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THE VALUE OF A LIFE STORY AND WHY THE RIGHTS TO AN INDIVIDUAL'S LIFE STORY SHOULD NOT ESCAPE BANKRUPTCY

Robert Sutton*

I. INTRODUCTION

Imagine you turn on your television and you are immediately drawn into a police chase on the six o'clock news. The culprit veers onto an off ramp and disappears from the news helicopter's cameras. The screen cuts away to the anchor, who—within minutes—has reports coming in that police have lost the suspect. Not only that, but the suspect is now believed to be the lead suspect in a string of murders over the past six months. Fast forward three years later and you are again watching television. The man who was driving that car is now on your screen sitting next to his attorney. You do not know him personally, but his face you will never forget; and you could probably tell someone more about this man, his job, his childhood, and all the hardships he has had to endure than you could about your own cousins. For the past ten months, the media has been engrossed with this man; his every move plastered across the news for all to see. As much as you want to see this man found guilty, your need to know more about him is even greater. The jury returns; his lawyers were superb. "Not guilty" on all four murder charges, but there are still the resisting arrest charges; he will do two years.

Fast forward three years. You turn on VH1 and there he is again. He is being interviewed in front of a large oceanfront home. It is his home. Your head spins a little as you remember hearing he had declared bankruptcy just three months prior. As the fog in your head clears, you hear the interviewer speaking about a book deal. The man confirms he indeed has signed a tell-all deal. He turns slightly to look at the home behind him and smiles as he makes a joke about how sometimes, crime can pay. You turn the television off. Who could blame you?

Scenarios like this are not uncommon. It has become a well-known fact that our society has an obsession with the morbid.¹ Murder and mystery pique our intrigue. Through happenstance, there are times when individuals are faced with an opportunity to receive a windfall through great tragedy.² Often is the case with

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1. See Keith F. Durkin, *Death, Dying, and the Dead in Popular Culture*, in 1 HANDBOOK OF DEATH & DYING 43, 43 (2003), available at http://www.sagepub.com/upm-data/5234_Bryant_Death_Dying_Dead_Popular_Culture.pdf.

2. See Josh Getlin, *Despite Objections, 'If I Did It' Is Doing It*, L.A. TIMES (Oct. 17, 2007), <http://articles.latimes.com/2007/oct/17/entertainment/et-ojbook17>.

high-profile crimes, whether it be murder or an affiliation with the mafia.³ The litigation surrounding these crimes is often extensive and expensive.⁴ This was the case surrounding the Casey Anthony trial in Florida. Her litigation costs in attorney's fees alone reached nearly \$500,000.⁵ This debt, along with others, bringing the total to nearly \$800,000, forced Casey Anthony to file for bankruptcy.⁶ In an unprecedented move, the trustee requested that she be allowed to auction off her "life story rights" in order to help pay back her creditors.⁷

This article will explore exactly which rights hold value and why the bankruptcy estate should be allowed to sell such rights. First, the article will cover the facts and some major events of the Casey Anthony case, including the attempted sale. Next, it will discuss the constitutional issues surrounding "life story rights," as well as the general goals of bankruptcy. Finally, this article will discuss which rights are likely to be allowed to be sold and what type of infrastructure may work to guide such a sale.

II. THE CASEY ANTHONY CASE

While the focus of this article revolves around Casey Anthony's filing for bankruptcy and the assigned trustee's subsequent request to sell Casey's "life story rights," it is important to start at the beginning. The sensitive nature of this case, which led to prolific media attention, is vital to understanding not only why a third party would be interested in purchasing Casey Anthony's "life story rights," but also in hypothesizing what a sale of such rights may look like in practice.

