSRECHT UND VERMÖGENSRECHT. DEUTSCH-FRANZÖSISCHER RECHTSVERGLEICH ÜBER DIE ZULÄSSIGKEIT DER KOMMERZIALISIERUNG VON KÖRPERSUBSTANZEN 149 (Frankfurt am Main 2004); H. Forkel, *Das Persönlichkeitsrecht am Körper, gesehen besonders im Lichte des Transplantationsgesetzes*, *in* JURA 73 (2001).

48. For a discussion of the issues raised by commodification, see D. SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE. THE MORAL LIMITS OF MARKETS 91-210 (Oxford 2010); M.J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); M.J. Radin & M. Sunder, *The Subject and Object of Commodification*, *in* M.M. Ertman & J.C. Williams eds., RETHINKING COMMODIFICATION. CASES AND READINGS IN LAW AND CULTURE 8 (N.Y.-London 2005).

49. Knowledge seems to be the last frontier: see B. Jessop, *Knowledge as a Fictitious Commodity: Insights and Limits of a Polanyian Perspective*, *in* A. Buğra & K. Ağartan eds.,

the attributes of human personality have also become "commodified." Corporeal (organs, tissues, gametes, DNA samples, etc.) and incorporeal (name, image, voice, personal data, etc.) components of the personal identity have acquired an enormous economic value and are increasingly treated as commodities to be bought, sold and licensed on the marketplace.[50] This process strongly impacts the regime of personality rights, altering both the nature of the controversies brought before the courts and the functions assigned to the remedial system.[51] Whereas in the past the focus was mainly on the *protection* of the inviolate personality against invasions by third parties and on the recovery of *nonpecuniary* losses arising from the infringement of dignitary interests, the emphasis is now on the *exploitation* of the commercial value of personality and compensation for *profits* foregone (or restitution of unlawfully earned profits) as a result of the unconsented use. Consequently, personality rights converge to an increasing extent with property rights[52] and the conceptual boundaries between patrimonial and extra-patrimonial rights, and between alienable and inalienable entitlements tend to be blurred.[53] This phenomenon has an important bearing on the theory of personality rights. It challenges the received wisdom concerning a supposed incompatibility between personality rights and economic interests and invites jurists to take seriously into

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READING KARL POLANYI FOR THE TWENTY-FIRST CENTURY. MARKET ECONOMY AS A POLITICAL PROJECT 115 (N.Y. 2007).

50. *See* C. Prins, *Property and Privacy: European Perspectives and the Commodification of our Identity*, *in* P.B. Hugenholtz & L. Guibault, *The Future of the Public Domain: An Introduction*, *in* P.B. Hugenholtz & L. Guibault eds., THE FUTURE OF THE PUBLIC DOMAIN 223 (The Hague 2006); L.A. Sharp, *The Commodification of the Body and Its Parts*, 29 ANN. REV. ANTHROP. 287 (2000); D. Nelkin & L. Andrews, Homo Economicus. *Commercialization of Body Tissue in the Age of Biotechnology*, 28 HASTINGS CENT. REP. 30 (1998); J.J. Zodrow, *The Commodification of Human Body Parts: Regulating the Tissue Bank Industry*, 32 SW. U. L. REV. 407 (2003); T. Revet, *L'argent et la personne*, *in* ARCH. PHIL. DR. 43 (1997); F. Bouvard, *La commercialisation de l'image de la personne physique*, *in* P. Bloch ed., IMAGE ET DROIT 375 (Paris 2002); M. Vivant, *Le patronyme saisi par le patrimoine*, *in* MÉLANGES OFFERTS À ANDRÉ COLOMER 517 (Paris 1993); C.D. Tindall, *Argus Rules: The Commercialization of Personal Information*, 2003 U. ILL. J. L. TECH. & POL'Y 181.

51. *See* A. Büchler, *Die Kommerzialisierung von Persönlichkeitsgütern*, *in* AcP 300 (2006); J. Helle, *Wirtschaftliche Aspekte zivilrechtlichen Persönlichkeitsschutzes*, *in* RABELSZ 448 (1996); V. Zeno-Zencovich, *Profili negoziali degli attributi della personalità*, *in* DIR. INF. 545 (1993); G. RESTA, AUTONOMIA PRIVATA E DIRITTI DELLA PERSONALITÀ 123 *et seq.* (Napoli 2005).

52. *See* D. Lefranc, *L'auteur et la personne (libres propos sur les rapports entre le droit d'auteur et les droits de la personnalité)*, *in* D. chr., 1926 (2002). For a critique of this development, see Peifer, *supra* note 18, at 495.

53. *See* T. Hassler, *La crise d'identité des droits de la personnalité*, *in* PET. AFF. n.244, 3 (2004); M. Bui-Leturcq, *Patrimonialité, droits de la personnalité et protection de la personne, une association cohérente*, *in* R.R.J. 767 (2006); E.H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One's Image*, 76 TUL. L. REV. 673, 675 (2002).

account issues related to the disposition, alienation and transfer of these rights, which have been in the past largely overlooked.[54] In sum, it forces us to abandon the comfortable, but unrealistic, assumptions on which the mainstream theory of personality rights had been built, and to look beyond that famous "wall" that has traditionally separated the protection of personality from other compartments of private law.[55]

In the following pages I will present an overview of the way in which legal systems in Europe and the United States have responded to such challenges, highlighting some questions that are as yet unresolved and worth considering from the perspective of legal reform.

III. WHO OWNS IDENTITY?

To better illustrate the nature of the questions at stake and the changing landscape of personality rights litigation, I will start by referring to some recent high-profile cases.

(a) The first case, Goldman v. Simpson,[56] is one of the most recent episodes in the OJ Simpson legal saga. Following his acquittal in the criminal trial, OJ Simpson was sued for wrongful death by the parents and executors of Ronald Goldman's estate and by the executor of Nicole Simpson's estate. The Court of Appeal of California awarded the plaintiffs more than 20 million dollars in compensatory and punitive damages.[57] This sum having not yet been paid, the creditors filed a motion in the Superior Court of California, requesting the transfer of OJ Simpson's publicity rights in satisfaction of the judgment. The motion was based upon Sect. 695.010 California Code of Civil Procedure, which subjects to the enforcement of a money judgment "all property" of the debtor. Since California is one of the States that have recognized the right of publicity and since this is generally conceived as a property

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54. On this, see the systematic analysis by C. AHRENS, DIE VERWERTUNG PERSÖNLICHKEITSRECHTLICHER POSITIONEN. ANSATZ EINER SYSTEMBILDUNG 27 *et seq.* (Würzburg 2002).

55. For a critique of the traditional "epystemology of separation", see F. Rigaux, *Les paradoxes de la protection de la vie privée*, *in* P. Tabatoni ed., LA PROTECTION DE LA VIE PRIVÉE DANS LA SOCIÉTÉ D'INFORMATION. L'IMPACT DES SYSTÈMES ÉLECTRONIQUES D'INFORMATION 37, 42 (Paris 2000) ("Ce mur [. . .] ne séparerait pas de manière moins abrupte, du monde grossier des intéresses financiers et des affaires, l'univers éthéré et même désincarné, de la personnalité individuelle. Incarnant cette vision idéalisée de l'être humain, les droits de la personnalité s'érigeraient purs de toute souillure face aux institutions traditionnelles de la propriété, des obligations et des contrats, à l'ombre desquelles les humains pèsent, comptent et transigent".).

56. Goldman v. Simpson, No. SC036340 (Cal. Super. Ct. W. L.A. Cty. Oct. 31, 2006).

57. Rufo v. Simpson, 103 Cal. Rptr. 2d 492 (Cal. Ct. App. 2001).

right,[58] the plaintiffs argued that OJ's right of publicity could be seized by the creditors. The court denied the motion on the basis of lack of precedents, practical difficulties, and on the argument that to hold differently would lead to a serious limitation of the privacy rights of the debtor (the Court underlined that the right to privacy in California is "of direct constitutional magnitude under art. 1 Cal. Const. and has been held to be broader and more protective of privacy than its federal counterpart").[59] This decision has been criticized by some commentators, arguing that the right of publicity, as an intellectual property right, should be capable of being seized and assigned to creditors.[60] Nevertheless it is of great interest, because it represents one of the very first rulings on the involuntary transfer of publicity rights and sheds light on the possible consequences of the recognition of an autonomous intellectual property right on the commercial value of personality.[61]

(b) The second case—Washington University v. Catalona[62]—concerns the ownership of human biological materials stored in a bio-bank. Over several years, Dr. Catalona, an internationally known urologist, collected thousands of tissue samples and related data for research purposes. As the Division Chief of Urologic Surgery at Washington University, he contributed to the establishment of an important Bio-repository. Conflicts arose between the University and Dr. Catalona over the management of the collection, so he eventually resigned and moved to Northwestern University, asking his patients to authorize the transfer of the samples and related data to the new research institute. About 6000 patients signed and sent back the informed consent form. However, Washington University refused to transfer the samples and sued Dr. Catalona, seeking to establish the University's ownership of the biological materials. Several patients intervened in the lawsuit in support of Dr. Catalona, claiming the right to control the further uses of the biological materials stored in the bio-bank. Called upon to establish who was the legal owner of the samples, the District Court and the Federal Court of Appeals for the Eighth Circuit denied Dr. Catalona's

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58. D. Westfall & D. Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 80 (2005); M. Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALBANY L. REV. 1357, 1361 (2007); T.J. McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J. L. & ARTS 129 (1995).

