Publicity Rights and Defamation of the Deceased: Resurrection or R.I.P.?

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PUBLICITY RIGHTS AND DEFAMATION OF THE DECEASED: RESURRECTION OR R.I.P.?

I. INTRODUCTION

“Elvis Presley was a pedophile.”

Had this statement been communicated in such manner during Elvis’s lifetime, he would have been able to sue for defamation, with a favorable chance of success (provided that he would be able to meet the appropriate elements of the action). Yet, courts in civil proceedings have consistently refused to grant a similar cause of action for postmortem defamation; and, save a small legion of hopeful fans, it is widely recognized that Elvis is in fact deceased. Thus Elvis, or rather his estate, would have little hope of civil recourse against any directed defamatory remarks published today.

However, if one were to print that Elvis was a pedophile on T-shirts and then sell them, or even place his name or likeness, absent any potential defamatory statements, on leaflets and distribute them, his estate, in certain jurisdictions, would be able to sue on the grounds that such an action was an infringement on his publicity rights. Unlike defamation of the dead, in which courts

1. Let it be known that at no time during the course of research for this paper did this author encounter any material even slightly suggesting that Elvis was indeed a pedophile.

2. See generally New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, 418 U.S. 323 (1974). In this string of jurisprudence, the United States Supreme Court established its defamation doctrine, which provides that, absent a finding of actual malice, the First Amendment protects defamatory statements directed at public officials and figures. These cases will be given greater attention in Section III-A, infra.

3. See Philip Wittenberg, DANGEROUS WORDS 209 (1947) (stating that “[i]n nearly every state in the Union there is a law making libel of the dead a crime, but the unanimous rule in civil cases bars recovery”).

4. There is, in fact, an entire body of Elvis Law in which his estate has initiated litigation against both individuals and entities for using his name or
commonly do not recognize such a cause of action for damages, descendible publicity rights granting relief to the deceased’s estate for appropriation of name or likeness are acknowledged by some states.\textsuperscript{5}

To allow descendible publicity rights while prohibiting a cause of action for defamation of the dead, suggests that not only do the departed retain an interest in their identity, but that they must also preserve a layer of skin thick enough to withstand defamatory attacks against their immortal reputation. This is an inconsistent treatment of the dead as it, in a sense, resurrects the person for certain causes of action when identity is at stake while adding another nail to the coffin for other identity-related matters. The reputation of the deceased should either die with the being, thereby precluding any defamation or publicity actions, or exist beyond the grave in such a way as to receive congruent treatment to that of a living person. This paper is a prayer to harmonize the treatment of the dead with respect to publicity and defamation concerns. Part II examines the notion of a descendible publicity right. In particular, this section will focus on how this right is often seen as a derivation of certain privacy rights. Part III provides an overview of defamation law as it applies to the deceased. Specifically, this section will examine the common law holdings, as well as certain criminal statutes that do in fact outlaw defamation of the dead. In its attempt to reconcile these differences in which the dead are viewed, Part IV will initially address the topics of survivability and likeness for a particular purpose. See \textit{e.g.} Hoffman v. Capital Cities, 255 F. 3d 1180 (9th Cir. 2001) (concerning the “Jail House Rock” persona); Brewer v. Producers Video Inc., 216 F. 3d 1281 (11th Cir. 2000) (concerning a television special dealing with Elvis from his death to the present); Elvis Presley Enters. V. Capece, 141 F. 3d 188 (5th Cir. 1998) (concerning the “Velvet Elvis” nightclub); State ex. rel. Elvis Presley Int’l v. Crowell, 773 S.W. 2d 89 (Tenn. Ct. App. 1987) (concerning an organization named after Elvis); Estate of Presley v. Russen, 513 F. Supp. 1339 (D. N.J. 1981) (concerning an Elvis impersonator); Memphis Development Foundation v. Factors Etc., Inc., 616 F. 2d 956 (6th Cir. 1980) (concerning little pewter Elvis dolls); Factors Etc., Inc. v. Pro Arts, Inc., 579 F. 2d 215 (2nd Cir. 1978) (concerning a Elvis memorial poster).

\textsuperscript{5} See \textit{e.g.}, Cal. Civ. Code § 3344.1 (1999).
wrongful death before examining a uniform treatment of the dead. By suggesting that legal jurisdictions “put both feet in the grave,” this section will argue that posthumous publicity and reputation actions should remain with the deceased.

II. GRATEFUL DEAD? DESCENDIBLE PUBLICITY RIGHTS

Dead celebrities in some jurisdictions should consider themselves fortunate. Despite the fact that they are biologically no more, their identity continues to thrive from beyond the grave. Where, in the course of life, celebrities are able to use their names and likenesses as a source of wealth and influence, some states have extended this right of publicity into the afterlife, as well.6 Thus someone’s persona is able to achieve, in a sense, the American Dream Plus; that is, to be able to generate fame and wealth not only in life but also in death.

The right of publicity is the “right of every person to control the commercial use of his or her identity.”7 Even though this right speaks to “every person,” publicity rights are typically reserved for celebrities.8 This inadvertent exclusion of lay people stems from the idea that right of publicity primarily serves to protect the commercial value of one’s name or likeness.9 Generally, the name or likeness of non-celebrities holds little, if any commercial appeal.10 Though, what is now regarded as a property interest for celebrities, the right of publicity has its roots in the right to privacy, which is unconditional to fame.11 Therefore, it is

7. See id. at 130.
9. See generally id.
10. This notion has even prompted one state to codify a publicity cause of action that excludes all non-celebrities. See CAL. CIV. CODE §3344 et seq. (West Supp. 1999) (providing that celebrities, in life and death, have a property interest in their personae).
11. See generally Michael Madow, Private Ownership of Public Image, 81 CAL. L. REV. 125, 147-78 (chronicling the emergence of a right of publicity).
important to investigate the upbringing of publicity rights before attending to descendible publicity.

A. Privacy Actions of Appropriation and the Emergence of Publicity Rights

Invasion of privacy actions are but a mere patch of five ‘o’clock shadow—fresh growth, if you will—on the face of tort law. That is, prior to 1890, no common law court had ever granted relief solely based upon such a cause of action. It was in that year that two young Boston lawyers named Samuel D. Warren and Louis D. Brandeis collaborated on an article that synthesized the notion of privacy into a legal action and thus spawned an entirely new branch of tort law. The article, entitled “The Right to Privacy” and published in the Harvard Law Review, arose out of a general animus the authors garnered toward the press’ increasing infatuation with individuals’ private lives. Warren and Brandeis sought to address both the growing number of liberties taken by the newspapers in publishing “idle gossip” and the need to tether the press away from private matters. Shortly thereafter, the first American decisions willing to accept this notion of invasion of

However, the right of publicity as being derived from privacy rights is not a universally accepted conclusion. Some commentators have suggested that publicity rights originated in unfair competition laws. See Gary M. Ropski, Celebrity Status and Right of Publicity, NEW YORK L. JOURN., Jan. 31, 1997, at 5; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995) (providing a right of publicity).