On June 9, 2008, Casey Anthony claimed that her daughter, Caylee Anthony, was missing, but later informed police that she dropped Caylee off at her babysitter's apartment.⁸ On July 15, 2008, Casey's mother, Cindy Anthony, informed the police that she suspected Casey may have stolen the family car as well as money.⁹ Cindy also reported that she found Casey's car, which had been previously abandoned.¹⁰ Cindy further reported that the car smelled of decomposition and when questioned by police, admitted that it has been over thirty days since she last saw her granddaughter.¹¹ The following day, Casey Anthony was arrested by police on the suspicion of multiple charges, including child neglect and filing a false official statement.¹²

3. See Ethan Bordman, *How Much Does Crime Pay?*, WASH. LAW., May 2011, <http://www.dcbarr.org/bar-resources/publications/washington-lawyer/articles/may-2011-son-of-sam-laws.cfm>.

4. See Jeff Weiner, *Trustee Asks Judge to Allow Casey's Story to Be Sold*, ORLANDO SENTINEL (Mar. 18, 2014), http://articles.orlandosentinel.com/2013-03-18/news/os-casey-anthony-sell-story-bankruptcy-20130318_1_casey-anthony-movie-or-interview-jose-baez.

5. *Id.*

6. *Id.*

7. *See id.*

8. CNN Library, *Casey Anthony Trial Fast Facts*, CNN (June 22, 2015), <http://www.cnn.com/2013/11/04/us/casey-anthony-trial-fast-facts/>.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

On July 17, 2008, police found evidence of human decomposition as well as hair and dirt in Casey's car.¹³ On August 27, 2008, air samples from the trunk of Casey's car confirmed that a decomposing body had in fact been held inside.¹⁴ On October 14, 2008, Casey was indicted by a grand jury for capital murder.¹⁵ On December 11, 2008, skeletal remains were found in a wooded area near the Anthony home, and on December 19, the remains were confirmed to be Caylee Anthony.¹⁶ On May 24, 2011, Casey Anthony's trial began.¹⁷ During the opening arguments, Casey's attorney, Jose Baez, made allegations of child molestation against Casey's father, George Anthony, and claimed that Caylee's death occurred in the Anthony family pool, which Casey and George attempted to cover up.¹⁸ Jury deliberation began on July 4, 2011.¹⁹ After almost eleven hours, the jury returned with its verdict.²⁰ Casey was found not guilty on charges of murder, child abuse, and manslaughter.²¹ However, she was found guilty on four separate charges of providing false information to law enforcement officers.²² Ultimately, on July 7, 2011, Casey Anthony was sentenced to four years in prison, including time served.²³

The Casey Anthony tragedy was a saga that lasted well over four years, but Casey's sentencing and subsequent release were not the end of the story. On January 25, 2013, Casey Anthony filed for bankruptcy, claiming nearly \$800,000 in debt, but less than \$1,000 in assets, as well as being unemployed.²⁴ On December 17, 2013, Casey was granted a standard bankruptcy discharge, eliminating most of her debt.²⁵ However, it was what happened between these two events that is the most interesting.

III. THE ATTEMPTED SALE

When Casey Anthony filed for bankruptcy, it was apparent that the bankruptcy trustee would not have much to work with.²⁶ With a debt to asset ratio of nearly 800:1, there simply would not be much for the trustee to distribute to Casey's creditors.²⁷ Then the trustee made an unprecedented move.²⁸ The trustee petitioned

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13. *Id.*
 14. CNN Library, *supra* note 8.
 15. *Id.*
 16. *Id.*
 17. *Id.*
 18. *Id.*
 19. *Id.*
 20. CNN Library, *supra* note 8.
 21. *Id.*
 22. *Id.*
 23. *Id.*
 24. *Id.*
 25. *Id.*
 26. *See* CNN Library, *supra* note 8.
 27. *See id.*

28. *See* Elizabeth Chuck, *Florida Judge Delays Decision on Selling Rights to Casey Anthony's Life Story*, NBC NEWS (Apr. 9, 2013), http://usnews.nbcnews.com/_news/2013/04/09/17670492-florida-judge-delays-decision-on-selling-rights-to-casey-anthonys-life-story?lite.