59. *Goldman*, No. SC036340, at 11.

60. *See* T. Ganani, *Squeezing the Juice: The Failed Attempt To Acquire O.J. Simpson's Right of Publicity, and Why It Should Have Succeeded*, 26 CARDOZO ARTS & ENT. L.J. 165 (2008); H. Beard, *Squeezing "The Juice": Can the Right of Publicity Be Used To Satisfy A Civil Judgement?*, 15 J. INTELL. PROP. L. 143 (2007).

61. *See infra* Part VI.B.

62. Wash. Univ. v. Catalona, 490 F 3d 667 (8th Cir 2007).

countermotion and affirmed Washington University's ownership of the collection. In particular, the Courts refused to hold that individuals who released an informed consent to medical research retained the right to control the subsequent utilization of the biological materials and could authorize transfer to a third party or repossess such samples.[63]

(c) The third case was decided by the German Federal Supreme Court (*Bundesgerichtshof*) and deals with the inheritability of the right to control the commercial exploitation of one's own personality under German law.[64] The only child and sole heir of Marlene Dietrich sued the producer of a musical, who permitted a corporation to use the name and image of the actress for the special edition of a vehicle; she also sued the manufacturer of Xerox copy machines, who used the pseudonym "Blue Angel" in a commercial advertisement, alleging the infringement of personality rights of the deceased. She sought not only injunctive relief, but also compensation for damages (a remedy which had previously been denied in similar cases by German courts).[65] The German Supreme Court was therefore called upon to decide: (a) whether the personality rights protect economic interests, besides nonmaterial interests; and (b) whether such rights are capable of being assigned and passed to the heirs after the death of the individual. The court answered affirmatively to both of these questions, stressing the importance of self-determination as one of the basic values guaranteed by the general personality right, and grounding this value in the right to control the commercial exploitation of identity.[66] Accordingly, it observed that "the general right

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63. See for a comment F. Bellivier & C. Noiville, *Les collections d'échantillons biologiques entre propriété et contrat*, *in* REV. DES CONTRATS 493 (2007); L.B. Andrews, *Who Owns Your Body? A Patient's Perspective on* Washington University v. Catalona, 34 J. LAW, MED. ETHICS 398 (2006).

64. BGH, 1-12-1999, *Marlene Dietrich*, *in* JURISTENZEITUNG 1056 (2000), with comment by H. Schack; English translation in D.S. WELKOWITZ & T.T. OCHOA, CELEBRITY RIGHTS. RIGHTS OF PUBLICITY AND RELATED RIGHTS IN THE UNITED STATES AND ABROAD 205 (Durham 2010).

65. For a detailed account of the posthumous protection of personality rights under German law (before and after the Marlene Dietrich decision), see H. Rösler, *Dignitarian Posthumous Personality Rights—An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT. L. 153, 174, 181 (2008).

66. BGH, 1-12-1999, cit., 209 (of the English translation) ("The *Bundesgerichtshof* has always included the commercial interests in the personality within the protection guaranteed by the personality rights. The personality rights should accordingly protect the right of free decision, belonging only to the person entitled, on the question of whether and under what conditions his picture or his name—and the same applies for other characteristic features of the personality—is used for the business interests of third parties [. . .]. In relation to economic interests in the personality, the *Bundesgerichtshof* has recognised that the right of personality also shows elements which are of financial value [. . .]. It has accordingly described the right to one's own picture as an exclusive right of financial value and generally regarded claims for compensation as possible on violation of the right of personality.").

of personality and its special forms of manifestation primarily serve the protection of non-material interests, in particular the protection of the claim of the personality to worth and respect [. . .] but besides this, the general right of personality and its special forms also protect those interests of the person which are of financial value."[67] The inclusion of economic interests within the scope of protection of the general personality right did not prevent the court from taking a very innovative step with respect to the regime of transfer. Indeed, the Supreme Court affirmed the inheritability of the commercial components of Marlene Dietrich's personality right, while confirming that "defensive claims which protect the deceased's nonmaterial interests are to be made by the relatives."[68] At the same time the decision left open the delicate question of alienability inter vivos.

IV. THE QUESTIONS AT STAKE

These cases are interesting because they offer a practical illustration of some of the issues raised by the commodification of personal identity. Among the principal questions faced by the courts are the following:

(a) Who has the right to control the exploitation of the corporeal and incorporeal aspects of personality?
(b) How is this entitlement protected?
(c) What are the limits of freedom of contract with regard to personality rights?

It would be erroneous to regard these questions, and in particular the last one, as an absolute novelty for the theory of personality rights. After all, the rejection by Savigny of the category of the "rights over one's own person" was notoriously based upon the argument that to do otherwise would lead to the recognition of the individual's right to commit suicide;[69] and when Joseph Kohler gave the definitive theoretical foundation to the category of "*Individualrechte*" (the older label for personality rights), the criterion employed to distinguish these rights

67. BGH, 1-12-1999, cit., 208.
68. BGH, 1-12-1999, cit., 209.
69. F.C. VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, vol. I, § 53, 336 (Berlin 1840) (with references to Donellus, Puchta and Hegel in footnote a, at 337-38). On this, see S. Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale. Étude de droit comparé*, I, PREMIÈRE PARTIE: L'ÉVOLUTION HISTORIQUE ET LE MOUVEMENT INTERNATIONAL 249 (Stockholm 1967); R. Wiethölter, *Le formule magiche della scienza giuridica*, ital. translation of RECHTSWISSENSCHAFT 116 (Roma-Bari 1975).

from the cognate "*Immaterialgüterrechte*" (intellectual property rights) was precisely the different degree of "alienability."[70]

However, despite the formal invariance of some of these questions, their substantive content has significantly changed. Whereas in the past such issues had above all a theoretical import, in current times the transformation of social and economic conditions has strongly increased their practical significance. When the classical theory of personality rights was elaborated, in the late nineteenth century,[71] the basic conceptual problem consisted in coordinating the dogmatic structure of *droit subjectif*, modeled on the archetype of ownership, with a typology of *biens juridiques* which had the peculiarity of being internal to the person.[72] What was intensively discussed (not only by jurists, but also by philosophers, who had long reflected on the *ius in se ipsum*) was the possibility of formally recognizing an absolute sphere of freedom and at the same time setting limits to avoid an antisocial use of such freedom. Today, by contrast, the substantive question is remarkably different and might be framed in this way: are we, as a society, ready to accept that the market should expand to every sector of social life and that even aspects of personal identity shall be conceived and treated as alienable commodities? And what kind of legal regime should be designed in order to avoid the outcome that economic pressure towards commodification results in major violations of the value of human dignity?

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70. *See* J. KOHLER, DAS AUTORRECHT. EINE ZIVILISTISCHE ABHANDLUNG. ZUGLEICH EIN BEITRAG ZUR LEHRE VOM EIGENTHUM, VOM MITEIGENTHUM, VOM RECHTSGESCHÄFT UND VOM INDIVIDUALRECHT 74 (Separatabdruck aus Jhering's Jahrb. XVII) (Jena 1880); J. KOHLER, DAS RECHT DES MARKENSCHUTZES. MIT BERÜCKSICHTIGUNG AUSLÄNDISCHER GESETZGEBUNGEN UND MIT BESONDERER RÜCKSICHT AUF DIE ENGLISCHE, ANGLO-AMERIKANISCHE, FRANZÖSISCHE, BELGISCHE UND ITALIENISCHE JURISPRUDENZ 77 (Würzburg 1884). On this, see B. Dölemeyer & D. Klippel, *Der Beitrag der deutschen Rechtswissenschaft zur Theorie des gewerblichen Rechtsschutzes und Urheberrechts*, *in* F.K. Beier, A. Kraft, G. Schricker & E. Wadle eds., GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT IN DEUTSCHLAND 185, 229 (I, Weinheim 1991).

71. The most accurate historical analysis is the one provided by D. Klippel, *Historische Wurzeln und Funktionen von Immaterialgüter- und Persönlichkeitsrechte im 19. Jahrhundert*, *in* ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 132 (1982); D. KLIPPEL, DER ZIVILRECHTLICHE SCHUTZ DES NAMENS. EINE HISTORISCHE UND DOGMATISCHE UNTERSUCHUNG 193 *et seq.* (Paderborn-München-Wien-Zurich 1985).

72. *See* P. Rescigno, entry *Personalità (diritti della)*, *in* ENC. GIUR., XXIII, at 2 (Roma 1991); V. Zeno-Zencovich, entry *Personalità (diritti della)*, *in* DIG. DISC. PRIV., SEZ. CIV., XIII, at 430 (Torino 1995).