12. See PROSSER AND KEATON ON TORTS, § 117 at 849.


15. See Pember, supra note 13, at 23.

16. See Warren and Brandeis, supra note 14, at 196.
privacy as a legal principle followed.\textsuperscript{17} Since then, the law has evolved into four different causes of action continually rooted to the right of privacy: (1) Appropriation of likeness; (2) unreasonable intrusion into areas of private concerns; (3) public disclosure of private facts; and (4) false light publication.\textsuperscript{18}

Appropriation is the first type of invasion of privacy action to be recognized by courts.\textsuperscript{19} Essentially, this form of invasion provides a cause of action to a plaintiff whose name or likeness has been used, or appropriated, without consent.\textsuperscript{20} Not unlike defamation,\textsuperscript{21} plaintiffs in appropriation actions must show that the name or likeness used by the defendant was indicative of their character and not purely coincidental.\textsuperscript{22} That is, a woman with distinguishing blonde hair grown down past her knees may not sue for appropriation of her likeness if a woman of similar hair length is coincidently featured in a shampoo commercial.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{17} For a list of early privacy cases, see Prosser and Keaton, \textit{supra} note 12, § 117 at fn. 10.
\item \textsuperscript{18} See John w. Wade, \textit{Developing Trends in the Tort Action for Invasion of the Right of Privacy}, 16 Va. L. Weekly, DICTA COMP. 1, 7-12 (1965); Prosser and Keaton, \textit{supra} note 12, § 117 at 851-66.
\item \textsuperscript{19} See Prosser and Keaton, \textit{supra} note 12, § 117 at 851. Because the right of publicity is often viewed as a derivation of appropriation causes of action, this article will examine only this branch of the right of privacy tort. For discussion relating to the other three braches, see Prosser and Keaton, \textit{supra} note 12, § 117 at 854-66; Wade, \textit{supra} note 18, at 7-12.
\item \textsuperscript{20} See id. 851-52. Definitions of appropriation have differed in their wording, but remain consistent in spirit. See \textit{e.g.} Wade, \textit{supra} note 18, at 7-8 (stating that “commercial appropriation of some aspect of the plaintiff’s personality” is an invasion of privacy).
\item \textsuperscript{21} See Section III-B-1, infra.
\item \textsuperscript{22} See Prosser and Keaton, \textit{supra} note 12, § 117 at 852-53. “It is the plaintiff’s name as a symbol of identity that is involved here, and not as a mere name.” Id. at 852.
\item \textsuperscript{23} Similarly, a one Humphrey Widdlethorpe may not be granted relief if his name happened to appear in a novel coincidently and without any indication of his identity. See \textit{e.g.} People on Complaint of Maggio v. Charles Scribner’s Sons, 130 N.Y.S. 2d 514 (1954) (in which the same name as the plaintiff’s is used in a novel).
\end{itemize}
One of the first appellate cases concerning appropriation was *Roberson v. Rochester Folding-Box Company.* In *Roberson*, the defendant placed a picture of a beautiful woman (who was not a celebrity) on widely circulated lithographs advertising flour. The court in a 4-3 decision outright rejected the, then novel, invasion of privacy claim. In doing so, the court found that, absent "a clever article in the Harvard Law Review," there was a lack of precedent and other legal material on which to base an affirmative decision. The court, additionally, forecasted "a vast amount of litigation . . . bordering upon the absurd" if such a right were to be embraced. And, in a further attempt to accredit its hesitation to accept the right to privacy as a legal principle, the court expressed its fear of appropriately distinguishing between what is public and what is private, as well as, the potential undue burden placed on the freedom of speech and press. With the *Roberson* decision, the invasion of privacy tort was not exactly steadfast out of the gates.

25. See id. at 442. The plaintiff claimed that he had been "greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked, causing her great distress and suffering both in body and mind; that she was made sick and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician." Id. Instead of detailing all of her maladies, if such an action was to arise today, all she would have to advance is that the defendant appropriated her likeness.
26. See id.
27. See id.
28. See id; see also Prosser and Keaton, supra note 12, § 117 at 850. Such fears are certainly justifiable, as courts today continue to encounter issues of private versus public and limitations on First Amendment freedoms. See generally Lois G. Forer, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT (1987) (providing in-depth coverage on the effect defamation and privacy actions have on speech and press liberties).
29. In fact, so much controversy surrounded the *Roberson* decision that one of the concurring judges submitted a law article in its defense. See O'Brien, The Right of Privacy, 2 COLUM. L. REV. 437 (1902). And consequently, New York enacted a statute "making it both a misdemeanor and a tort to make use of the name, portrait or picture of any person for 'advertising purposes or for the
Understandably so, the first courts to hear such matters were "preoccupied with the question whether the right of privacy existed at all." As more cases were decided, however, appropriation jurisprudence began to stabilize and thus form the law as we know today.

Because appropriation concerns the use of an individual's name or likeness, often in a commercial or profit-minded sense, it naturally follows that celebrities, whose names and likenesses are used to sell and empower products, appear frequently as plaintiffs in such actions. The difference between the celebrity and the non-celebrity plaintiff in appropriation actions is quite distinguishable. A non-celebrity plaintiff, similar to the woman Roberson whose name or likeness accompanies a commercial endeavor, asserts claims that are more akin to the traditional notion of privacy as a "right to be let alone." Such plaintiffs are "plucked from obscurity and rudely exposed to widespread and unwanted publicity." However for a celebrity, who has already been injected into the pubic eye and is accustomed to braving the

30. See Prosser and Keaton, supra note 12, § 117 at 850-51 (quoting N.Y. Civil Rights Law, §§50-51 (1921)).

31. The leading case of this movement, which rejected the holding in Robinson and adopted the views of Warren and Brandeis was Pavesich v. New England Life Insurance Company. 50 S.E. 68 (Ga. 1905) (concerning the use of the plaintiff's picture without consent in newspaper advertisements). For further examples of appropriation cases, see e.g. Manger v. Kree Institute of Electrolysis, Inc. 233 F. 2d 5 (2nd Cir. 1956) (in which a plaintiff's name was appropriated without consent); Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938) (in which the plaintiff's likeness was appropriated without consent); Eick v. Perk Dog Food, Co., 106 N.E. 2d 742 (Ill. App. 1952) (in which a plaintiff's picture was appropriated without consent); Young v. Greneker Studios, 26 N.Y.S. 2d 357 (1941) (in which a plaintiff's likeness was used as a model for a mannequin without consent).

32. "It is an unquestioned fact that the use of a prominent person's name, photograph or likeness... in advertising a product or in attracting an audience is of great pecuniary value." Melville Nimmer, The Right of Publicity, 19 LAW & CONTEMP. PROB. 203, 215-16 (1954).

33. See Madow, supra note 11, at 168.

34. See id.
elements of publicity, to complain of *additional* publicity may seem rather inexplicable to a finder of fact.\(^{35}\) A celebrity’s grievance is not so much that his name or likeness had been appropriated without consent, but rather that such use went uncompensated.\(^{36}\) With this, the right of publicity has thus emerged, separating itself from the privacy action of appropriation.\(^{37}\)

Although lawsuits in which public figures have claimed appropriation of name or likeness have dated as far back as the late nineteenth century,\(^{38}\) it was not until 1953 when “the right of publicity” was initially phrased and the “economic conception of fame” was thus legally realized.\(^{39}\) In *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc.*, the United States Court of Appeals for the Second Circuit held that, “in addition to and independent of” the traditional notion of invasion of privacy by appropriation, there also existed a “right of publicity” granting individuals—namely prominent ones—protection for their personas.\(^{40}\) While *Haelen*

35. See id. at 168-69. “How could Babe Ruth, who had performed before thousands of people... and endorsed products, complain of distress or humiliation when his picture was used without his consent on a baseball card...” Id. at 169.

36. See id.

37. In another sense, Professor Madow stated: “The right of publicity was created not so much form the right of privacy as from frustration with it.” Id. at 167; but see McCarthy, supra note 6, at 134 (stating that “the right of publicity grew out of the rights of privacy”).

In a now-famous case concerning the news broadcast of a man being shot from a cannon, the United States Supreme Court has also recognized that the right of publicity was distinct from the right to privacy. See *Zachini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (holding that broadcasting the footage was an infringement on the plaintiff’s right of publicity).

38. See e.g. *Atkinson v. John E. Doherty & Co.*, 80 N.W. 372 (Mich. 1899) (in which the defendant named a brand of cigars after a deceased public figure).