the bankruptcy judge overseeing the proceeding for permission to sell “the exclusive worldwide rights in perpetuity to the commercialization of Casey’s life story.”²⁹ The motion that was filed indicated that there existed at least one written offer of \$10,000 for the rights made by a Texas attorney, James Schober.³⁰ Interestingly enough, the offer was in no way contingent on Casey Anthony’s cooperation.³¹ In fact, Schober was not interested in profiting from the story which he sought.³² “[His] stated intention [was] to acquire the Property in order to prevent Ms. Anthony or others from publishing or profiting from her story in the future.”³³ When asked again about his intent, Schober responded, “[that he wanted] to demonstrate that the asset has present value; second, to ensure that the proceeds from the sale of the asset are applied to the payment of her existing debts . . . ; and third, to ensure that the sale of the asset takes place in the clear light of day.”³⁴

Casey’s attorneys claimed:

“By allowing property that can only be created by post-petition labor to be sold as part of the bankruptcy estate, a debtor would never be able to achieve a ‘fresh start,’” the filing says. “Perhaps more troubling, the Order sought by the Trustee would result in the judicial invasion and taking of thoughts and memories that have not been memorialized but are contained solely within the debtor’s mind. This is a terrifying Orwellian prospect that would destroy the long-standing protections guaranteed by the Bankruptcy Code.”

. . . .

“The Trustee’s Motion would literally bar Ms. Anthony from ever discussi[ng] her life experiences with anyone by use of ‘all forms of social media’ or ‘the internet.’ Therefore, the plain language of the requested Order would bar Ms. Anthony from even sending an e-mail to her mother related to her childhood experiencing because the rights to those thoughts and memories would belong t[o] someone else”³⁵

At the close of the initial hearing the bankruptcy judge postponed judgment on the issue for thirty days.³⁶

29. Weiner, *supra* note 4.

30. *Id.*

31. *Id.*

32. See Casey Anthony Offered 10,000 Dollars to Not Talk and Share her Story, DAILY MAIL (Mar. 16, 2013), <http://www.dailymail.co.uk/news/article-2294532/Casey-Anthony-offered-10-000-dollars-NOT-talk-share-story.html>.

33. Weiner, *supra* note 4.

34. Chuck, *supra* note 28.

35. *Id.*

36. *Id.*

A court ordered resolution never came.³⁷ In May, the trustee withdrew the request, indicating that both parties were working on a settlement.³⁸ Casey Anthony agreed to pay the bankruptcy estate \$25,000 to forgo selling her “life story rights.”³⁹ Given her financial situation, it was unclear where Casey Anthony would find the funds to pay the bankruptcy estate.⁴⁰ Casey Anthony’s willingness to incur greater debt while involved in a bankruptcy proceeding raises many questions about the possible validity of such an endeavor.

IV. WHAT ARE “LIFE STORY RIGHTS?”

What are “life story rights?” At first glance this seemingly innocuous question may appear straightforward and unambiguous, but as it turns out, that may not be the case. To the uninformed, the phrase “life story rights” may initially conjure an idea of a specific, well- defined, neatly-packed bundle of rights relating to the compilation and dissemination of the facts surrounding an individual’s life. However, the idea that “life story rights” exist in some tangible form that can be given, sold, or traded away is misleading. “What are referred to as ‘life story rights’ agreements are, in fact, more akin to covenants not to sue for invasion of privacy, slander, libel, etc. than they are a true grant of rights.”⁴¹ In this way, when one speaks of his own “life story rights” what he is actually referring to is not any specific set of facts or occurrences, but his ability to pursue legal action when the use of such facts or occurrences by a third party violates his rights.⁴² To better understand exactly what “life story rights” are, it is necessary to explore the genesis of these rights.