V. THE PROTECTION OF PERSONAL AUTONOMY: A MATTER OF PRIVACY OR PROPERTY?

The first element that stands out in a comparative overview is the general strengthening, in most areas of the protection of personality, of the value of self-determination. Either relying on the general constitutional guarantees of liberty and dignity, or on the more specific provisions concerning the corporeal and incorporeal components of personal identity, the courts have recognized the principle that every individual should have the right to freely decide who, under what conditions and for which purposes may lawfully exploit aspects of his/her personality.[73] The techniques adopted to protect this interest significantly differ in relation to the incorporeal and the corporeal aspects of the personality, however. Whereas with regard to the former the tendency is toward the adoption of full-scale property rules, in the context of body-rights the overall consensus is rather on the liability-rules model.[74]

A. Incorporeal Attributes and the Dominance of Property Rules

In the United States the recognition of a right to control the commercial exploitation of one's own personality dates back to the Fifties, when the famous case of *Haelan v. Topps Chewing Gum* was decided by the Federal Court of Appeals for the Second Circuit (the opinion for the court was handed down by Judge Jerome Frank).[75] The history of the right of publicity is one of a striking discontinuity.[76] This right was conceived and recognized in overt opposition to the pre-existing right to privacy. The latter was characterized by a strict personal-

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73. On the value of self-determination and its meaning for the debate on commercial appropriation of personality, see B. SEEMANN, PROMINENZ ALS EIGENTUM. PARALLELE RECHTSENTWICKLUNGEN EINER VERMARKTUNG DER PERSÖNLICHKEIT IM AMERIKANISCHEN, DEUTSCHEN UND SCHWEIZERISCHEN PERSÖNLICHKEITSSCHUTZ 142 (Baden-Baden 1996).

74. I use the notions of property rules and liability rules in the sense of G. Calabresi & D. Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). However, following R. ELLGER, BEREICHERUNG DURCH EINGRIFF. DAS KONZEPT DES ZUWEISUNGSGEHALTS IM SPANNUNGSFELD VON AUSSCHLIEßLICHKEITSRECHT UND WETTBEWERBSFREIHEIT 297-98 (Tübingen 2002), I will consider claims for restitution and share of profits—in addition to injunction and compensatory damages—as a typical feature of property rules.

75. Haelan Labs. v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); *see* S.W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 855 (1995).

76. M. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 126, 167 (1993); H.P. Götting, *Vom Right of Privacy zum Right of Publicity. Die Anerkennung eines Immaterialgüterrechts an der eigenen Persönlichkeit im amerikanischen Recht*, *in* GRUR INT. 656 (1995).

right regime and as such it had proven inadequate in meeting the needs of the entertainment and advertising industries. The right of publicity, by contrast, was carefully designed by scholars and courts specifically in order to fill such gaps.[77] Therefore it displayed, since the very beginning, the character of a full scale property right.[78] This means—in operational terms—that it grants the right to control the commercial exploitation of personality (even when no dignitary values are at stake) *and* is freely detachable from the personal sphere.[79]

In Continental Europe, by contrast, the evolution has been different.[80] Instead of breaking up the traditional category of personality rights, courts have resorted to techniques of dynamic interpretation to adapt old provisions on name, image and privacy rights to changing social and economic landscapes. They have favored, in other words, a functional evolution (*Funktionswandlung*) of the category of personality rights, rather than a radical paradigm shift, like the one implied in the recognition of a full-scale intellectual property right in one's own identity.[81] It should be underlined that this development has been feasible only because the Continental law of personality has—from the very beginning—maintained a deeper and more ambiguous connection with the universe of property rights than a Warren style right to privacy.[82] Despite the emphasis put by many authors on the 'negative' function and noneconomic character of personality rights,[83] as a matter of fact the statutory provisions on name, likeness and other personal indicia have never impeded an instrumental use of personal remedies to advance purely economic interests. Indeed, the model of protection adopted by provisions such as § 22 German *Kunsturhebergesetz* of 1907 (Act on Artistic Creations),[84] art. 96 Italian Copyright Act of 1941[85]—and also by

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77. For a critical analysis of the relationship between the right of publicity and market interests, see Madow, *supra* note 76, at 172; G.M. Armstrong, *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443 (1991); J. Frow, *Elvis' Fame: The Commodity Form and the Form of the Person*, 7 CARD. STUD. L. & LIT. 131 (1995); Post, *supra* note 17, at 665.

78. *See* Westfall & Landau, *supra* note 58, at 78.

79. On this, see Post, *supra* note 17, at 665.

80. *See* RESTA, *supra* note 51, at 123-247; GÖTTING, *supra* note 19, at 12-139; Reiter, *supra* note 53, at 681-95; W. Van Caenegem, *Different Approaches to the Protection of Celebrities Against Unauthorised Use of Their Image in Advertising in Australia, the United States and the Federal Republic of Germany*, *in* EUR. INT. PROP. REV. 452 (1990).

81. *See* Büchler, *supra* note 22, at 177 *et seq.*; Büchler, *supra* note 51, at 300.

82. For a more detailed argumentation, see RESTA, *supra* note 51, at 113, 214, 242.

83. *See supra* Part I.

84. § 22 KUG ("Portraits may only be disseminated or exhibited with the consent of the person portrayed. Consent is deemed to have been given if the person portrayed has received remuneration for having the portrait taken. For ten years after the death of the person portrayed, consent given by the relatives of that person must be obtained".).

the earlier French case law on the *droit à l'image*, conceived by the courts as an "absolute right"[86]—reproduced the typical paradigm of property rules: injunction and damages following unconsented use of personal identity (likeness or other indicia) for noninformational purposes. A number of early decisions testify to the flexibility of such model and the pragmatism of the courts in applying it to the first controversies related to personality merchandising. Probably the most eloquent illustration of the instrumental use of personal remedies to further economic interests is represented by the famous *von Zeppelin* judgment of the German *Reichsgericht* in 1910.[87] Here the court, using the language and rhetoric of the inviolate personality, granted injunctive relief on the basis of art. 12 *BGB* against the reproduction of Baron von Zeppelin's name and likeness in a cigarette trademark, in spite of the fact that the plaintiff had already licensed the use to another competitor and therefore no violation of dignitary interests actually existed.[88]

At stake in these cases was the value of autonomy, which lies at the core of the continental system of personality protection. Further development has shown that the courts have never encountered particular problems in applying the statutory provisions to safeguard the interest of every individual to freely decide whether his or her identity is used for commercial purposes. The 'public figure' defense has ultimately been interpreted restrictively;[89] personality rights have been extended to legal persons (in contrast, again, with the U.S. experience on privacy);[90]

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85. Art. 96 l. 633/1941 ("Subject to the provisions of the following Article, the portrait of a person may not be displayed, reproduced or commercially distributed without the consent of such person. After the death of the person portrayed, the provisions of the second third and fourth paragraphs of Article 93 shall be applicable.").

86. *See* A. Lucas-Schloetter, *French Law*, *in* H. BEVERLEY-SMITH, A. OHLY, A. LUCAS-SCHLÖTTER, PRIVACY, PROPERTY AND PERSONALITY. CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION 148 (Cambridge 2005); Brüggemeier, *supra* note 6, at 11.

87. RG, 28-10-1910, in RGZ 74, 308 (1910).

88. This circumstance, overlooked by many, has been underlined by H. Stoll, *Empfiehlt sich eine Neuregelung der Verpflichtung zum Geldersatz für immateriellen Schaden?*, *in* VERHANDLUNGEN DES 45. DEUTSCHEN JURISTENTAGES, Band I, Gutachten 1, 17 n.64 (München-Berlin 1964). See also on this case, J. Helle, *Wirtschaftliche Aspekte zivilrechtlichen Persönlichkeitsschutzes*, *in* RABELSZ 448, 459 (1996); RIGAUX, *supra* note 2, at 280.

89. *See, e.g.*, BGH, 8-5-1956, *Dahlke*, *in* BGHZ, 20 (1956); BGH, 1-12-1999, *Marlene Dietrich*, cit.; Cass., 6-2-1993, n.1503, in *Giust. civ.*, 1994, I, 229 (*Bartali*); Cass. civ., 17-11-1987, *Bull. Civ.* 1987 I, n.301, 216 (*Delon*); E.S. Bass, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 798, 839 (2008); Reiter, *supra* note 53, at 684.

90. For an overview, see M. MEISSNER, PERSÖNLICHKEITSSCHUTZ JURISTISCHER PERSONEN IM DEUTSCHEN UND US-AMERIKANISCHEN RECHT. EINE RECHTSVERGLEICHENDE UNTERSUCHUNG DES ALLGEMEINEN PERSÖNLICHKEITSRECHTS JURISTISCHER PERSONEN (Frankfurt am Main 1998); L. Dumoulin, *Les droits de la personnalité des personnes morales*, *in* REVUE DES SOCIÉTÉS 1 (2006).

damages have been awarded not only for nonpecuniary losses, but also in the form of hypothetical license fees.[91] The most recent trend, perfectly exemplified by the *Marlene Dietrich* decision, is toward a gradual convergence with the system of compensation adopted in breach of intellectual property rights cases.[92] There is evidence, in particular, of an increasing resort to the skimming off of profits and to restitutionary remedies.[93]

Therefore, if the focus is on the issue of protection against unconsented uses, then the divergence between the US right of publicity and the Continental personality rights seems to be more one of style than of substance.[94] Notwithstanding the differences in the conceptual categories employed, the practical outcome tends to be similar: the adoption of property rules as a means of safeguarding the interest to control the commercial exploitation of personality.

B. Body Parts and Liability Rules

Substantially different is the situation with regard to the corporeal aspects of personality. Here the trend is clearly towards a "de-patrimonialization" of body rights. Although the traditional idea of property rights over various separated parts and products of the body is still used,[95] developments in science and in law are pushing in the

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91. For a comparative account, see P. Schlechtriem, *Unjust Enrichment By Interference With Property Rights*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, X, RESTITUTION—UNJUST ENRICHMENT AND NEGOTIORUM GESTIO 68, 72 (Tübingen 2001); P. SCHLECHTRIEM, RESTITUTION UND BEREICHERUNGSAUSGLEICH IN EUROPA. EINE RECHTSVERGLEICHENDE DARSTELLUNG vol. 2, at 250 (Tübingen 2001).