40. See *Haelan Lab.*, 202 F. 2d at 866. Both plaintiff and defendant in this case were chewing gum manufacturers that wanted to use photographs of certain baseball players for their product. The plaintiff contended that it had exclusive
Melville Nimmer channeled its momentum into a determinative law article chronicling the inadequate legal doctrine available to protect the commercial interest celebrities have in their personas and urging for the continued recognition of the Second Circuit’s “right of publicity.” In the article, Nimmer fashioned his proposal in the clothing of—what one professor referred to as—“moral principle.” What is meant by “moral principle” is clear:

Celebrities and other prominent figures have traditionally worked hard to achieve such a status. In doing so, their personas evolve into marketable assets. For compensation, they may lend their voice, or name, or image (i.e. some distinguishable element of their famed identity) as endorsement for any number of commodities ranging from airlines to zydeco music. In a sense, they “reap the fruits of their labors.” Therefore, to allow others to exploit a celebrity’s marketable identity for the sake of commercial benefit is an exercise in injustice, (i.e. they “reap where they have not sown”).

Certainly, this is not the exclusive philosophy advanced in support of publicity rights. It is, however, the most prolific and, more importantly, the most material to this paper, as it signifies the right of publicity as a laboriously achieved property right.

rights to the photographs. The defendant argued that the ballplayers had merely a privacy interest in their photographs, which was considered personal and thus nontransferable. See id. 867.

41. See generally Nimmer, supra note 32.

42. To do so, Madow stated, “would be more acceptable to courts and legislatures, as well as the general public . . .” See Madow, supra note 11, at 174-75 (citing to Nimmer, supra note 32, at 215-16).

43. Certainly, this is not entirely accurate. There are those odd occasions when certain individuals, like Kato Kaelin, seem to serendipitously achieve stardom. But we’ll leave this issue resting for another paper.

44. See Madow, supra note 11, at 178. “A labor-based moral argument for publicity rights presupposes that commercially marketable fame is no mere gift of the gods.” Id. at 182.

45. See id. at 181 “The basis most frequently and confidently advanced by courts and commentators is the labor theory on which Nimmer originally relied.” Id.
B. Descendible Publicity Rights

Despite its "breakthrough" acknowledgment of the right of publicity in *Haelan Laboratories*, the Second Circuit flatly refused to answer the question of whether this right was a "property right." It dismissed it as "immaterial" and further stated: "[T]he tag 'property' simply symbolizes the fact that courts enforce a claim that has pecuniary worth." 46 Dean Prosser and Professor Keaton have echoed similar sentiment: "It seems quite pointless to dispute over whether such a right is to be classified as 'property;' it is at least clearly proprietary in nature." 47 Fair enough—at least for cases that involve the living who, arguably, tend to sue on their own behalf. But what about those cases involving the deceased whose interests are furthered by their estates or descendents?

The right to privacy is considered a personal interest designed to prevent emotional injury as a result of the appropriation of one's identity for commercial use and is therefore not descendible. 48 Property rights, however, are typically descendible. 49 And while most scholars would agree that the right of publicity in securing one's identity from commercial exploitation is, in fact a proprietary interest, 50 jurisdictions have been plagued by inconsistency as to whether such a right is passed on to surviving

Further justifications supporting publicity rights, as provided by Professor Madow, include: Economic arguments, in which incentives are necessary "to stimulate creative effort and achievement," and consumer protection arguments, i.e. "promot[ing] the flow of useful information about goods and services to consumers . . . ."  See id. at 178-79.

46. See *Haelen Lab.*, 202 F. 2d at 868.
47. See Prosser and Keaton, *supra* note 12, at 854.
48. See *Wyatt v. Hall's Portrait Studio*, 128 N.Y.S. 247 (1911); see also McCarthy, *supra* note 6, at 134 (stating that in personal rights, the "damage is to human dignity . . . and causally connected to mental distress").
49. For example, a tangible piece of property, such as Blackacre, could be considered descendible upon death.
50. See e.g. McCarthy, *supra* note 6, at 134. "Damage is commercial injury to the business value of personal identity." Id.
relatives. Consequently, jurisdictions that do recognize a descendible publicity right have done so by acknowledging this right as a type of intangible proprietary interest. Whereas, courts that have held that the right of publicity dies with the person have often entangled privacy and publicity rights.

To return to the Introduction of this paper, recall my use of Elvis Presley in hypothetical examples that both potentially soiled his reputation and infringed upon his right of publicity. The reason why I chose Elvis was not just because I was a fan; nor did I merely pull his name from a hat filled with the names of other dead celebrities. Rather, I used him because he is one of the most prolific figures when it comes to publicity rights of the dead. As I had noted above, there is an entire body of Elvis law, most of which concern descendible publicity rights. Thus, it is not surprising that Tennessee is just one of thirteen states that statutorily recognizes the right of publicity both in life and death. Of all the cases comprising Elvis jurisprudence, one decision that is cited as often as any is State ex. rel. Elvis Presley International v. Crowell. In this case a group of Elvis fans, collectively calling themselves the Elvis Presley International Memorial Fund, sought a charter as a Tennessee not-for-profit organization in support of the Memphis and Shelby County hospital system. The Secretary of State denied the application on the grounds that Elvis’s name

52. See e.g. State ex. rel Elvis Presley Int’l v. Crowell, 773 S.W. 2d 89 (Tenn. Ct. App. 1987). See notes 56-60 and accompanying text infra.
54. See fn. 4, supra (string-citing a list of pertinent Elvis cases).
55. The Personal Rights Protection Act of 1984, TENN. CODE ANN. § 47-25-1103(b) (providing in part that the right of publicity “shall be freely assignable and licensable, and shall not expire upon the death of the individual so protected. . .”); see also, McCarthy, supra note 6, at 132.
56. 733 S.W. 2d 89 (Tenn. Ct. App. 1987).
57. See id. at 92.
could not be used in the charter. The court held that under Tennessee common law Elvis did, in fact, have a descendible right to his name and persona. What is puzzling about this case is that the court made no mention as to the possible consequences of allowing a not-for-profit organization to use the name or likeness of celebrity. As discussed above, the primary basis in support of publicity rights is preventing others from commercially benefiting through exploitation of a celebrity’s hard earned identity. What commercial benefit is a not-for-profit organizing looking to gain?

Even with the ruling in *Elvis Presley International*, “The King” should not rest too comfortably in his Graceland tomb. A dead Elvis is not necessarily alive and well; at least that is what the United States Court of Appeals for the Sixth Circuit held in *Memphis Development Foundation v. Factors Etc. Inc.* In this leading case, the court defied prior Tennessee state law and held that upon death “the opportunity for gain shifted from the celebrity to the public domain.” Thus, until the passage of the Tennessee Personal Rights Act of 1984, the federal law and state law governing descendible publicity rights in Tennessee were in conflict with one another.