The right to privacy is a logical starting point. It is difficult to find any specific language in our Constitution that grants an individual an all-encompassing right to privacy: the First Amendment’s⁴³ protection of religion, speech, and assembly may be read to grant an individual privacy in his beliefs; the Third Amendment’s⁴⁴ prohibition against the forced quartering of militia in an individual’s home, as well as the Fourth Amendment’s⁴⁵ protection against unreasonable search and seizure, allude to an individual’s right to privacy in his home, personal effects, and self; finally, the Fifth Amendment’s⁴⁶ protection against self-incrimination grants an individual the right to keep certain information that could be considered incriminating private.⁴⁷ It is clear that our Founding Fathers were well aware that a

37. See Amy Pavuk, *Casey Anthony to Pay \$25K to Settle Life-Story Rights in Bankruptcy Case*, ORLANDO SENTINEL (July 8, 2013), <http://www.orlandosentinel.com/news/local/caylee-anthony/os-casey-anthony-life-story-agreement-20130708,0,3635228.story>.

38. See *id.*

39. *Id.*

40. See *id.*

41. 5-23 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 23.07[A] (2014).

42. See *id.*

43. U.S. CONST. amend. I.

44. U.S. CONST. amend. III.

45. U.S. CONST. amend. IV.

46. U.S. CONST. amend. V.

47. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

key component to an individual's pursuit of happiness included privacy from governmental intrusion in many facets of life—an idea articulated by Justice Brandeis as:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.⁴⁸

While the Founding Fathers foresaw the importance of privacy, it was not until much later that the idea that a cause of action should exist between private individuals for a breach of privacy came to light in the United States.⁴⁹ Predating his opinion in *Olmstead v. United States* by nearly forty years, Brandeis, along with Samuel D. Warren, expressed concern that a private cause of action for a breach of privacy need exist in a law review article titled *The Right to Privacy*.⁵⁰ The article explores the evolution of the law concerning real property, nuisance, slander, and libel, but ultimately recognizes that the existing framework has left a void, stating, “it required little consideration to discern that this . . . could not afford all the protection required, since it would not support the court in granting a remedy”⁵¹ Further explaining:

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world [sic]; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Id.

48. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

49. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890).

50. See *id.*

51. *Id.*

intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.⁵²

This initial call for a cause of action resulting from a breach of privacy eventually led to its inclusion in the *Restatement (Second) of Torts*.⁵³ Section 652A *General Principle* states:

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- (2) The right of privacy is invaded by
 - (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
 - (b) appropriation of the other's name or likeness, as stated in § 652C; or
 - (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
 - (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.⁵⁴

Today, many states recognize common law causes of action for breaches of privacy similar to what the *Restatement (Second) of Torts* suggests.⁵⁵

Similar to, but not exactly mimicking the right to privacy, is the right to publicity.⁵⁶ A New Jersey court explained:

The right of publicity is a concept which has evolved from the common law of privacy and its tort “of the appropriation, for the defendant’s benefit or advantages, of the plaintiff’s name or likeness.” The term “right of publicity” has since come to signify the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit. The idea

52. *Id.*

53. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

54. *Id.*

55. *See, e.g.,* Cason v. Baskin, 20 So. 2d 243, 250 (Fla. 1944) (“[T]here is a right of privacy, distinct in and of itself and not merely incidental to some other recognized right, and for breach of which an action for damages will lie.”); Crump v. Beckley Newspapers, 320 S.E.2d 70, 82–83 (W. Va. 1983) (“[A] number of states whether by statute or by court decision, divided the tort of invasion of privacy into the following four categories: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another’s name or likeness; (3) unreasonable publicity given to another’s private life; and (4) publicity that unreasonably places another in a false light before the public.”); Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998) (“California courts have recognized . . . the privacy causes of action . . . : (1) public disclosure of private facts, and (2) intrusion into private places, conversations or other matters.”).