92. BGH, 1-12-1999, *Marlene Dietrich*, cit. On this evolution, see A. PEUKERT, GÜTERZUORDNUNG ALS RECHTSPRINZIP 189-95 (Tübingen 2008); ELLGER, *supra* note 74, at 742-84.

93. See the answers given by national reporters to *Case 10*, *in* PERSONALITY RIGHTS IN EUROPEAN TORT LAW, *supra* note 3, at 375-412; for a synthesis, see G. BRÜGGEMEIER, A. COLOMBI CIACCHI & P. O'CALLAGHAN, A COMMON CORE OF PERSONALITY PROTECTION pt. III, at 567, 572 (2010).

94. For a more detailed analysis, see RESTA, *supra* note 51, at 238; *see also* for a comparative account, Reiter, *supra* note 53, at 715; E. Logeais & J.B. Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L.J. 511 (1998); S. Bergmann, *Publicity Rights in the United States and Germany: A Comparative. Analysis*, 19 LOY. L.A. ENT. L.J. 479 (1999). From the perspective of a mixed jurisdiction, P.N. Broyles, *Intercontinental Identity: The Right to the Identity in the Louisiana Civil Code*, 65 LA. L. REV. 823 (2005).

95. For an overview, see R. HARDCASTLE, LAW AND THE HUMAN BODY. PROPERTY RIGHTS, OWNERSHIP AND CONTROL 13, 78 (Oxford–Portland 2007); R. Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 367 (2000); F. Bellivier & C. Noiville, *The Commercialisation of Human Biomaterials: What Are the Rights of Donors of Biological Material?*, 1 J. INT'L BIOTECH. L. 89 (2004); B. Lemennicier, *Le corps humain, propriété de soi, propriété de l'État*, *in* DROITS 111 (1991); J. Taupitz, *The Use of Human Bodily Substances and Personal Data for*

opposite direction. First of all, the advances in bioinformatics have transformed every biological specimen into a potential carrier of sensitive personal information;[96] therefore, at least for data protection purposes, the application of a personal rights regime appears more appropriate than a property law paradigm. Secondly, concerns have been raised over the negative impact of exclusive rights over the human body for scientific research; in particular it is feared that both the collection and the subsequent re-use of DNA samples stored in bio-banks might be hindered by the recognition of absolute veto rights over body parts and elements.[97] Thirdly, the widespread diffusion of a neo-Kantian and dignity-centered jurisprudence in the contemporary bioethical debate has favored a noninstrumentalist and extra-patrimonial approach to the human body.[98]

As a result, the convergence of policy considerations and moral concerns has discouraged the adoption of full-scale property rules in the area of body rights. Pathbreaking, in this regard, has been U.S. law. Starting with the famous decision of the Supreme Court of California in *Moore v. Regents of the University of California*,[99] followed by *Greenberg v. Miami Children's Hospital Research Institute*,[100] the American courts have refused to hold that the individual has a property right on excised body parts and tissues of commercial value.[101] The most important consequence of this assumption is the denial of proprietary remedies, namely the claim for conversion for unconsented exploitation

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Research: The German National Ethics Council's Opinion, 3 J. INT'L BIOTECH. L. 25, 26 (2006); G. Criscuoli, *L'acquisto delle parti staccate del proprio corpo e gli artt. 820 e 821 c.c.*, in DIR. FAM. 266 (1985).

96. *See* D. Beyleveld & M.J. Taylor, *Data Protection, Genetics and Patent for Biotechnology*, 14 EUR. J. HEALTH L. 177, 178-82 (2007); E. Mand, *Biobanken für die Forschung und informationelle Selbstbestimmung*, *in* MEDIZINRECHT 565 (2005).

97. *See* Moore v. Regents of the Univ. of Cal., 51 Cal. 3d 120, 142-45 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991) (rejecting the conversion claim (also) on the basis of the policy consideration that "the extension of conversion law into this area will hinder research by restricting access to the necessary raw materials"). For an analysis of the social and economic context, see C. WALDBY & R. MITCHELL, TISSUE ECONOMIES: BLOOD, ORGANS AND CELL LINES IN LATE CAPITALISM (Durham 2006).

98. Paradigmatic is the French approach: *see* Cabrillac, *supra* note 45, at 177-86; Galloux, *supra* note 39, at 383; on the dignity-based discourse, see G. HOTTOIS, DIGNITÉ ET DIVERSITÉ DES HOMMES 1 (Paris 2009).

99. *Moore v. The Regents of the University of California*, 793 P.2d 479, *cert. denied*, 499 U.S. 936 (1991). For a critical analysis of this decision, see J. BOYLE, SHAMANS, SOFTWARE AND SPLEENS. LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 98 (Harvard 1996).

100. Greenberg v. Miami Children's Hosp. Research Inst., Inc., 264 F. Supp. 2d 1064 (S.D. Fla. 2003).

101. R. Rao, *Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?*, 35 J. L. MED. & ETHICS 371, 372 (2007); HARDCASTLE, *supra* note 95, at 64.

of human biological material.[102] By contrast, breach of fiduciary duties can be invoked as a cause of action (at least in the context of a doctor-patient relationship), with the result that the damages recoverable are essentially those of a noneconomic character. There is no basis, by contrast, for a right to share in the profits.[103] This suggests that the protection of the right to control the commercial exploitation of the body is based upon a liability paradigm rather than on a property one.[104]

European law seems to adopt a similar stance. The clearest example is offered by France, where the principles concerning the respect and utilization of the human body were codified in 1994.[105] Art. 16-1 of the Civil Code states that "the human body, its elements and its products may not form the subject of a patrimonial right,"[106] a prohibition that is repeated in art. 16-5.[107] The patrimonial character of the rights over the human body has been expressly denied and it seems that these rights have been assigned a purely negative and defensive function.[108]

The position taken by France has an important parallel in the general provision of art. 3 of the European Charter of Fundamental Rights, which stipulates the prohibition on making the human body and its parts as such a source of financial gain. Although this provision is clearly aimed at outlawing a market-based system of collection and distribution of body parts and products, it may also have an indirect bearing on the ownership issue. The principle of the extra-patrimonial character of body rights seems therefore deeply rooted in European law, further confirmed by the first results of the research study on "The boundaries of information property," conducted under the auspices of the Trento Common Core Project on European Private Law.[109]

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102. *See also* Greenberg v. Miami Children's Hosp. Research Inst., Inc., 264 F. Supp. 2d 1064 (S.D. Fla. 2003).

103. Rao, *supra* note 101, at 372.

104. For a comparison between the "property rights" model and the "personal rights" one, see Taupitz, *supra* note 95, at 26-27; Rao, *supra* note 101, at 372. *See also* C. HALÀSZ, DAS RECHT AUF BIO-MATERIELLE SELBSTBESTIMMUNG. GRENZEN UND MÖGLICHKEITEN DER WEITERVERWENDUNG VON KÖRPERSUBSTANZEN 265 (Berlin 2004).

105. *See* Galloux, *supra* note 39, at 382.

106. Art. 16-1 (translated into English by G. Rouhette, in http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm).

107. *See infra* Part VI.A.

108. Galloux, *supra* note 39, at 387, 392; F. Bellivier & C. Noiville, *La circulation du vivant humain: modèle de la propriété ou du contrat?*, *in* T. Revet, ed., CODE CIVIL ET MODÈLES. DES MODÈLES DU CODE AU CODE COMME MODÈLE 101, 115 (Paris 2005); F. PAUL, LES CHOSES QUI SONT DANS LE COMMERCE AU SENS DE L'ARTICLE 1128 DU CODE CIVIL 193 (Paris 2002); ZERR, *supra* note 47, at 67.

109. The research group "Boundaries of information property" is co-directed by C. Godt, L. Guibault, G. Van Overwalle & D. Beyleveld (see http://www.iuctorino.org/docwiki/tiki-index.php?page=Boundary+Information+Property). Case 7 of the Questionnaire deals with

What is striking, however, is the sharp contrast between the solutions adopted with regard to the incorporeal and the corporeal attributes of human personality. Beneath the conceptual unity of the category of personality rights, a bipolar regime is emerging: the intangible aspects of identity are increasingly protected against commercial appropriation through property rules, whereas the corporeal elements are protected through liability rules.

VI. LICENSING IDENTITY?

The divergence between the two regimes becomes even sharper when the focus of attention is shifted onto the issue of disposition. Although many questions are still open and might provide much scope for disagreement, it is undeniable that freedom of contract is currently subjected to broader and more effective restraints with respect to body parts and products than with regard to the intangible dimension of the personality.

