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Recommended Citation

(2016) "Claim of Relational Right of Privacy Denied," *The Catholic Lawyer*: Vol. 12 : No. 1 , Article 12.
Available at: <https://scholarship.law.stjohns.edu/tcl/vol12/iss1/12>

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the Court, in affirming, might very well expand on its decision in *Torcaso*, and might outlaw religious tests not only for public officials but also for jurors and witnesses. Such a decision, establishing a national standard, would prevent state decisions from remaining as controlling authority.

The fact that the Maryland provision remained in effect for so long is indicative of how religious beliefs are used to judge a man's qualifications for public service. The courts should be quick to assert that religion is not an acceptable standard by which the state should judge a man's capacity.

Claim of Relational Right of Privacy Denied

The widow and son of Alphonse (Al) Capone and the administratrix of his estate brought an action against the producers, the sponsor and the broadcasting company which telecast several programs purportedly based on the life of the deceased. The estate claimed a property right in the name, likeness and personality of Capone, while the wife and son asserted an invasion of their right of privacy, even though they were not mentioned in the telecast. In affirming the decision of the district court, the United States Court of Appeals *held* that the estate had no protectible property right in the name, and, that under Illinois law, living relatives of a decedent are not entitled to recover under a "relational right" of privacy. *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (7th Cir. 1965).

Although the right of privacy is now recognized and protected,¹ it has been held

that a deceased person has no such right.² However, there is some conflict³ as to whether there exists a "relational right" of privacy, *i.e.*, a right of the living relatives of the decedent to be protected from unwarranted publications or disclosures concerning the deceased person's life. The prevailing opinion is that the right of privacy is personal, not relational, and that it does not survive the decedent.⁴ This conclusion follows from the failure of the courts to recognize a right of privacy when the party claiming the right is not mentioned in the course of the alleged invasion,⁵ and from the historical policy against survival of defamation actions.⁶

² *Ravellette v. Smith*, 300 F.2d 854, 857 (7th Cir. 1962); *Schuyler v. Curtis*, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895).

³ Compare *Coverstone v. Davies*, 38 Cal. Rep. 2d 315, 322-23, 239 P.2d 876, 881 (1952), with *Smith v. Doss*, 251 Ala. 250, 253, 37 So. 2d 118, 121 (1948).

⁴ *E.g.*, *Coversone v. Davies*, 38 Cal. Rep. 2d 315, 239 P.2d 876 (1952); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960).

⁵ *Bradley v. Cowles Magazines, Inc.*, *supra* note 4.

⁶ See Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 247-48 (1932).

¹ See generally Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890); *The Right of Privacy*, 11 CATHOLIC LAW. 335 (1965).

Most of the early "relational rights" cases, wherein the courts denied recovery for invasion of privacy, were brought primarily on the theory of injury to feelings. Thus, in *Schuyler v. Curtis*,⁷ relatives of a deceased woman sought to enjoin the erection of a statue of the deceased by which the defendants intended to honor her as a philanthropist. The court decided that erection of such a statue provided no plausible grounds to the relatives for injured feelings, and thus, the facts were not sufficient to constitute an invasion of their privacy. However, the court did *not* deny that there could be a "relational right" if the proper grounds existed. "[O]ur decision furnishes . . . not the slightest occasion for the belief that under it the feelings of relatives or friends may be outraged or the memory of a deceased person degraded with impunity, by any person. . . ."⁸

Where, in addition to injured feelings, there was evidence of commercial exploitation, some courts have recognized the possibility of recovery. Thus, where a hospital permitted a newspaper to take unauthorized photographs of a deformed infant's corpse, it was held that the parents had a valid cause of action.⁹ Likewise, where a photographer was employed to take a dozen photographs of the corpses of Siamese twins, and where additional

copies were made and copyrighted, an action by the parents for invasion of their right of privacy and breach of a confidential relationship was sustained.¹⁰ Although in both of these cases the courts relied on the relational interest that parents have in their children, their arguments were reinforced by the evidence that confidential relationships had been violated. Thus, in circumstances where there existed both commercial exploitation and the violation of surviving relatives' rights, the courts were willing to grant recovery.