56. *See* Estate of Presley v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981).

generally underlying an action for a right of privacy is that the individual has a right personal to him to be let alone and, thus, to prevent others from invading his privacy, injuring his feelings, or assaulting his peace of mind. In contrast, underlying the right of publicity concept is a desire to benefit from the commercial exploitation of one's name and likeness.⁵⁷

The inclusion of a right to publicity is clearly a key component of an individual's "life story rights." After all, it is the commercialization of an individual's person that leads to value.⁵⁸ Without the right to publicity, there would exist little commercial benefit to "life story rights."

Less generic causes of action are also described in the *Restatement (Second) of Torts* for defamatory statements, which include slander and libel.⁵⁹ Section 558 lists the elements for a defamation cause,⁶⁰ while section 568 distinguishes slander and libel.⁶¹ It is important to note that for all three causes of action, certain conditions exist that may give rise to absolute or conditional immunity.⁶² For the purpose of this analysis, one such condition that will likely arise more often than not is the idea of "newsworthiness."⁶³

V. TWIN AIMS OF CHAPTER 7 BANKRUPTCY

At its heart, the bankruptcy process seeks to balance two competing goals: the equal distribution of funds to the debtor's creditors, and the relief for the debtor from his financial past.⁶⁴ Of interest for this analysis is the Chapter 7 bankruptcy, or liquidation. The liquidation process is overseen by an appointed bankruptcy trustee who is in charge of selling the debtor's non-exempt assets⁶⁵ and distributing the net proceeds to the debtor's creditors who hold allowed claims.⁶⁶ In this way, the trustee is really the key component in ensuring that the first goal of a Chapter 7 bankruptcy is met. The trustee is in charge of: policing the debtor, insofar as the trustee is responsible for reviewing claims for exempt assets; determining whether the debtor is attempting to file for bankruptcy in a manner that would be considered an abuse and therefore, not qualified for a discharge; determining whether or not a

57. *Id.*

58. *See id.*

59. RESTATEMENT (SECOND) OF TORTS § 568 (1997).

60. *Id.* § 558.

61. *Id.* § 568.

62. *See id.* § 558.

63. *See Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377-78 (Fla. 1989) ("The right of privacy does not forbid the publication of information that is of public benefit, and the right does not exist as to persons and events in which the public has a rightful interest.") (quoting *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715, 717 (Fla. Dist. Ct. App. 1971)).

64. *See* CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 1 (2d ed. 2009).

65. *Id.* at 92 (stating certain assets are exempt, and considered a major part of the debtor's financial fresh start).

66. *Id.*

claim by a creditor is secured; and distributing funds for unsecured claims on an appropriate pro rata basis.⁶⁷

The second goal of a Chapter 7 bankruptcy focuses on relief for the debtor.⁶⁸ The immediate effects of filing a petition are momentous—the greatest of which is the automatic stay⁶⁹ which stops all collection attempts by the debtor's creditors with no other notice beyond the filing of the petition.⁷⁰ While less important overall, but perhaps more important to the analysis at hand, is the creation of the bankruptcy estate.⁷¹ At the moment of filing, all legal and equitable interests in property held by the debtor become property of the estate.⁷² This is important to the analysis of selling “life story rights” because it is at this point that any assets subsequently acquired by the debtor are in fact, property of the debtor, not of the estate.⁷³ Further analysis in subsequent sections will seek to clarify whether “life story rights” actually exist at the time of filing, absent an existing express agreement.⁷⁴

The second issue that presents itself in terms of the sale of “life story rights,” and possible conflicts that may arise when viewed against the backdrop of a fresh financial start, deals with the debtor's future earning potential.⁷⁵ “Postpetition proceeds are *not* included in the bankruptcy estate to the extent those proceeds are earnings from services performed by an individual debtor after the commencement of the case.”⁷⁶ The fact that in order for the “life rights” to hold value, some form of postpetition action to create and disseminate facts pertaining to an individual's life truly muddies the waters in terms of whether such a sale would unduly inhibit a debtor's ability to earn an income postpetition.

67. *See id.* at 87.

68. *Id.* at 1.

69. 11 U.S.C. § 362(a) (2010).