A. The Human Body and the Gift Paradigm

A preliminary warning is necessary: if the legal status of the incorporeal attributes is not homogenous, in the field of body rights it is even harder to find a single regime of disposition and transfer of rights, which applies without qualifications to every component of the body.[110] On the contrary, the law usually provides different rules for different objects (the body v. body parts; double organs v. single organs; organs v. tissues; gametes v. products without reproductive function, etc.) *and* different uses (therapeutic purposes v. scientific research; commercial v. altruistic uses, etc.).[111] One should therefore be very cautious in drawing general conclusions, which might in the end be applicable to some particular phenomena and not to the whole complex of legal relationships concerning the body. This having been said, it is undeniable that the overall trend, at least in European law, is towards the adoption of a strictly regulated and highly protective regime, characterized by a

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"personalised genomic information" and is modelled on the *Moore* case. Most national reporters have been sceptical of the legal possibility of claiming a share in the profits generated by an unlawful commercial exploitation of human genes; this conclusion has been generally based on the assumption of the negative function of personality rights and on the principle of noncommercialization of the human body (see German Report, p. 19; Belgian Report, p. 47-48; Czech Report, p. 17; Dutch Report, p. 24; Polish Report, p. 22; Slovenia Report, p. 36; Italian Report, p. 23; Spanish Report, p. 18; all these documents are on file with the author).

110. *See generally* Rao, *supra* note 95, at 443-59.

111. Rodotà, *supra* note 40, at 179; A. FOUBERT, LE DON EN DROIT 141 (thèse Panthéon-Assas 2006).

conscious and deliberate marginalization of market transactions.[112] Such a regime applies to most body parts and products and is based on the idea that the commodification of the human body should be prevented and discouraged by the legal system. Article 3 of the European Charter of Fundamental Rights reflects this concern, stating that, in the field of medicine and biology, the body and its parts should not as such be made "a source of financial gain."[113] Such a principle was already enshrined in Art. 21 of the Oviedo Convention on Biomedicine,[114] and, on a national scale, in art. 16-5 French Civil Code.[115] More specific applications of the same paradigm are to be found in several European directives, national statutory enactments and international soft-law instruments.[116]

It is arguable that the prohibition of sale transactions concerning the human body rests at least on three general considerations.[117] The first is the principle of respect for human dignity. Indeed, it should be noted as significant that art. 3 of the European Charter is inserted in the Chapter on "Human Dignity." This value choice appears intimately coherent with a tradition of thought deeply rooted in Western civilization, of which the

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112. For a fascinating description of the gradual change in legal and social perspectives about market and nonmarket procurement systems of blood and tissues, see M.A. HERMITTE, LE SANG ET LE DROIT. ESSAI SUR LA TRANSFUSION SANGUINE 94-149 (Paris 1996).

113. *See* S. Hennette-Vauchez, *Sub Art. II-63, Droit à l'intégrité de la personne*, *in* L. Burgorgue-Larsen, A. Levade & F. Picod, eds., TRAITÉ ÉTABLISSANT UNE CONSTITUTION POUR L'EUROPE, II, LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION. COMMENTAIRE ARTICLE PAR ARTICLE 52, 58 (Bruylant 2005).

114. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, signed at Oviedo, 4-4-1997. For an introduction, see P. Fraisseix, *La protection de la dignité de la personne et de l'espèce humaines dans le domaine de la biomédecine: l'exemple de la Convention d'Oviedo*, *in* REV. INT. DR. COMP. 37 (2000); with regard to art. 21, see R.M. LOZANO, LA PROTECTION EUROPÉENNE DES DROITS DE L'HOMME DANS LE DOMAINE DE LA BIOMÉDECINE 120 (Paris 2001).

115. *See* Galloux, *supra* note 39, at 388; Cabrillac, *supra* note 45, at 185; M.A. Hermitte & K. Parizer, *La bioéthique et la constitution française. Interrogations de privatistes sur les modèles constitutionnels contemporains*, *in* C. Byk, ed., LA CONSTITUTION FACE AU DÉFI DE LA BIOÉTHIQUE 57 (Paris 2008) (arguing that the principle of extra-patrimoniality of human body should be considered an important component of the "constitutional identity" of the country).

116. *See, e.g.*, art. 12 Directive 2004/23/EC, on collection, storage and distribution of human cells and tissues; Directive 2002/98/EC, blood directive; art. 4 Directive 2001/20/EC, on clinical trials. For a comparative overview, see J. RANGEL DE ALVARENGA PAES, LE CORPS HUMAIN ET LE DROIT INTERNATIONAL (thèse Université Panthéon-Assas (Paris II), 2003); G. Ferrando, *Diritto e scienze della vita. Cellule e tessuti nelle recenti direttive europee*, *in* IL DIRITTO CIVILE OGGI. COMPITI SCIENTIFICI E DIDATTICI DEL CIVILISTA 417 (Napoli 2006).

117. For a recent assessment of the main objections to markets in body parts, see SATZ, *supra* note 48, at 189-205; *see also* M.A. Hermitte, *Le corps humain, hors du commerce, hors du marché*, *in* ARCHIVES DE PHILOSOPHIE DU DROIT 120 (1988).

Kantian philosophy represents only one component.[118] In the context of increasing mechanization and dehumanization of personal relationships, the emphasis on dignity clearly has the purpose of locating the body in the sphere of the inner self, opposing its objectification.[119] The second concern is grounded on the value of equality. By prohibiting commercial transactions, the legal system wants to avoid differences in the level of wealth and social power negatively affecting decisions concerning the disposition of the body.[120] It is clear—and the existing markets offer clear evidence of it—that sellers in such markets would only be the poor and disadvantaged individuals.[121] Strictly related to this argument is the third consideration: solidarity. The adoption of a procurement system based upon the logic of altruism, rather than utilitarian self-interest is part of a more general arrangement of society characterized by a fundamental trust in the role of the state as the principal provider of health services.[122] Indeed, the altruistic model is usually complemented by the state's monopoly on the activities of collection and allocation of body parts, in particular organs, for therapeutic purposes; and this monopoly should guarantee that important allocative choices are not made on the basis of the willingness to pay, but on transparent and collectively chosen criteria of merit and needs.

From a strictly legal point of view, the alienation of body parts and products is therefore based upon the paradigm of the gift rather than that of contract.[123] Indeed, the conception of gift adopted in this field is not equivalent to the category of "*donation*" or "*Schenkung*" commonly used in patrimonial law. The word "gift," here, is taken in the broader sense of

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118. *See* C. Ruiz Miguel, *Human Dignity: History of an Idea*, 50 JAHRBUCH ÖFFENT. RECHTS 281 (2002); T. De Koninck, *Archéologie de la notion de dignité humaine*, *in* T. De Koninck & G. Larochelle eds., LA DIGNITÉ HUMAINE. PHILOSOPHIE, DROIT, POLITIQUE, ÉCONOMIE, MÉDECINE 13 (Paris 2005); P. Kondylis & V. Pöschl, entry *Würde*, *in* O. Brunner, W. Conze & R. Koselleck eds., GESCHICHTLICHE GRUNDBEGRIFFE. HISTORISCHES LEXIKON ZUR POLITISCH-SOZIALEN SPRACHE IN DEUTSCHLAND VII, at 637 (Stuttgart 1992).

119. *See* M. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFFAIRS 249, 264 (1995); Zatti, *supra* note 45, at 45.

120. *See* RODOTÀ, *supra* note 40, at 126.

121. On this, see the researches by L. Anderson & D.A. Snow, *L'industrie du plasma*, *in* 104 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 25 (1994); R. Almeling, *Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation*, 72 LAW & CONT. PROBLEMS 37 (2009).

122. On the specific features of the European "social" model, as reflected in the European Charter of Fundamental Rights, see P.C. Guillot, *Le modèle européen de société*, *in* LA FRANCE FACE À LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE, *supra* note 43, at 387. On the relationship between gift giving and the role of the modern state, see J.T. GODBOUT (AND A. CAILLÉ), L'ESPRIT DU DON 222 *et seq.* (Paris 2000).

123. S. PRIEUR, LA DISPOSITION PAR L'INDIVIDU DE SON CORPS 149 (Paris 1999); FOUBERT, *supra* note 111, at 11, 111.

unilateral consent or attribution of a nonpatrimonial character.[124] It is the modern equivalent to the Maussian gift,[125] rather than a particular version of the *donation* of civil law.[126] This conceptual difference is clearly highlighted by the new provisions of the French Civil Code inserted by the bioethical laws of 1994. Indeed, the expression used in several articles is "*don*," instead of "*donation*" (see for instance arts. 16-8 and 311-19).[127] And the divergence is not only a terminological one. The regime of alienation of body parts and products for therapeutic and experimental uses is characterized by a set of principles that are antithetical to the common paradigms of patrimonial law.[128] Among the most important are the bilateral anonymity between the donor and the recipient[129] and the absence of a binding effect of the consent (which might be withdrawn at any time).[130] Also, formal requirements are often prescribed, generally out of protective and evidentiary concerns. Lastly, the relationship between the donor and the recipient is rarely a direct one, considering that the State often intervenes to supervise and administer activity involving distribution of body parts and elements.[131]

Given this background, not much space is left for market mechanisms, such as those proposed by the economic analysis of law.[132] Some extra-European jurisdictions have adopted a strictly regulated market for bloods and gametes.[133] In Europe the collection of body parts

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124. *See* R. HYLAND, GIFTS. A STUDY IN COMPARATIVE LAW 470 (Oxford 2009).