An examination of statutory development in this area discloses that only four states presently protect the right of privacy, and then, only when there has been commercial exploitation.¹¹ Of the four states, only New York restricts its protection to living persons.¹² The remaining three states afford some protection to the next of kin ("relational right") where there has been an appropriation of the decedent's name. In a Utah decision,¹³ the widow and daughter of an entertainer sought to enjoin the exhibition of a motion picture which fictionalized incidents in his life. The court held that the statute was applicable only where the violation constituted actual advertising or the promotion of a collateral commodity (a product using the name of the decedent), and did not extend to a semi-fictional portrayal of a person's life in a motion picture. In

⁷ 147 N.Y. 434, 42 N.E. 22 (1895).

⁸ *Id.* at 452, 42 N.E. at 27.

⁹ *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930). Although this case constitutes only slight authority for recognition of a "relational right" of privacy, since it involved violation of a confidential relationship, it nonetheless recognizes that there can be an invasion of privacy when the wrongful act is directed at a deceased person.

¹⁰ *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912).

¹¹ N.Y. CIV. RIGHTS LAW §§ 50-51; OKLA. STAT. ANN. tit. 21, § 839 (1958); UTAH CODE ANN. § 76-4-8 (1953), § 76-4-9 (Supp. 1963); VA. CODE ANN. § 8-650 (1950).

¹² See N.Y. CIV. RIGHTS LAW § 50.

¹³ *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954).

balancing the rights of the individual against public policy, the court noted:

Where the right of privacy of the individual is pitted against the general weal, we give some consideration to the precept that the best social policy is that which results in the greatest good to the greatest number, unless application of this principle cuts into inviolable rights of the individual.¹⁴

Thus, in adopting a utilitarian approach, the court construed the statute very narrowly, giving motion picture makers wide latitude in fictionalizing biographies of deceased persons.

The defenses traditionally applicable to a right of privacy action can also be asserted in an action based on a "relational right." Where an event is newsworthy, the mass media are privileged to report it under the first amendment guarantee of freedom of the press.¹⁵ Also, when a person becomes a public figure, he relinquishes a part of his right of privacy, as the public has a justifiable interest in the notorious events of life.¹⁶ For example, in *Metter v. Los Angeles Examiner*,¹⁷ a widower sued a newspaper which published a story and picture of his wife's suicide leap from a building. He based his action on the theory of an invasion of his "relational right" of privacy. The court denied recovery because the wife's suicide was a newsworthy matter

which made her a public figure, and, thus, not the subject of a right of privacy.

In the instant case, the appellate tribunal affirmed the lower court's rejection of the plaintiff's claim of injury to a property right, and agreed that the extent of the relief sought was for an alleged invasion of a right of privacy. In doing so, it dismissed the plaintiff's analogy to the "dead body cases," wherein courts have granted relief for an invasion of the right to bury the remains of a deceased relative.

After stating that, under Illinois decisional law, the right of privacy was personal, and that in order to prevail the plaintiff must prove invasion of his own right of privacy, the Court observed that "it is anomalous to speak of the privacy of a deceased person. . . . Comment, fictionalization and even distortion of a dead man's career do not invade the privacy of his offspring. . . ." ¹⁸ However, it should be noted that the concurring opinion disagreed on this latter point, and expressed the conviction that the right of privacy of the deceased's widow and son had indeed been invaded. Moreover, the concurring judge stated his belief that the lives of the widow and son were shattered after the television series began. He noted that the son's children were ridiculed so incessantly that their father found it necessary to remove them from school, to sell his home and restaurant business, to change his name and to move to another city. Nonetheless, while expressing his abhorrence of the fictionalization of Capone's career, the concurring judge

¹⁴ *Id.* at 264, 272 P.2d at 183.

¹⁵ See, e.g., *Abernathy v. Thornton*, 263 Ala. 496, 83 So. 2d 235 (1955); *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956).

¹⁶ See, e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1941); *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948).

¹⁷ 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

¹⁸ *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418, 420 (7th Cir. 1965).

agreed with the majority that, under Illinois law, there was no available remedy.

The lower court had also found that a wrong had been committed, and that a remedy should have been available for these plaintiffs, although one was lacking under present law.¹⁹

The instant case indicates the harshness of the present status of the law in the area of the right of privacy, under which relief cannot be granted for the invasion of a "relational right" of privacy. The traditional restrictions endure: unless a plaintiff can prove that he was specifically mentioned or portrayed, he will remain without a remedy when only his relative's name is appropriated.