70. *See id.*

71. *See* 11 U.S.C. § 541(a) (2010).

72. *Id.*

73. *See* TABB, *supra* note 64, at 405.

In five specific situations, postpetition property is added to the estate:

1. The trustee recovers property for the benefit of the estate pursuant to the avoiding powers, or another enumerated Code section, § 541(a)(3);
2. Property is preserved for the benefit of the estate or ordered transferred to the estate, § 541(a)(4);
3. The debtor gets a “windfall” by inheritance, divorce, or life insurance within 180 days after the filing, § 541(a)(5);
4. The property is proceeds of estate property, § 541(a)(6); and
5. The estate acquires property, § 541(a)(7).

Id.

74. *See infra* Section VII.

75. *See* TABB, *supra* note 64, at 426.

76. *Id.*

VI. SHOULD THE TRUSTEE HAVE BEEN ALLOWED TO SELL CASEY'S LIFE STORY RIGHTS?

When asked why he wanted to purchase the rights to Casey Anthony's life story, Schober mentioned that he intended to show that the story held present value.⁷⁷ In order for the asset to be included in the estate, it must have existed at the time the petition was filed and the estate was created.⁷⁸ The baseline question becomes whether or not, at the time of filing, Casey Anthony's life story had value as an asset.

Based on events surrounding the murder, trial, and bankruptcy, it is likely that the rights to Casey Anthony's life story did hold value.⁷⁹ The most easily seen example is Schober's offer itself, worth \$10,000.⁸⁰ In this case, the offer seems to be a self-justification, but it is not the only example that supports the proposition that Casey Anthony's story holds value.⁸¹ The trustee claimed that there existed a second competing offer of \$12,000.⁸² Even prior to the idea that Casey Anthony's "life story rights" could be sold, Casey was receiving offers to sell her story.⁸³ After being released from prison in 2011, it was reported that an independent producer had offered Casey Anthony \$1 million to tell her story.⁸⁴ Davidson Goldin, a public relations expert, said, "[b]etween a combination of a book, maybe some sort of magazine articles, TV interviews and other ways of telling this monstrous story that she has, she'll probably be able to wrestle out of this about a million dollars," on Good Morning America.⁸⁵ Looking at similar situations, it is apparent that a book about a highly publicized case—with an outcome generally deemed unfavorable—could generate profit.⁸⁶ O.J. Simpson was given a \$1 million advance for his book, *If I Did It*, which described how Simpson could have committed the murders of those with which he was accused.⁸⁷ While ultimately, none of the offers to the trustee amounted to a sale, and the O.J. case is not necessarily a direct analog, it is clear that people were willing to pay money to hear Casey Anthony's story.⁸⁸ Schober's other reasons,⁸⁹ revolving around the payment of creditors, as well as the transparency of the transaction, truly do speak to the fairness goals involved in any Chapter 7 bankruptcy.⁹⁰

Turning to Casey Anthony's attorneys' arguments, it is clear that they believed the proposed sale offended not only the bankruptcy goals, but also offended Casey

77. Chuck, *supra* note 28.

78. 11 U.S.C. § 541(a) (2014).

79. See Jim Avila, *Casey Anthony: Will She Profit from Her Case?*, ABC NEWS (July 17, 2011), <http://abcnews.go.com/US/casey-anthony-profit-case/story?id=14090596>.