125. M. MAUSS, ESSAI SUR LE DON. FORME ET RAISON DE L'ÉCHANGE DANS LES SOCIÉTÉS ARCHAÏQUES (Paris 2009) (1925). On the Maussian paradigm, see A. Caillè, *Marcel Mauss et le paradigme du don*, *in* SOCIOLOGIE ET SOC. 141 (2004); B. Karsenti, *The Maussian Shift: A Second Foundation for Sociology in France?*, *in* W. James & N.J. Allen, eds., MARCEL MAUSS: A CENTENARY TRIBUTE. METHODOLOGY AND HISTORY IN ANTHROPOLOGY I, at 71 (N.Y. 1998).

126. G. Resta, *Doni non patrimoniali*, *in* ENCICLOPEDIA DEL DIRITTO. ANNALI IV (Milano, forthcoming 2011); C.M. Mazzoni, *Gift of Organs. What Kind of Gift*, 1 J. INT'L BIOTECH. L. 117 (2004).

127. *See* PRIEUR, *supra* note 123.

128. *See* FOUBERT, *supra* note 111, at 111; for a comparative account, HYLAND, *supra* note 124, at 483.

129. *See* F. Bellivier & C. Noiville, *Contrats et vivant*, *in* TRAITÉ DES CONTRATS 118 (J. Ghestin ed., Paris 2006); Cabrillac, *supra* note 45, at 189; FOUBERT, *supra* note 111, at 228; V. Depadt-Sebag, *Le don de gamètes ou d'embryon dans les procréations médicalement assistées: d'un anonymat imposé à une transparence autorisée*, *in* D. 891 (2004).

130. FOUBERT, *supra* note 111, at 111.

131. *See* GODBOUT (AND CAILLÉ), *supra* note 122, at 78.

132. *See* G. Becker & J.J. Elias, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, 21 J. ECON. PERSP. 3 (2007). For an overview, see also K. HEALY, LAST BEST GIFTS. ALTRUISM AND THE MARKET FOR HUMAN BLOOD AND ORGANS 1, 110 (Chicago-London 2006).

133. For a comparative overview, see M. Mercat-Bruns, *Droits sur les produits du corps de la femme et discrimination: l'éclairage du droit français et du droit américain*, *in* M. Mercat-Bruns ed., PERSONNE ET DISCRIMINATION: PERSPECTIVES HISTORIQUES ET COMPARÉES 141 (Paris

and products for therapeutic and scientific purposes is almost entirely insulated from economic concerns, although there is an increasing debate concerning the use of nonmonetary incentives to stimulate the supply.[134] The only area in which market devices might have a role concerns the procurement of DNA samples for storage in bio-banks and for use in industrial research. Indeed, some scholars have made the case for a broader recourse to remuneration schemes in order to strengthen the position of patients in genetic research. However some ethics committees have already raised objections against the adoption of market incentives even in this area, since it would lead to a distortion of the general logic according to which consent to the alienation of body parts and products should be insulated from market pressures.[135]

B. Commercial Exploitation of Personality and the Limits of Freedom of Contract

This scenario starkly contrasts with the state of the art in the field of intangible attributes, like the name, likeness and similar personal indicia. The normative structure of the European Charter of Fundamental Rights seems to mirror, consciously or unconsciously, such a difference. Whereas art. 3 expressly states the prohibition against making the human body and its parts a source of financial gain, no similar limitation is provided for by art. 8, related to the protection of personal data. The consent of the person is mentioned as a condition of validity of data processing, but nowhere is it stated that this should be a gratuitous declaration.[136] In general, observation of the law in action and of commercial practices suggests that no fundamental legal objection is currently raised against the commercial exploitation of personal identity.[137] Differently from the 'corporeal personality,' the commodifi-

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2006); J.A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COL. J. TRANSNAT'L L. 189, 209 (2004).

134. *See* P. Steiner, *Le don d'organes: une typologie analytique*, *in* REV. FRANÇ. SOC. 479, 498 (2006). The issue is even more debated in the U.S. *See* J.D. Mahoney, *Altruism, Markets and Organ Procurement*, 72 LAW & CONT. PROBLEMS 17 (2009).

135. *See* COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE, PROBLÈMES ÉTHIQUES POSÉS PAR LES COLLECTIONS DE MATÉRIEL BIOLOGIQUE ET LES DONNÉES D'INFORMATION ASSOCIÉES: 'BIOBANQUES' 'BIOTHÈQUES' Avis, 9 n.77 (20-3-2003); NATIONALER ETHIKRAT (GERMAN NATIONAL ETHICS COUNCIL), BIOBANKEN FÜR DIE FORSCHUNG. STELLUNGNAHME 87 (Berlin 2004). On this, see Taupitz, *supra* note 95, at 32.

136. On the protection of personal data in the European Charter, see O. De Schutter, *Sub Art. II-68, Protection des données à caractère personnel*, *in* TRAITÉ ÉTABLISSANT UNE CONSTITUTION POUR L'EUROPE, II, LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION, *supra* note 113, at 123.

137. For an interesting account of the evolution of social and legal attitudes towards personal licensing, see Armstrong, *supra* note 77, at 459; J.M. GAINES, CONTESTED CULTURE. THE

cation of incorporeal attributes, such as image, name, or voice is a process already accomplished in our societies and hardly reversible.

Not surprisingly, it is in this area that the traditional theory of personality rights has faced the most challenging objections. Here the tension between factual reality and dogmatic consistency has reached its peak.[138] At times this tension has led to important *revirements*, as is well illustrated by the *Marlene Dietrich* decision of the German Federal Supreme Court, affirming the inheritability of the commercial components of the general personality right, in contrast with the old assumption that personality rights are extinguished with the death of the rights-holder.[139] On other occasions the courts have managed to adapt the traditional doctrines to changed social and economic landscapes, as has happened, for example, with the recognition of the binding character of consent to publication of one's own picture or use of a personal name for commercial purposes;[140] or even with the admission of the *erga omnes* effect and real character of the exclusive licenses on personality rights of

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IMAGE, THE VOICE, AND THE LAW 143 (Chapel Hill, London 1991). For an overview of the most important agreements accepted in various jurisdictions, see AHRENS, *supra* note 54, at 354; Büchler, *supra* note 22, at 177; A. OHLY, "VOLENTI NON FIT INIURIA". DIE EINWILLIGUNG IM PRIVATRECHT 159 (Tübingen 2002); L. Marino, *Les contrats portant sur l'image des personnes*, *in* COMMUNIC. COMM. ELECT. 10 (2003); G. Loiseau, *Des droits patrimoniaux de la personnalité en droit français*, 42 MCGILL L.J. 319, 330 (1997); G. LOISEAU, LE NOM OBJET D'UN CONTRAT (Paris 1997); LUCAS-SCHLÖTTER, *supra* note 18, at 407; RESTA, *supra* note 51, at 271; V. Zeno-Zencovich, *Profili negoziali degli attributi della personalità*, *in* DIR. INF. 545 (1993); L.H. Clavería Gosálbez, *Negocios jurídicos de disposición sobre los derechos al honor, la intimidad y la propia imagen*, *in* ANUARIO DE DERECHO CIVIL 31 (1994).

138. Büchler, *supra* note 22, at 177, 187.

139. *See supra* Part III. On the issue of inheritability of the patrimonial components of personality rights after the *Marlene Dietrich* decision, see C. Ahrens, *Fragen der erbrechtlichen Gestaltung postmortaler Persönlichkeitsrechtsverwertungen*, *in* ZEITSCHRIFT FÜR ERBRECHT UND VERMÖGENSNACHFOLGE (ZEV) 237 (2006); O.C. Brändel, *Das postmortale Persönlichkeitsrecht als Nachlassgegenstand*, *in* FESTSCHRIFT FÜR WILLI ERDMANN ZUM 65. GEBURTSTAG 49 (Köln-Berlin-Bonn-München 2002).

140. See the recent decision of the Federal Supreme Court of Switzerland, 2-7-2010, in *Entscheidungen des Bundesgerichts*, 136 III 401 (2010), which has refused to hold that an individual's consent to publication of her likeness in commercial settings can be revoked unilaterally (in this case: photograph of an escort published on the Internet); against the opinion of a large part of the Swiss scholars, the Court has openly stated that personality rights can be the object of binding and enforceable contractual agreements (in so holding the court relied on the analysis by Büchler, *supra* note 22, at 187). Similarly, in France, Cass. Civ., 28-1-2010, nr. 08-70248, in Bull. Civ., 2010, I, n. 21; Cass. Civ., 11-12-2008, in J.C.P., 2009, II, 10025, with a comment by G. Loiseau, affirming that ordinary contract law applies to the agreements relating to the commercial exploitation of a person's likeness: "*les dispositions de l'article 9 du Code civil, seules applicables en matière de cession de droit à l'image, à l'exclusion notamment du Code de la propriété intellectuelle, relèvent de la liberté contractuelle*". With regard to Italian law, see Cass., 11-10-1997, n.9880, in Foro it., 1998, I, 499; Cass., 2-5- 1991, n.4785, *in* NUOVA GIUR. CIV. COMM., 1992, I, 44. On this issue, see AHRENS, *supra* note 54, at 329-440; Zeno-Zencovich, *supra* note 51, at 553; LOISEAU, *supra* note 137, at 231, 377.

commercial value.[141] In general, in most jurisdictions a shift from a delictual to a contractual regime has already been largely accomplished;[142] what is now under way is a transition to a property-based model.