58. See id.
59. The court did recognize that Tennessee passed a statute codifying descendible publicity rights. However, at the time this litigation commenced such statute was but a twinkle in a congressman’s eye. Hence, the common law analysis. See id. 99.
60. See id. at 100 (remanded on other grounds).
61. See notes 42-45 and accompanying text supra.
62. I am inclined to call this notion the “appropriation versus dedication” problem and will discuss it more closely in Section IV of this paper.
63. 616 F. 2d 956 (6th Cir. 1980). The facts of this case concern the creation of pewter Elvis statutes for resale.
64. See id. at 959.
65. See fn. 55 supra.
66. See *Elvis Presley Int’l*, 733 S.W. 2d at 95-96.
It should be noted that the Federal Circuits, in deciding to apply state law, also lack consistency. See e.g. *Factors Etc., Inc., v. Pro Arts, Inc.*, 579 F.2d 215 (2nd Cir. 1978) (holding that the Elvis persona was descendible under New York common law and thus an unauthorized memorial poster of him was an
Descendible publicity rights are not all just "hound dogs" and "heartbreak hotels," however. An often-cited, non-Elvis case in support of such rights is Martin Luther King Jr. Center for Social Change, Inc., v. American Heritage Products. In this case, the Georgia Supreme Court held that the right of publicity was descendible and thus to create a bust of Dr. King, Jr. for retail purposes without the authorization of his estate would, therein, be a violation of that right. What is more interesting about this case, however, is that the court further ruled that publicity rights were descendible irrespective of whether the public figure exploited their image for commercial advantage during their lifetime. The defendant argued that even though publicity rights were descendible, the fact that Dr. King, Jr. did not use his name or likeness for commercial profit while alive precluded his estate from doing so in death. The court dismissed this, stating that Dr. King, Jr. could have exploited his identity during his lifetime, and although he chose not to, this does not "strip his family and estate the right to control... his status and memory and to prevent unauthorized exploitation thereof by others." This conclusion is distinguishable from other cases that have ruled in favor of descendible publicity rights. For example, one such case held that the right of publicity, "having been exercised during the individual's life and thus having attained a concrete form, should descend at death of the individual..."
As stated above, courts that preclude descendibility tend to do so by separating the right of publicity from the right to privacy with a short rope; certainly shorter than what Nimmer and his champions had in mind. Ohio is one such jurisdiction. On as many as three occasions, The Buckeye State has rejected the notion of descendible publicity rights. One example is a case often referred to as The Raging Bull Case. In this case the wife of the late boxer Jimmy Reeves sued the defendant for violation of her husband's publicity rights in the dramatization of his fight with Jake LaMotta in the film "Raging Bull." The court did observe that a majority of jurisdictions had previously granted devisable publicity rights. But nonetheless, it held that the right "was more closely aligned with the right of privacy" than a property interest, and as such, it ceased at death.

With Ohio's track record why did Reeves's widow file her claim in that jurisdiction? Why not file in California, the defendant's domicile, instead? If she had initiated the suit in California, however, the ultimate determination might not have changed. For, in Lugosi v. Universal Pictures, the California Supreme Court similarly held that the right to one's persona was a privacy interest and thus terminated upon death. In rejecting the plaintiffs' claim

(emphasis added) (concerning an apparently rather talented Elvis impersonator).

For further discussion on similar cases, see Matherne, supra note 51, at 763-66.

73. See Matherne, supra note 51, at fn. 62.
74. See id.
76. See id. at 1232.
77. See id. at 1233-34.
78. See id. at 1235.
79. 603 P. 2d 425, 431 (Ca. 1979). It should be noted that the state of California subsequently enacted legislation that in effect overruled the holding in Lugosi by expressly providing for devisable publicity rights. CAL. CIV. CODE § 3344.1 (as amended by 1999 CAL. STAT. CH. 998). However, this happened
that the Bela Lugosi Dracula character was an interest passed on to surviving relatives, the court stated that "[t]he very decision to exploit name and likeness is a personal one." The court further held that since relatives do not hold a property interest in a celebrity's persona during their lifetime, it should follow that they do not receive such upon death, either. Thus, at least for this California Supreme Court, Dracula whose very character embodies the promise of everlasting life is, in a legal sense, dead.

III. DEAD MEN HEAR NO TALES? DEFAMATION OF THE DEAD

Defamation is an umbrella term under which exist the torts of libel and slander. False statements in writing or some other permanent state that tend to discredit a person are libel. Whereas disparagements "in some fugitive form," i.e. spoken or gesticulated, are considered to be slander. There had been numerous formulae defining defamation, however at common law, it was typically recognized as stigmatizations holding a person up to hatred, contempt, or ridicule. Historically, the claimant in a defamation action recovered monetary damages without being required to show any actual economic loss. Thus, actual damages were assumed.

after the Reeves suit commenced. Thus, Lugosi would have been the ruling law.

80. See Lugosi, 603 P. 2d at 430.
81. See id.
83. See id. For purposes of this paper, "defamation" and "libel" will be used synonymously.
84. For a further discussion on the various common law definitions, see id. at 3-7.
87. Perhaps William Shakespeare expressed this convention the best when he wrote: "Good name in man and woman, dear my lord,
With these governances of defamation law, it is important to reserve brief attention to the law as it applies to the living before discussing its application toward the deceased.

A.  Defamation of the Living

Defamation of a living person is considered a cause of action, as it invades a person's "interest in reputation and good name."88 This interest is at the crux of a defamation tort.89 Consequently, such an issue arises only when something disparaging to one's reputation is imparted to a third person.90 This is irrespective of the defamed's own subjective feelings of slight and insult.91 Thus, at common law, the following elements must be met in order to prove defamation: (1) the statement must be "published" to a third party; (2) it must be false; (3) it must be defamatory, i.e. considered injurious to one's reputation and standing in the community; (4) it must be "of and concerning" the person seeking legal recourse; and (5) the alleged defamer must have acted with a

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Is the immediate jewel of their souls:
Who steals my purse, steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name,
Rob me of that which not enriches him,
And makes me poor indeed." Othello, Act III, Scene 3, line 167-73.

90. See Prosser and Keaton, supra note 12, § 111 at 771;
The relationship between the defamed, the defendant, and those privy to the marring statement is often referred to as the "defamation triangle." See Brown, supra note 88, at 1529, Fn 20 (citing Epstein, Was New York Times v. Sullivan Wrong?, 53 U. Chi. L. Rev. 782, 785 (1986)).
91. See Prosser and Keaton, supra note 12, § 111 at 771.
Here the authors note that "[d]erogatory words and insults directed to the plaintiff himself may afford an action for the intentional infliction of mental suffering, but unless they are communicated to another the action cannot be one for defamation, no matter how harrowing they may be to the feelings." See id.
particular level of culpability. At common law, this level of culpability differed among jurisdictions and was usually divided between strict liability and negligence.

In the landmark decision *New York Times v. Sullivan*, the United States Supreme Court entered the defamation fray, and therein constitutionalized the cause of the action. Specifically, the decision addressed the element of defendant culpability, which as noted above, was fraught with inconsistency at common law. The case concerned an advertisement that ran in the *New York Times* implicating the plaintiff, one of the elected Commissioners of the City of Montgomery, Alabama, as having persecuted those

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92. *See* Prosser and Keaton, *supra* note 12, §111 at 773-80; The Second Restatement of Torts similarly provides the elements of a defamation cause of action as such:

(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher; and
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Restatement (Second)* Torts, § 558.

For further consideration of each of the common law elements: *see* Brown and O’Sullivan, *supra* note 82, at 36 (stating “[a]ny act on the part of the defendant which makes known the defamatory matter to a third person amounts to publication); R. Epstein, *Torts* (5th ed. 1990) (stating that truth is an absolute defense to a defamation claim and thus “tantamount to an assertion that a statement is defamatory only if it is false”); Cardiff v. Brooklyn Eagle, Inc., 75 N.Y.S. 2d 222 (1947) (holding that a published obituary of an living person is not defamatory as it did not exose the plaintiff to “hatred, ridicule, or contempt); Youssoupooff v. Metro-Goldwyn-Mayer Pictures, 50 T.L.R. 581 (C.A. 1934) (discussing whether a film depicting a Russian princess having an intimate relationship with Rasputin, a real-life figure of repute, was indeed “of and concerning” plaintiff Princess Irina Alexandrovna).

93. *See e.g.* *Restatement (Second)* Torts, § 558(c) (providing “fault amounting at least to negligence”); *but see* Tate v. Bradley, 837 F. 2d 206 (5th Cir. 1988) (stating that “[a]ctual malice . . . is presumed and need not be proved if the words are defamatory on their face”).


95. For example, the trial judge’s charge to the jury in the proceeding below provided that a finding of defamation is *libel per se*, aloof of the plaintiff’s actual intent or negligent behavior. *See* id. at 262.
participating in certain lawful demonstrations during the Civil Rights Movement. The Court concluded that the statements were commentary of a public official acting within his authorized capacity, and that, irrespective of veracity, such commentary is not "libelous per se." Further, the Court provided that the First Amendment afforded a measure of "breathing space" for criticism of officials and their public conduct, and thus held that such statements are considered defamatory only if there is a showing of actual malice on behalf of the defendant. In doing so, the Court established a constitutional mechanism through which a defamation claim must be processed; with its cogs and gears pausing for determinations of plaintiff status and defendant culpability.