While there is some conflicting opinion in the area, most authorities are in accord that a "relational right" of privacy should be recognized by the courts.²⁰ One argument is that since the interest one has in his relationship with a deceased member of the family has received protection against *physical* appropriation, there is no reason why such protection should not be given to *intangible* appropriation, especially where it is of the commercial type.

The law has progressed from protection of the physical person to protection of reputation and sensibilities. It is no greater transition from protection of a dead body to protection of the reputation and memory of a departed relative. Nor are the

sensibilities of the living concerning their departed kin to be ignored. Judicial recognition of the fact that one's own privacy may be invaded by unauthorized use of the name or picture of a deceased member of his family is a step forward in the historical tradition of the common law.²¹

The "relational right" of privacy may also be analogized to "defamation by association." A publication may defame a person even though, on its face, it makes no direct reference to him. The reference may be indirect, with the identification depending upon circumstances known to the hearers. It is not necessary that every listener understand the significance of the utterance, so long as there are some who reasonably understand its defamatory meaning.²²

To some extent, at least, this theory appears applicable to the circumstances of the instant case. While there may have been no specific reference to the individuals alleging an invasion of their privacy, there was, nonetheless, an unfortunate association in the minds of friends and neighbors between them and the personality which was appropriated and fictitiously portrayed. Consequently, it might be argued that the invasion of Al Capone's privacy and the damages suffered by his relatives are facts sufficient to state a cause of action—an "invasion by association."

The case against the recognition of such a "relational right" hinges on the contention that it would open the floodgates to litigation. Since special damages need not be shown in invasion of privacy cases,

¹⁹ *Maritote v. Desilu Prods., Inc.*, 230 F. Supp. 721, 726 (N.D. Ill. 1964).

²⁰ See Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 Nw. U. L. REV. 553, 594-605 (1960); Green, *Relational Interests*, 29 ILL. L. REV. 460, 485-90 (1934); Nizer, *The Right of Privacy—A Half Century's Developments*, 39 MICH. L. REV. 526, 553-56 (1941).

²¹ Nizer, *supra* note 20, at 556.

²² See GREGORY & KALVEN, TORTS 968-73 (1959).

every relative, no matter how distant, might claim that his rights had been invaded.²³ However, it should not be overlooked that the courts are daily confronted with similar problems in those libel cases where special damages need not be alleged; and certainly in the libel area this problem has never been regarded as a serious obstacle to recovery.

Since most courts have thus far refused to break precedent and recognize a "relational right" of privacy, legislative action is required. If Oklahoma and Virginia, whose statutes are similar to that of Utah, should adopt the same narrow construction of "commercial exploitation" accepted in that jurisdiction, then it will be apparent that this type of statutory protection is not completely effective. A well drafted statute should protect against any invasion of a deceased person's memory, and should extend beyond protection from mere promotion of collateral commodities which capitalizes on the name or personality of a decedent. It should, in fact, proscribe all commercial exploitation of the decedent's name, personality and likeness whenever the publication is primarily fictional or for entertainment and amuse-

²³ "Every defamation, false imprisonment, and malicious prosecution would then be an actionable invasion of the privacy of the relatives of the victim." *Coverstone v. Davies*, *supra* note 3.

ment, as distinguished from a publication primarily historical, and, thus, intended for the education or information of the public.²⁴

In failing to overcome the inertia of the law, this decision has highlighted the injury to relatives that can result from unrestricted commercial exploitation of a deceased person's name and personality. It is apparent that in this age of modern news media, the typical invasion of privacy by network telecasting will involve most of the fifty states. Consequently, either a federal or a uniform state statute is required to provide the necessary protection. In view of the likelihood of increased judicial and legislative acceptance of the right of privacy, and because of the growing need for controlling the exploitive tendencies of radio and television, such legislation may well be forthcoming.

²⁴ A uniform right of privacy act has been proposed in Ludwig, "*Peace of Mind*" in *48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734, 764 (1948): "Any person, firm or corporation that interferes with any living person, or with a deceased's memory, by intruding, in any unreasonable and serious manner upon the private activities of the living, or by making known in like manner the private affairs of any one, living or deceased, or by exposing such person to the public by substantial use of his name, portrait, picture, likeness or by other means sufficient to identify him, shall be liable for invasion of his privacy . . ." (Emphasis added.)