80. Weiner, *supra* note 4.

81. Chuck, *supra* note 28.

82. *Id.*

83. Avila, *supra* note 79.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See Weiner, *supra* note 4.

89. Chuck, *supra* note 28.

90. *Id.*

Anthony's constitutional rights.⁹¹ Based on the comments made by the attorneys, it would seem that the proposed sale of the "life story rights" was more of a gag order than anything else.⁹² They noted that Casey Anthony would be barred from sending e-mails or messages over social media websites based on the plain language of the motion.⁹³ Clearly, such a chilling of Casey Anthony's free speech by the court would have resulted in a constitutional violation.⁹⁴ As the offer stood, it seemed as though Schober was overreaching in the covenants he sought.⁹⁵ This was likely because what Schober actually wanted was to prevent Casey Anthony, or anyone, from profiting from the tragedy that had occurred.⁹⁶ Such a restrictive offer was unlikely to have been approved had the bankruptcy judge been forced to make a ruling.⁹⁷ This does not mean that Schober and the trustee's idea to sell Casey Anthony's "life story rights" was without merit.⁹⁸ By analyzing the different facets of what "life story rights" include and how they interact with goals of bankruptcy and existing law, it may be possible to develop a model that allows all three to exist in harmony.

VII. A LOOK AT EACH PIECE OF THE "LIFE STORY RIGHTS" BUNDLE

The discussion will again begin with an individual's right to privacy. "[T]he tort of invasion of privacy [generally falls] into four categories: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; [or] (4) publicity that unreasonably places another in a false light before the public."⁹⁹ The acquisition of "life story rights" will generally include a clause or reservation preventing the individual from pursuing a cause of action for all four categories.¹⁰⁰ This type of clause will generally look similar to:

[If Studio exercises the option . . .] Owner hereby releases Studio from and agrees that Owner will not assert or maintain against Studio, its successors, assigns and/or licensees, any and all claims, actions, suits or demands, of any kind whatsoever, which at any time hereunder Owner may have or assert to have, arising out of or in connection with the Productions and/or the exercise of the Life Story Rights. This release and covenant not to sue is intended to include, but is not limited to, any claims, action, suits or

91. See Amy Pavuk, *Casey Anthony: Bankruptcy Attorneys to Argue over Rights to Sell Her Life Story*, ORLANDO SENTINEL (Apr. 8, 2013), http://articles.orlandosentinel.com/2013-04-08/news/os-casey-anthony-bankruptcy-life-story-20130408_1_casey-anthony-jose-baez-stephen-meininger.

92. See Chuck, *supra* note 28.

93. *Id.*

94. See Pavuk, *supra* note 91.

95. See Chuck, *supra* note 28.

96. Weiner, *supra* note 4.

97. See Chuck, *supra* note 28.

98. See *id.*

99. *Crump v. Beckley Newspapers*, 320 S.E.2d 70, 83 (W. Va. 1983).

100. NIMMER & NIMMER, *supra* note 41.

demands, based upon any . . . invasion of privacy, defamation and/or right of publicity (whether statutory or otherwise).¹⁰¹

This type of agreement is fairly common, and when undertaken under one's own volition, it is unlikely that the legality of such an agreement would be questioned.¹⁰² However, the analysis is quite different when looked at from the perspective that it would be the bankruptcy estate signing away the rights of an individual and not an individual assigning his own rights.¹⁰³ The question becomes: "Should we allow the bankruptcy estate to preclude an individual from seeking a cause of action he would normally be entitled to?"

In my opinion, to allow the bankruptcy estate to preclude an individual from pursuing a cause of action for a violation of his right to privacy would be too far. In this case, there would be what essentially amounted to a violation of the constitutional rights previously discussed.¹⁰⁴ We would have a state actor—the bankruptcy court—paving the way for a third party to violate the rights of an individual that our Constitution seeks to protect. This is by no means the end of the discussion. While it is likely that the trustee would not be allowed to assign an individual's right to privacy, is it even necessary?

While an individual who seeks to purchase a person's "life story rights" may not be able to acquire a covenant precluding a right to privacy cause of action, there may in fact be little cause to do so.

The right of privacy does not prohibit the publication of matter which is of legitimate public or general interest. At some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. It has been said that the truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest. However, the phrase "public or general interest," in this connection does not mean mere curiosity.

. . . One of the primary limitations upon the right of privacy is that this right does not prohibit the publication of matters of general or public interest, or the use of the name or picture of a person in connection with the publication of legitimate news. A person who, by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, may be said to have

101.