Sullivan provided the impetus for the Court to establish its defamation doctrine. By solely addressing the issue of officials and their public conduct, it left matters concerning public figures, private affairs, and private individuals on the table and vulnerable to misinterpretation. The next cases in this line extended the

96. See id. at 257-59. It should be noted that the plaintiff in Sullivan was never named, but rather he argued that the advertisement reflected on him and was, thus, "of and concerning" him.
97. See id. at 279.
98. See id. at 279-80.
99. Justice Brennan, in writing for the majority, ruled:
"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering from damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." See id. at 279-80 (internal quotations omitted).
101. Shortly after the Sullivan decision, Professor Harvey Kalven commented that the case's holding invited a "dialectic progression from public official to government policy to public policy to matters in the public domain." Harvey Kalven, The New York Times Case: A Note On "The Central Meaning
Sullivan holding to criminal libel statues and then to public figures who were not considered public officials.\textsuperscript{102} The direction the Court was taking after Sullivan seemed to place more emphasis on the public interest in the subject of the defamatory publication than the "public" status of the plaintiff.\textsuperscript{103} However, this movement toward public concern was pared in Gertz v. Robert Welch, Inc., as the Court returned its focus to the plaintiff's status.\textsuperscript{104} Here, the Court held that defamation of a private individual should receive a lesser degree of constitutional protection regardless if the subject of the publication was a matter of public concern.\textsuperscript{105} Thus, the First Amendment tableau by which a defamation matter must be set against should be recognized as such:

If it is a \textit{Public Official} and a matter of \textit{Public Concern}, then \textit{Actual Malice};\textsuperscript{106}

If a \textit{Public Figure} coupled with a \textit{Public Concern}, then \textit{Actual Malice};\textsuperscript{107}

If a \textit{Private Individual} coupled with a \textit{Public Concern}, then a lesser \textit{Negligence} standard.\textsuperscript{108}


\textsuperscript{101} See Lewis, supra note 100, at 623.

\textsuperscript{102} See id. \textit{Gertz} in fact rejected a previous plurality decision that held that actual malice standard applied to any plaintiff so long as the subject of publication was a public concern. \textit{See} Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

\textsuperscript{103} The ruling in \textit{Sullivan} has been extended to suggest that "anything which might touch on an official's fitness for office" is a public concern regardless of whether or not the person was acting within his/her official capacity. \textit{See} Garrison, 376 U.S. at 77.

\textsuperscript{104} There are generally two types of public figures: All-purpose within all contents, i.e. a celebrity such as Madonna, and limited-purpose, or "vortex" public figures who either voluntarily inject themselves or are drawn into a temporary public issue, i.e. the Atlanta Olympics' security guard Richard Jewel. \textit{See generally}, Time, Inc v. Firestone, 424 U.S. 448 (1976); \textit{Gertz}, 418 U.S. at 323.

\textsuperscript{105} Presently, the Court has not yet conveyed a standard with respect to
Despite the Supreme Court’s insertion into the defamation arena, some scholars have pointed out that the once common law-exclusive cause of action has not entirely succumbed to a freedom of speech application. That is, an interest in protecting one’s reputation in the community remains a legitimate concern for a state to pursue, notwithstanding the constitutional weight now given to both the defendant’s state of mind and the publicity of the subject matter. This longstanding interest in reputation is important when considered within the context of defaming the dead.

B. Defamation of the Dead

It should be maintained with little argument that a person may continue to live in memoriam long after their death and thus be in the position to have their eternal character soiled by postmortem defamatory statements. However, civil courts have consistently rejected causes of action for defamation of the dead. This is not so in a criminal context where several states continue to have statutes criminalizing statements designed to “blacken” or vilify the memory of one who is dead. This incongruence between civil and criminal law seems to hinge on the notion of injury. That is, one who is deceased retains some form of reputation and attempts to mar that reputation should be discouraged. Yet this

defamation of private individuals within private matters. The Court did hint, however, that First Amendment protection is ratcheted down when it allowed recovery of presumed and punitive damages absent a showing of actual malice for a private individual/private interest defamation case. See Dun & Bradstreet v. Greenmoss Builders.

109. See e.g. Brown, supra note 88, at 1530 (stating that even though “modern defamation litigation has emphasized state of mind issues, protection of reputation is still the thrust of a defamation suit”).

110. See generally Wittenberg, supra note 3, at 202-08.

protection should not be so extensive as to include monetary awards to the deceased’s estate or surviving relatives. Such an award to the descendents would seem unjust, since it was not their reputation that was made the subject of hatred, ridicule, or contempt; in other words, the defamation was not “of and concerning” them.

1. “Of and Concerning”: The No Civil Remedy Rationale

Generally, arguments given in support of a defamation suit initiated by one’s estate or surviving relatives echoed the Roman law of libel, which held, *inter alia*, “contemptuous demeanor toward a corpse to be an insult to the heir for which an action would lie.” However, in rejecting these causes of action, common law courts, both pre- and post-*Sullivan*, have primarily relied on the rationale that the alleged defamatory statements must concern the plaintiff. This rationale is further evident in the Restatement (Second) of Torts, as it provides: “One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendents or relatives.” Thus a defamation suit brought on behalf of a deceased person would likely falter, as the statements would not

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114. *See* RESTATEMENT (SECOND) OF TORTS, § 560. “The interest of the descendents or other relatives of the deceased person in his good name is not given legal protection by the common law.” *See* id. at cmt. a.
have discredited the plaintiff's character. 115

To suggest that the common law rule precludes all libel actions that might arise out an instance of such defamation is overzealous. A plaintiff is refused relief when he or she sues on behalf of the deceased. 116 This is different than a scenario in which a defamatory remark concerning the dead also contains a direct attack on the good name of someone who is alive. 117 Appropriately, cases arising out of defamatory statements made against the dead have been divided into three categories: (1) the defamation is solely directed toward the deceased; (2) the defamation indirectly affects the good name of someone living; and (3) the defamation of one who is dead contains an affront against the reputation of one who is living, as well. 118

As discussed above, common law courts have long held that there is no cause of action for cases that fall within the first category. 119 Further, courts have generally extended this standard to those cases classified within the second category, as well. 120 A widely cited example of such a case is the Baldy Jack Rose decision. 121 In his time “Baldy” Jack Rose was an infamous “self-confessed” murderer in New York. 122 A Jack Rose different from

115. See e.g. Benton v. Knoxville News-Sentinel Co., 130 S.W. 2d 106 (1939); Bradt v. New Nonpareil Co., 79 N.W. 122 (1899) (holding that a mother may not sue on behalf of her deceased son, as the statement that he was a counterfeiter did not concern her).

116. See Whittenberg, supra note , at 203.

117. See id.

118. See id.

119. See notes 113-115 and accompanying text supra.

120. See e.g. Wellman v. Sun Printing & Pub. Ass’n, 21 N.Y. Supp. 577 (1892) (holding that despite injury to his professional character a husband could not sue for damages arising out of defamatory remarks made against his dead wife).

It should be noted that Wellman represented the first American decision made with respect to this classification, “and its authority has been buttressed by a large number of cases which have followed its conclusion.” Recent Decisions, 10 FORDHAM. L. REV. 319, 320 (1941).


122. See Wittenberg, supra note 3, at 205. The author made further reference that “Baldy” was involved in the murder of the gambler Arnold
“Baldy” had died and a New York paper published an article attributing “Baldy’s” notorious life to his. The article also named his surviving wife and children who, in turn, initiated litigation arguing that the erroneous identification of their Jack Rose as “Baldy” Jack Rose and the further mention of their names constituted an indignity upon their reputation and good name within the community. In rejecting the plaintiffs’ contention, the Court of Appeals for the State of New York held that “it has been long accepted law that a libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation.”