This shift has taken its most visible and consistent form in the law of the United States, where the recognition of a full scale intellectual property right on the commercial exploitation of personality has led the courts to affirm the alienability and transferability of such right.[143] By contrast, in Europe several factors have impeded (or at least delayed!) such a development. Among these is also the principle of *numerus clausus* of exclusive rights.[144] Instead of openly recognizing an independent and freely alienable property right, European law has continued to work with the traditional personality rights framework, opening it up to the influence of commercial practice and making it more flexible.

However, several questions remain open and should be carefully addressed, especially in the perspective of legal reform.[145] In general, the issue that is still unresolved and is worth discussing is how to adjust the ordinary regime of contract law to provide a safety net of protection for the personality interests involved in all these commercial relationships. In other terms, the problem is how to draw an acceptable compromise

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141. See the decision by the Austrian Supreme Court of Justice (OGH), 15-6-2000, in JBl, 2001, 54, with a comment by Nauta, *Die Rechtsstellung des Lizenznehmers*, *in* ÖJZ 404 (2003); *see also* BGH, 14-10-1986, Nena, in GRUR, 1987, 128; OLG Hamburg, 11-6-1998, in NJWE-WettbR, 1999, 169; Trib. Modena, ord. 11-8-1998, in AIDA, 1999, 548. On this issue, see H. Forkel, *Lizenzen an Persönlichkeitsrechten durch gebundene Rechtsübertragung*, in GRUR 491, 492-93 (1988); AHRENS, *supra* note 54, at 400-01.

142. The shift from a delictual to a contractual approach is stressed by AHRENS, *supra* note 54, at 364; *see also* Büchler, *supra* note 22, at 187 *et seq.*

143. *See* Westfall & Landau, *supra* note 58, at 83.

144. *See* PEUKERT, *supra* note 92, at 189; K.N. PEIFER, INDIVIDUALITÄT IM ZIVILRECHT. DER SCHUTZ PERSÖNLICHER, GEGENSTÄNDLICHER UND WETTBEWERBLICHER INDIVIDUALITÄT IM PERSÖNLICHKEITSRECHT, IMMATERIALGÜTERRECHT UND RECHT DER UNTERNEHMEN 273, 316 (2001); LUCAS-SCHLÖTTER, *supra* note 18, at 276-77; Lucas-Schlötter, *supra* note 86, at 159. The relevance of the *numerus clausus* principle as a possible obstacle to the recognition of full-scale property rights emerges also from the debate in mixed jurisdictions: *see* N.R. Whitty & R. Zimmermann, *Rights of Personality in Scots Law: Issues and Options*, *in* RIGHTS OF PERSONALITY IN SCOTS LAW. A COMPARATIVE PERSPECTIVE, *supra* note 2, at 25 ("[A]ny right of exclusive 'licensees' to sue third parties infringing their rights under the licence seems to be in the nature of a new type of incorporeal property right resembling intellectual property and the Scottish courts do not have jurisdiction to create new types of property right [because of the principle of the *numerus clausus* of real rights].").

145. Several papers presented at this Conference deal with the issue of commercialization of personality interests; many of them seem to assume that any future codification of personality rights should expressly address this topic.

between freedom of contract and the state's duty to protect human dignity and fundamental rights.[146]

Hidden in contemporary discourses on the commercial exploitation of personality is the assumption that the 'economic' and 'noneconomic,' the 'personal' and the 'patrimonial,' the 'material interests' and the 'nonmaterial interests' are dimensions strictly antithetical and easily distinguishable from one another. It is this assumption, for instance, that lies beneath the recognition of an autonomous intellectual property right in the 'persona' and that pushes for the introduction of a full scale proprietary regime of transfer of rights.[147] It is this assumption, once again, that supports the idea that whenever a person has voluntarily commodified the attributes of her own identity, then she automatically waives any claim founded on the protection of personality and dignity, since these attributes have been "objectified."[148] Despite its broad acceptance, this approach appears too simplistic and conceptually untenable.[149] Indeed, as is well illustrated by the case law related to commercial appropriation of personality and the long-lasting experience of the moral rights in copyright, the attempt to sharply separate economic and noneconomic aspects of the protection of personality has proven to be tricky. These dimensions are, in many situations, deeply connected

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146. *See* Büchler, *supra* note 22, at 185; RESTA, *supra* note 51, at 276-345.

147. The dualistic approach is supported, *ex plurimis*, by J.C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA. THE RIGHT OF PUBLICITY (UNITED STATES) AND PORTRAIT LAW (NETHERLANDS) BALANCED WITH FREEDOM OF SPEECH AND FREE TRADE PRINCIPLES 234 (The Hague-London-Boston 1996); G. Loiseau, *Les droits sur le nom: un droit à la recherche d'un statut*, *in* GAZETTE DU PALAIS, 19-5-2007, at 18 n.139; LOISEAU, *supra* note 137, at 471; Loiseau, *supra* note 137, at 333; Bouvard, *supra* note 50, at 375, 384; A.R. Bertrand, *Un nouveau droit voisin du droit d'auteur: le droit à l'image*, *in* CAHIERS DR. AUT. 1 n.32 (1990); V. BEUTHIEN & A.S. SCHMÖLZ, PERSÖNLICHKEITSSCHUTZ DURCH PERSÖNLICHKEITSGÜTERRECHT. ERLÖSHERAUSGABE STATT NUR BILLIGE ENTSCHÄDIGUNG IN GELD 25 (München 1999); V. Beuthien & A.S. Schmölz, *Persönlichkeitsschutz durch Gewinnherausgabe*, in K&R, 1999, 396; E. Ullmann, *Persönlichkeitsrechte in Lizenz?*, *in* AfP 209 (1999); C. Scognamiglio, *Il diritto all'utilizzazione economica del nome e dell'immagine delle persone celebri*, *in* DIR. INF. 20 (1988).

148. This approach is clearly represented by E.M. BICHON-LEFEUVRE, LES CONVENTIONS RELATIVES AUX DROITS DE LA PERSONNALITÉ 269 (thèse Paris XI, 1998) ("C'est que la personne qui consent ainsi à l'exploitation d'attributs de sa personnalité, les a, au préalable, objectivés, 'chosifiés.' En vérité, l'image, la vie privée, le nom d'une personne, lorsqu'ils donnent lieu ainsi à la conclusion de contrats d'exploitation, se sont en quelque sorte détachés de la personne de leur titulaire par la seule volonté de ce dernier qui espère en tirer quelque revenues. De leur nature personnelle lorsqu'ils s'appliquent à l'individu, les attributs acquièrent une nature réelle lorsqu'ils sont ainsi commercialisés. En d'autres termes, il se crée entre la personne et ses attributs une relation d'extériorité, de sujet à objet: ses attributs sont pour elle un objet potentiel de profit en raison de leur valeur marchande".). Similarly BEUTHIEN & SCHMÖLZ, *supra* note 147, at 33.

149. F. Rigaux, *La distinction entre les droits subjectifs patrimoniaux et les biens non patrimoniaux*, *in* LA VIE PRIVÉE. UNE LIBERTÉ PARMI LES AUTRES? 153, 160 (Bruxelles 1992).

and cannot be easily disentangled.[150] Often personal fulfillment is achieved through safeguarding economic interests and vice versa; economic and noneconomic interests related to personal identity tend to merge very easily and frequently.[151] The young girl who is a talented model agrees to the commercial exploitation of her image both as a way of enhancing her personality and of making some money.[152] Similarly, the individuals who participate in a reality show waive their privacy both out of economic considerations and as a way of fulfilling their desire for fame.[153] To apply to either a purely personal or a purely contractual regime might lead, in these instances, to inappropriate results, in particular if one takes into account the stark asymmetry of contractual power and information which characterizes many commercial relationships in the sectors of sports and entertainment.[154] The law should instead accept this ambiguity—which stems from the complex nature of personal identity—and work out a regime carefully tailored to the peculiar nature of the goods and interests involved.

The law of several European jurisdictions already contains doctrines and principles, which might represent a useful foundation for the protection of dignitarian interests in contractual settings. They need only to be placed in the limelight and openly tied to the State's duty to protect fundamental rights.[155]

The first is the principle of specificity and determinacy of consent.[156] This principle is explicitly stated in data protection legislation (see art. 2, let. *h* European Directive 95/46/EC) and constantly applied by the case law on *droit à l'image*.[157] To require strict compliance with this principle in the field of personality rights has the advantage of limiting

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150. *See* A. Peukert, *Persönlichkeitsbezogene Immaterialgüterrechte?*, *in* ZUM 710, 714 (2000).

151. For a critique of such dichotomies, expressed with specific reference to an interesting case, see T. Gidron, *The Publicity Right in Israel: An Example of Mixed Origins, Values, Rules, Interests and Branches of Law*, 12 ELEC. J. COMP. L. 1, 9 (2008).

152. See for an illustrative case Trib. Catania, 16-12-1982, *in* GIUR. MERITO, 1984, I, 855; *see also* the famous Brooke Shields decision, *Shields v. Gross*, 58 N.Y.2d 338 (1983).

153. *See* Cass. soc., 3-6-2009, in D., 2009, jur., 1530; B. Edelman, *Quand "L'Ile de la tentation" ne séduit pas le droit*, *in* D., 2009, 2517; B. Edelman, *'Quatre pattes, oui; deux pattes, non.'* Loft Story—*une nouvelle fonction-auteur*, *in* D., 2001, chr., 2763; U. Hinrichs, *'Big Brother' und die Menschenwürde*, in NJW, 2000, 2173.