Although the Baldy Jack Rose decision does reflect the contemporary, majority standard, there are cases in which surviving relatives who are named in the defamatory publication have been able to sustain a defamation cause of action. One such case is Van Wiginton v. Pulitzer Pub. Co., wherein the court ruled that a claim may be pursued if the plaintiff is specifically featured in the article and his or her relationship with the deceased is prominent.

If both the living and the deceased are defamed within the same stride, then the instance falls within the third category, wherein the living plaintiff is typically granted legal recourse. Thus if a

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Rothstein, which gave rise to the “famous Lieutenant Becker Case.” See id. 123. See Rose, 31 N.E. 2d at 182. 124. See id. 125. See id. (Emphasis added). For further discussion on the Baldy Jack Rose Case and appropriate analogous cases at the time of its decision, see Wittberg, supra note , at 205; Recent Decisions 10 FORDHAM L. REV. 321 (1941); Notes and Comments, 26 CORNELL L. Q. 732 (1940); Decisions, 40 COLUM. L. REV. 1267 (1940). 126. 218 Fed. 795 (8th Cir. 1914) (concerning a girl who was mentioned in an article that erroneously stated that her deceased father was convicted of murdering her mother). Another similar case held that plaintiff merely had to be named in the publication. See Merrill v. Post Pub. Co., 83 N.E. 419 (1908) (concerning a postmaster who was named in article that erroneously depicted his sister as having stolen mail from his post office). 127. See Prosser and Keaton, supra note 12, § 111 at 778-79 (stating that “no
magazine article incorrectly portrayed a plaintiff and her deceased husband as being a "modern-day Bonnie and Clyde," she should be able to initiate litigation on her behalf, as the publication directly injured her reputation. Arrival at this standard should be achieved with little difficulty, as such a situation merely resembles the everyday brand of defamation. The distinction simply arises out of the fact that the defamation is accompanied in a publication by an additional disparagement of one who is dead.

Because the "of and concerning" element is fundamental to a defamation cause of action, libeling the dead is virtually unrecognized by common law courts. Consequently, reputation is recognized as a personal right. And although reputation is often regarded as everlasting, the common law has long dismissed the right to "reflect in the reputation of another."

A similar periphery issue involves instances when a living person has been mistakenly reported as being dead. In such matters, courts have typically held the defendant liable for defamation. See e.g. Dall v. Time, Inc., 252 N.Y. App. Div. 636 (concerning an article, which stated that President Roosevelt's son-in-law had committed suicide as an attention-getting device for the real story of the suicide of the French Prime Minister's son-in-law); see also Iryami, supra note 112, at 1093; Wittenberg, supra note 3, at 206-08; but see Cardiff v. Brooklyn Eagle, Inc., 75 N.Y.S. 2d 222 (1947) (holding that a published obituary of an living person is not defamatory as it did not expose the plaintiff to "hatred, ridicule, or contempt").

However, the notion that reputation is a personal right is not universally accepted. Professor Bellah argued that "reputation is something shared and reflected. Something that in the reputation of a parent, child, spouse, or friend reflects to some degree on us." See Bellah, supra note 99, at 745. Perhaps, it is with this idea of reputation that criminal statutes outlawing
Thus surviving relatives are restricted from bringing defamation suits on behalf of their deceased kin in the same manner as would be if a person attempted to recover from an assault of another.\textsuperscript{134} As one British scholar stated, "[l]ibel deals with the settling of personal accounts between the living."\textsuperscript{135} To put it another way, the law, in requiring that the defamatory statement be "of and concerning" the plaintiff, has excluded the deceased (more so, the deceased’s reputation) from litigation.\textsuperscript{136} It would be improper, though, to suggest that all defamatory statements concerning the dead fail, in a legal sense, to reach an audible ear. Certainly, other avenues for redress remain. For example, some scholars have strenuously argued for claims of infliction of emotional distress as alternatives to defamation actions.\textsuperscript{137}

\footnotesize
\begin{itemize}
  \item defamatory of the dead were enacted. See Section III-B-2, infra.
  \item 134. See Brown, supra note 88, at 1533.
  \item 135. See Joseph Dean, HATRED, RIDICULE OR CONTEMPT 96 (1954).
  \item 136. At this point, it should be noted that Rhode Island is the only jurisdiction that provides a cause of action for defamation of the dead. However, the defamation must be published as a part of an obituary or a similar notice within three months of death. Additionally, the statute requires a one-year statute of limitation for the possible plaintiffs. See R.I. GEN. LAWS 10-7.1-1 (2000); see also Iryami, supra note 112, at 1092.
  \item By devising such a statute, it can be argued that Rhode Island was attempting to prevent a similar situation that occurred in Louisiana in which a news broadcast erroneously reported that the plaintiff’s deceased son was involved in a murder, wherein causing the family to suffer “general abuse, ridicule [and] a refusal to take up collections for the funeral.” See Coulon v. Gaylord, 433 So. 2d 429, 430 (La. Ct. App. 1983); see also Brown, supra note 88, at 1533-34.
  \item 137. See e.g. Brown, supra note 88, at 1542-57.
  \item Another interesting manner in which a surviving son sought vindication against defamatory statements published concerning his deceased father occurred in the English case, \textit{Wright v. Gladstone} (1927). Captain Peter Wright published a book of essays, one of which included the unfavorable portrayal of the former Prime Minister Gladstone. One of the former Prime Minister’s sons then wrote to the secretary of a club of which both he and Wright belonged. In the letter, the son called Wright a “liar and a coward” for defaming a dead man and thus giving no cause for remedy. Wright then sued the son for libel wherein litigation commenced. It was during the course of the very public trial that the son was able to cleanse his father’s good name from its soiling made previous by Wright’s prose. Thus, by publicly insulting Wright, the younger Gladstone
\end{itemize}
Notwithstanding the notion that the “of and concerning” element is primarily responsible for negating defamation causes of action with respect to the dead, some scholars have urged that to allow defamation suits on behalf of the deceased would have a chilling effect on biographies and other historical writings. One recognized argument suggests that historians, in doing a great public service, are usually unable to collect eyewitness information or interview their subjects, and thus need the freedom to report and comment on information accordingly. If this were so, however, what does this say about defamation laws that protect the living? It can be argued that such laws can also have a similar “chilling effect” on writers and social critics who report and document the living world. Further, this “chilling effect” rationale does not address the reasons why criminal statutes prohibiting defamation of the dead continue to exist.

2. Everlasting Rep.: The Rationale of Criminal Defamation

In upholding criminal statutes that outlaw defamation of the dead, courts have acknowledged that the public interest in the memory of the dead is a legitimate state concern. A typical criminal statute for defamation of the deceased is like that of Colorado’s, which provides:

“... [One who] knowingly publish or disseminate, either by written instrument, sign, picture, or the like, any statement or object tending to blacken the memory of one who is deceased. . .”

adopted a “circuitous approach” to litigation. Certainly, he did not receive monetary damages, but he was able to restore the reputation of one who is deceased. Because the Gladstone case was not appealed, it was not reported. For an in-depth discussion of the case, see Dean, supra note 135, at 96-117; Armstrong, supra note 112, at 229-32.

138. See Brown, supra note 88, at 1538-42; see generally Lois G. Forer, A CHILLING EFFECT 208-234 (asking the question: “Is there a right to biography?”).