154. For some examples, see S.L. Whiteleather, *Rebels with a Cause: Artist's Struggles To Escape a Place Where Everybody Owns Your Name*, in 21 LOY. L.A. ENT. L. REV. 253 (2001); GAINES, *supra* note 137, at 153.

155. I have already discussed at length this topic in RESTA, *supra* note 51, at 281.

156. *See* Forkel, *supra* note 141, at 491, 499; GÖTTING, *supra* note 19, at 279.

157. *See* LUCAS-SCHLÖTTER, *supra* note 18, at 366; A. De Vita, *Sub* art. 10, *in* A. PIZZORUSSO, R. ROMBOLI, U. BRECCIA & A. DE VITA, DELLE PERSONE FISICHE 559 (Bologna 1988).

the chances that people—for example actors at the beginning of their careers, young models, athletes, etc.—would be forced to accept contract terms which would result in far-reaching interferences into their personal sphere and possibly bind them for a long period of time.[158] In this area, by contrast, the governing paradigm should be one of foreseeability, as also argued by the so-called *Vorhersehbarkeitstheorie*, developed in the field of author's moral rights.[159]

The second is the criterion of restrictive interpretation, which is usually provided for by copyright statutes[160] and frequently applied by the courts in cases concerning the right to one's own likeness.[161] Its importance is related to the fact that in this way a default rule is created, according to which, whenever the scope of a contractual grant is unclear, the right to control the commercial exploitation is considered reserved to the initial right-holder.[162] This principle has proven particularly important anytime a new technology has been introduced and new kinds of exploitation have been rendered possible (Internet is the most obvious example).

The third is the *ius se poenitendi*, which is expressly granted by the Spanish Act on the protection of personality[163] and, as a moral right, by the copyright law of several Continental jurisdictions.[164] Several authors

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158. For some examples, see *Rogers v. Republic Pictures Corp.*, 213 F.2d 662 (9th Cir. 1954); *Autry v. Republic Prod. Inc.*, 213 F.2d 667 (9th Cir. 1954); *Rooney v. Columbia Pictures Industries, Inc.*, 538 F. Supp. 211 (S.D.N.Y. 1982). *See also* Whiteleather, *supra* note 154, at 255.

159. *See* G. Schricker, *Urheberpersönlichkeitsrecht*, *in* G. Schricker ed., URHEBERRECHT AUF DEM WEG ZUR INFORMATIONSGESELLSCHAFT 79, 93 (Baden-Baden 1997); A. METZGER, RECHTSGESCHÄFTE ÜBER DAS DROIT MORAL IM DEUTSCHEN UND FRANZÖSISCHEN URHEBERRECHT 195 (München 2002).

160. *See* FRENCH CODE OF INTELL. PROP. arts. L.131-3, L.122-7, L.132-20; German Copyright Act § 31, al. 5; Italian Copyright Act arts. 19, 119.

161. See, for instance, the French decision by Cass., 30-5-2000, in J.C.P., 2001, II, 10524, with comment by B. Montels, *Le critère du 'nouveau public' au service d'une conception extensive du droit au respect de la vie privée*; *see also* Tallon, *supra* note 19, at 23; LUCAS-SCHLÖTTER, *supra* note 18, at 379; J. Ravanas, *Droits de la personnalité et justice contractuelle: le rayonnement de l'article 9 du code civil dans un ensemble contractuel*, *in* D., 2000, jur., 347, 350; W. Schulz & U. Jürgens, *Das Recht am eigenen Bild—Eine fallorientierte Einführung in Struktur und aktuelle Probleme des Bildnisschutzes*, in JuS, 1999, 664, 666; Clavería Gosálbez, *supra* note 137, at 56.

162. *See* GÖTTING, *supra* note 19, at 280; OHLY, *supra* note 137, at 342.

163. *See, e.g.*, art. 2 of the Spanish *Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen* ("El consentimiento a que se refiere el párrafo anterior será revocable en cualquier momento, pero habrán de indemnizarse en su caso, los daños y perjuicios causados, incluyendo en ellos las expectativas justificadas."); L.H. Clavería Gosálbez, *Reflexiones sobre los derechos de la personalidad a la luz de la Ley Orgánica 1-1982, de 5 de mayo*, *in* ANUARIO DE DERECHO CIVIL. 1242, 1252 (1983); Clavería Gosálbez, *supra* note 137, at 43.

164. *See* H. Hansmann & M. Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 139 (1997).

have proposed by analogy the extension of this rule to the whole category of personality rights[165] and indeed some courts have already resorted to this paradigm to resolve controversies concerning the right to one's own likeness. It should be underlined that such a paradigm does not imply an aprioristic refusal of the binding effect of contractual agreements concerning personality rights. As is well known, the author's *ius se poenitendi* is not absolute; most jurisdictions require evidence of a "serious moral reason" and condition its exercise on the payment of a reasonable indemnity to the publisher.[166] Similarly, in the area of commercial exploitation of personality, the courts have sometimes allowed unilateral termination of the agreement only on the basis of objective and not unreasonable moral reasons.[167] The combination of these three devices may contribute to neutralizing most conflicts arising from the clash pitting the internal logic of a binding contract against personal identity, which has the peculiarity of being continuously evolving.[168]

Lastly, the rules exempting particular properties from seizure and from countable assets in bankruptcy represent a further means of protection in the context of commercial exploitation of personality.[169] As is well illustrated by the experience with domain names, the consequences of the recognition of a new property right of commercial value are, on the one hand, an increasing resort to collateralization and, on the other hand, attempts by unsatisfied creditors to make this right available for seizure and sale.[170] A similar phenomenon has arisen in the field of personality rights.[171] The commercialization of personal identity

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165. *See* Forkel, *supra* note 141, at 500; Büchler, *supra* note 22, at 187; GÖTTING, *supra* note 19, at 150, 280; RESTA, *supra* note 51, at 300-07.

166. For a comparative account, S. Strömholm, *Droit moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 42 SCANDINAVIAN STUD. IN LAW 217, 237 (2002); G. Boytha, *La législation nationale relative aux contrats d'auteur dans les pays suivant la tradition juridique de l'Europe continentale*, *in* DROIT AUT. 208 (1991).

167. *See, e.g.*, LG Köln, 20-12-1995, *in* AfP, 1996, 186; OLG München, 17-3-1989, in AfP, 1989, 570.

168. J. HELLE, BESONDERE PERSÖNLICHKEITSRECHTE IM PRIVATRECHT. DAS RECHT AM EIGENEN BILD, DAS RECHT AM GESPROCHENEN WORT UND DER SCHUTZ DES GESCHRIEBENEN WORTES 119 (Tübingen 1991); D. GUTMANN, LE SENTIMENT D'IDENTITÉ. ÉTUDE DE DROIT DES PERSONNES ET DE LA FAMILLE 9-12 (Paris 2000).

169. For a detailed analysis, see RESTA, *supra* note 51, at 356.

170. *See* BGH, 5-7-2005, *in* NJW, 2005, 3353; BVerfG, 24-11-2004, in NJW, 2005, 589; OGH, 25-3-2009, in ÖJZ, 2009, 808; O. KOPF, DIE INTERNETDOMAIN IN DER EINZELZWANGSVOLLSTRECKUNG UND IN DER INSOLVENZ DES DOMAININHABERS (Jena 2006); V. HERMANN, DIE ZWANGSVOLLSTRECKUNG IN DIE DOMAIN—ZUR PFÄNDBARKEIT UND VERWERTUNG VON DOMAIN-NAMEN IN INTERNET (Aachen 2004).

171. *See* O. Sosnitza, *Die Zwangsvollstreckung in Persönlichkeitsrechte—Plädoyer für eine Neuorientierung*, *in* JZ, 2004, 992.

has been followed by proposals aimed at treating the right of publicity as an asset in the debtor-creditor context.[172] The O.J. Simpson case is the first reported decision on this issue and a particularly significant one.[173] It suggests that even in the United States, where the process of commodification has gone the furthest, the courts have felt the need to prevent the transformation of personal identity into "property for all seasons."[174] Within European Continental laws there are several provisions and doctrines which may afford a reasonable compromise between creditors' expectations and respect of personal autonomy and human dignity. One example is represented by the rule exempting from the oblique action "rights and actions which are strictly personal to the debtor" (art. 1166 French Civil Code; art. 2900 Italian Civil Code);[175] another is the regime of copyright, admitting to seizure only the profits gained by the publication of a work, but not the author's rights (art. 111 Italian Copyright Act; see also § 113 German *UrhG*). Indeed, the latter rule has been proposed as a model for all personality rights of commercial value[176].

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172. For a careful analysis of this issue, see M.B. Jacoby, *Auctioning Kim Basinger: The Imminent Collision of Bankruptcy and the 'Right of Publicity,'* 1 NORTON BANKR. L. ADVISER 1 (2001); M.B. Jacoby & D.L. Zimmerman, *Foreclosing of Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322 (2002).

173. *See supra* Part III.

174. Jacoby & Zimmerman, *supra* note 172, at 1368.

175. *See* LUCAS-SCHLÖTTER, *supra* note 18, at 316; J. Ravanas, *La défense des attributs de la personnalité d'un débiteur en liquidation judiciaire*, *in* D., 2001, jur., 1168; LOISEAU, *supra* note 137, at 483-84.

176. Sosnitza, *supra* note 171, at 996.