139. See Brown, supra note 88, at 1541.

140. See id.

141. See Prosser and Keaton, supra note 12, § 111 at 778-79.

Although rooted in the common law tradition, these statutes tend to be more encompassing than their English counterparts, which often required "actual malevolent intention" and "the tendency to cause a breach of peace." Without such English elements, American criminal statues thus shift the state’s enforcement interest from preserving the well-being and peace of the community to protecting the reputation of the departed. This was captured by one court as it stated: "[A]s a matter of sound public policy, the malicious defamation of the memory of the dead is condemned as an affront to the general sentiments of morality and decency, and the interests of society demand its punishment through criminal courts." Whether a criminal libel statute that includes the deceased within its purview is served to protect the community from breaches of order or designed as a safeguard against attacks hostile to a reputation that cannot be rightly defended, both fixate themselves on the tarnishing, or "blackening," of a dead person’s character.

A comparison can be drawn between the interest in protecting the good name of one who is dead and the standard applied to a matter involving the defamation of a private individual. A private person suing for defamation only has to provide that the defendant acted with negligence, and not with ill-will or reckless

143. See Armstrong, supra note 112, at 230.
144. See generally, id. at 229-232 (reviewing three cases at the time involving a defamation of the dead in France, England and the United States, respectively); but see Iryami, supra note 112, at 1103-05. Here, the author noted that the breach of peace requirement was not strict. It was not necessary to show actual breach of peace. Rather, "the defendant could be found guilty of criminal libel, if the natural effect of the published words would vilify the memory of the deceased making a breach of peace imminent or probable." Id. (Internal quotations omitted).
145. Skrocki v. Stahl, 110 P. 957, 960 (Cal. App. 3d 1910) (holding that the decedent’s brother did not have a cause action against statements made depicting the deceased as an anarchist).
146. See Iryami, supra note 112, at 1108 (noting that such a difference between the two rationales behind a criminal libel statue is a "minor" one).
The thought behind this is that a private person does not have convenient access to media outlets and therefore is unable to easily defend his/her name in the public forum. This inability to rightly defend one's name is evident in a matter of those deceased. Irrespective of whether the deceased was a celebrity or a private individual, he or she does not have the ability to defend their reputation—which the state has deemed everlasting—from beyond the grave. Thus, to criminalize attacks upon the good memory of the dead serves both to deter such affronts and further protect the otherwise un-defendable good name of those who are deceased.

Mention should be made that, despite its proliferation in as many as twenty-one jurisdictions, criminal libel prosecutions are presently in a state of decline. Perhaps one reason for this is the Supreme Court's decision in Garrison v. Louisiana. In Garrison, the Court held that the Louisiana criminal defamation statute, which even prohibited true statements made with "actual malice," to be unconstitutional as it abridged the right to free expression. In doing so, the Court extended the Sullivan standard (false statements made with actual malice or reckless disregard for the truth) from civil to criminal defamation. Following Garrison the constitutionality of such statutes have been questioned. For example in Colorado and South Carolina, a state and federal court, respectively, invalidated both of the states' criminal libel statutes, as they did not contain an "actual malice" standard. Also, the Model Penal Code contains no enumerations for criminal libel. Its drafters assumed that there

148. See id.
149. See id.
150. See Iryami, supra note 112, at 1108-12.
151. 379 U.S. 64 (1964).
152. See id. at 77-78.
153. See id. at 78-79.
154. See Iryami, supra note 112, at 1109-11.
156. See Iryami, supra note 112, at 1109-11.
was enough of a remedy for such an action provided at the civil level and thus to criminally punish was unnecessary. These examples, however, concern criminal libel in general and do not specifically speak to the issue of defamation of the dead; though it should logically follow that if criminal libel prosecutions in general are diminishing, then such matters concerning defamation of the dead are becoming extinct, as well.

IV. PUTTING BOTH FEET IN THE GRAVE: TOWARD A UNIFORM TREATMENT OF THE DEAD

As provided above, the dead in certain scenarios are afforded the same legal rights as though they were alive, while other times, their ability to initiate litigation is rendered, well...dead. With this, the question is posed: Why have a system that handles different legal matters of the dead inconsistently?

However, before attention can be given to the arguments advancing a uniform treatment of the dead, it is important to quickly address the practicality of two other legal matters concerning the deceased. That is, wrongful death and survivability.

A. Wrongful Death and Survivability

Actio personalis moritur cum persona. In translation this Latin maxim means “a personal right of action dies with the person.” The common law recognized this doctrine, providing specifically that if the tort victim died, so did his cause of action. It followed that if the tortfeasor died, the claim also died. Finally, the common law held that if the victim died, the survivors had no personal claim for loss of support or infliction of emotional

157. See Model Penal Code 250.7 cmt. 1; see also Iryami, supra note 112, at 1111.


160. See id.
distress. In the late nineteenth century, however, American jurisdictions rejected this common law rule and began adopting state legislation providing wrongful death and survivability actions. The two actions are distinguishable as such:

Wrongful death laws create an entirely new and independent claim, in which survivors of a tort victim are able to sue for damages inflicted as a result of the victim’s death. Survival statutes, on the other hand, “address the common law rule that a tort cause of action abated with the death of either party.” That is, the deceased’s cause of action is allowed to “survive” past death with the potential damages he would have received “if he had been able to sue at the moment of death.” Survivability of an action may even occur if the tortfeasor dies before the termination of a claim.

Wrongful death actions spring into effect at the time of death and are not descended to the survivors like a publicity right would. Because such statutes create a new cause of action for survivors while focusing on their loss, the dead are given a supporting role. With this, death actions are not that pertinent for purposes of this paper. Survival laws, however, do relate a little more closely to publicity rights. That is, the ability to advance a claim on behalf of a deceased relative is akin to a person claiming a descendible right of publicity on a deceased relative’s name or likeness. Also, at one point, both common law courts and some survival statutes have expressly disallowed the survival of defamation actions while the defamation was made before death. However, present trend suggests that more jurisdictions are allowing the survival of defamation claims.

161. See id.
162. See id.
163. See id. at 804. It should be noted that the defendant’s tortious behavior causally lead to the victim’s death.
164. See id.
165. See id. at 805. The cause of death is immaterial to a survival statute.
166. See id. at 807.
167. See id. at 1140.
168. See generally Cameron, supra note 158, at. 1834-39 (chronicling this
One last thought on this subject before moving on: The theme of this paper is to recognize instances in which the dead are called from their graves to basically participate as a party in an matter that arose out of an action that occurred after death. Because wrongful death actions create a new claim for the living and survival statutes provide either a mere continuation of a claim between two living people that was interrupted by the death of one or a commencement of a claim that arose out of a tort between two living people, where one of whom happened to die, they are periphery matters to the overall theme of this paper.

B. The Living Dead or Rest in Peace?

Acknowledging the need for a uniform treatment of the dead is just half of the task. The other is deciding which avenue to take. Should the dead be given free reign of the country's judicial system, much like its living citizens? Or should they, with all their potential legal concerns, be forever entombed?

In order to allow the dead to haunt courtrooms to the fullest of their capabilities, it is necessary to acknowledge defamation suits when publication occurred after death. Arguments for creating a cause of action for defamation of the dead center on the notion of reputation. Specifically, a person’s reputation, although personal and thus non-transferable, still maintains both a societal interest and a familial interest after death. Thus, the argument would follow: Because there is more than just the personal interest of the deceased at stake, those other living interests whose lives are affected by the defamatory statement should not be precluded from a cause of action. However, this is not sturdy reasoning. Living people whose interests have been affected by a defamatory remark

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169. See generally Brown, supra note 88; Iryami, supra note 112.
170. See Brown, supra note 8, at 1528 (stating that defamatory statements can effect feeling's of the decedent's family, as well as economic interests in the decedent's estate or family business); Iryami, supra note 112, at 1102-03 (stating that criminal libel statutes are devised to preserve society's interest in good order).
against one who is dead do have potential legal redress, just not in the form of a defamation action.\textsuperscript{171} For instance one might claim that the defamation of a deceased relative inflicted emotional distress.\textsuperscript{172}

Another course to take in support of defamation of the dead would be to illustrate the Supreme Court's language in \textit{Swidler \& Berlin v. Untied States}\textsuperscript{173} and contend that reputation is not a personal right; that it is similar to the right of publicity and therefore descendible upon death. In \textit{Swidler}, the Court held that lawyers may not release communications with a client and thus abridge the attorney-client privilege, even after the client's death.\textsuperscript{174} What sharpened this point to the issue of defamation of the dead, however, was Chief Justice William Rehnquist's conclusion on reputation. In writing for the majority, he stated that it is unreasonable to suggest that a person's interest in his reputation terminated at his death.\textsuperscript{175} To take the Chief Justice's statement and construe it to mean that reputation, by being able to exist after death, is like persona and therefore descendible upon death, would be an enormous leap. Further, to suggest that the Chief Justice had defamation and publicity rights in mind when writing that portion of the opinion is pure conjecture. Nonetheless, with \textit{Swidler} a seed has been planted. There is no telling how high and how far it may grow.\textsuperscript{176}

Certainly, if defamation of the dead does become a cause of

\textsuperscript{171} That is, unless they themselves were also defamed in the publication. See fn. 127-129 and accompanying text supra.

\textsuperscript{172} See Brown, supra note 88, at 1546-52.

\textsuperscript{173} 524 U.S. 399 (1998).

\textsuperscript{174} See id. This case arose out of the Independent Counsel's investigation of the dismissal of the White House Travel Office employees and Vince Foster's subsequent suicide. The law firm of Swidler \& Berlin sought to quash a subpoena requesting notes taken during a meeting with Foster prior to his death.

\textsuperscript{175} See id. Justice Sandra O'Connor, writing in dissent, purposed a balancing test between the reputation and the state's interest in information.

\textsuperscript{176} Just to note: At least one article advancing a defamation of the dead action has already included an analysis of \textit{Swidler}. See Iryami, supra note 112, at 1100-01.
action, it will have to abide by the First Amendment doctrine of *Sullivan* and its progeny\(^{177}\) in the same manner as a regular defamation matter. This is not the issue. What does trouble some commentators opposing such an action is the potential chilling effect it might have on historical and biographical writing.\(^{178}\) As noted above, historians need the broad liberty for error when writing since they usually are not able to interview their subjects.\(^{179}\) Consequently, Andy Rooney of “60 Minutes” chastised this liberty as slack and argued that the prohibition of defamation suits for the dead allowed historians to be unabashedly irresponsible.\(^{180}\) His gripe concerned Oliver Stone’s rearrangement of historical facts to meet the needs of his story in the movie “JFK.”\(^{181}\) Thus, this argument suggests that a cause of action for defaming the dead would not so much “chill” historical reporting, as it would serve as a check and thereby preserve its legitimacy.

Although scholars have identified legitimate interests urging for a cause of action, common law courts have not budged on the issue.\(^{182}\) Added to this, jurisdictions with criminal libel statutes have seen a steady decline in prosecutions and, more severe, recent attacks as to their constitutionality.\(^{183}\) With this in mind, lifting the no defamation of the dead rule is not the best way to reconcile the disparate treatment of the dead. In quest for a uniform treatment, it seems more appropriate to dismantle the notion of descendible publicity rights.

Fact: There remains dissention between jurisdictions as to whether publicity rights are devisable.\(^{184}\) Fact: There is some confusion as to whether such rights are property or personal.\(^{185}\)

\(^{177}\) See Section III-A *supra*.
\(^{178}\) See notes 138-40 and accompanying text *supra*.
\(^{179}\) See id.
\(^{180}\) See *Iryami, supra* note 112, at 1102.
\(^{181}\) See id.
\(^{182}\) See generally *Brown, supra* note 88; *Iryami, supra* note 112.
\(^{183}\) See *Iryami, supra* note 112, at 1109-11.
\(^{184}\) Compare Ohio and Tennessee, see notes 75-81 and accompanying text *supra*.
\(^{185}\) See notes 52 -53 and accompanying text *supra*. 

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Given these “facts,” descendible publicity rights are, if not vulnerable, then at least less stable than the common law rule on defamation of the dead. But this is not the only reason to target publicity rights when forming a uniform treatment of the dead. Placing celebrities’ publicity rights in the public domain upon death is better for society than passing these rights on the estate or surviving relatives.

Remember that the “moral principle” for which publicity rights are deemed descendible is the prohibition of unjust enrichment of those who exploit that which they have not labored for. However, this reasoning can only go so far. Yes, a merchandiser can arguably profit from selling T-shirts bearing Elvis’s image. But could not a similar type of “unjust enrichment” occur, when a decedent’s survivor exploits a name or likeness that only one person who walked this earth worked hard to create?

A descendible right of publicity extends beyond the prohibition of unjust enrichment, however. In *Elvis Presley International*, a not-for-profit organization in support of Memphis hospitals was enjoined from naming itself after Elvis. This use of his name was not an appropriation for commercial advantage, but rather a dedication to him. Similarly, in *Martin Luther King, Jr. Center*, the defendant was enjoined from producing a bust in honor and memorial of the late, great Dr. King, Jr. Thus, a descendible right of publicity fails to make a distinction between appropriation for a commercial advantage and dedication. One wonders how much the city of New Orleans had to pay the surviving relatives of Louis Armstrong in order to dedicate the city’s airport in the jazz legend’s honor.

Under the guise of safeguarding against unjust enrichment, devisable publicity rights have also encroached upon aspects of creativity and expression. Consider the case of *Estate of Presley v. Russen*. In this case a federal district court granted an injunction against the defendant from further performing his “Big El Show”

186. See Madow, *supra* note 11, at 179.
187. See 733 S.W. 2d at 92.
188. See 296 S.E. 2d at 706.
and thus held that impersonating a dead celebrity for profit is in violation of the surviving right of publicity. 190 It is this overinclusive notion of “commercial advantage” not being balanced against other meaningful interests, such as freedom of speech, that have lead to some jurisdictions’ hesitation in supporting a principle that is “overwhelmed” by various legal problems. 191 Therefore, to be rather blunt, the dead should stay dead. It is in society’s best interest to preclude all causes of action that arise after the victim has died. The dead should not be allowed redress for attacks against reputation while dead. Nor should their persona be legally misappropriated. In other words, seal the tomb tight enough to provide for the secure and soundless slumber of those deceased.

V. CONCLUSION

Between a common law that has dictated a “no defamation of the dead” policy and certain jurisdictions that allow causes actions involving the personas of dead celebrities, the old axiom “one foot in grave” is given an entirely new meaning. And then to add wrongful death and survivability actions to mix, the dead are given enough legal viability to make George Romero pale with fear. 192

As citizens of this country we are given, for all intents and purposes, unrestricted access to the legal system. With standing and an appropriate cause, anyone can have their matter heard before the bench. However, for the departed citizens, it depends. It depends on the type of claim and it depends on what state it is brought. Hence, sometimes their interests can be heard and sometimes not. Now I realize that my words are rather overstated. Of course, the dead do not literally have interests; they are dead. I am merely being hyperbolic, in order to illustrate that the dead, like it or not, are sometimes the subjects of extensive litigation brought on behalf of their name by surviving relatives and estates.

190. See id. at 1352.
191. See generally Memphis Development, 616 F. 2d 959-60.
192. George Romero, as you may know, is most famous for his motion picture series featuring the undead; its most notable installment was “Night of the Living Dead.” Universal Pictures, 1968.
Therefore, it seems as though the legal system in this country is at an appropriate point to reassess its treatment of the dead. My proposal is that this treatment be uniform. Either give the deceased the same legal rights extended to living citizens, or allow them and, most importantly, their legal concerns to rest eternally in peace. For the reasons provided in this paper, I advocate the latter. (Sorry, Elvis but your spirit should live in your music, and only in your music.)

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