Id.

102.

E.g., *Marder v. Lopez*, 450 F.3d 445, 450 (9th Cir. 2006).

103.

See Weiner, supra note 4.

104.

U.S. CONST. amend. I, III, IV, and V.

become a public personage, and he thereby relinquishes at least a part of his right of privacy.¹⁰⁵

It is clear from the above paragraphs that in the context of this discussion, there may actually be little value in an individual debtor's right to privacy. After all, it is highly unlikely that, absent being a public personage, the debtor's life story and surrounding facts would hold any commercial value.¹⁰⁶ Also, it is unlikely that the facts a purchaser would be interested in would be completely irrelevant or unrelated to the events that generated the public interest or concern in the first place.¹⁰⁷ Looking back at the Casey Anthony case as an example, the public interest was in the trial and the events that led to the trial.¹⁰⁸ These types of facts are clearly matters of public interest.¹⁰⁹

So why then is the right to privacy so commonly included when speaking of "life story rights?" The answer is really very simple. A person producing a tangible version of another's life story "[is] generally looking to minimize the risk of litigation and limit the effort [he] ha[s] to expend to obtain all underlying rights"¹¹⁰ It is important to remember that a lot of these ideas have their genesis outside of the bankruptcy context and are therefore, not necessarily tailored to meet the needs of the situations encountered in this sort of novel idea.¹¹¹ While it is true that a bankruptcy trustee will likely not be allowed to assign an individual's right to privacy, it would seem that is far from necessary.¹¹² More important than the right to privacy, is the right to publicity.¹¹³

The right to publicity is likely what a purchaser of "life story rights" is most interested in. It is what allows the purchaser to turn his investment into a profit.¹¹⁴ Without it, there is not much else.¹¹⁵ It may seem at first that if the right to a privacy cause of action is precluded by public interest, then a person's name or likeness should be allowed to be used in connection with a book or movie under the same rationale. This, however, is not the case. The difference has been explained as:

[A]lthough the publication of biographical data of a wellknown figure does not per se constitute an invasion of privacy, the use of that same data for the purpose of capitalizing upon the name by

105. Cason v. Baskin, 20 So. 2d 243, 251 (Fla. 1944) (quoting 41 Am. Jur. 934, 937-38) (internal quotation marks omitted).

106. See Avila, *supra* note 79.

107. See Tom Isler, *Whose Story Is It, Anyway? Obtaining a Subject's Life-Story Rights*, DOCUMENTARY MAG., Summer 2008, <http://www.documentary.org/content/whose-story-it-anyway-obtaining-subjects-life-story-rights>.

108. See Avila, *supra* note 79.

109. See Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378 (Fla. 1989).

110. Isler, *supra* note 107.

111. See *id.*

112. See Estate of Presley v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981).

113. See *id.*

114. See *id.*

115. See *id.*

using it in connection with a commercial project other than the dissemination of news or articles or biographies does.¹¹⁶

It is precisely the capitalization of one's name that a would-be-purchaser of "life story rights" is interested in.¹¹⁷ It is clear that the right to publicity is far more relevant than the right to privacy, so again, it must be determined if a bankruptcy estate should be allowed to assign these rights.

Unlike the right to privacy, the right to publicity is not as constitutionally grounded.¹¹⁸ A State's interest in protecting an individual's right to publicity deals more with encouragement.¹¹⁹

[T]he State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. . . . [T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.¹²⁰

Clearly, the Court has chosen to avoid alluding to any constitutional guarantee as it has done in the past when discussing a right to privacy.¹²¹ While our Constitution may not present a major hurdle in terms of selling a debtor's right to publicity, the goals of a Chapter 7 bankruptcy might.¹²² In fact, Casey Anthony's attorneys' objection to the sale of her "life story rights" was articulated as:

By allowing property that can only be created by post-petition labor to be sold as part of the bankruptcy estate, a debtor would never be able to achieve a "fresh start," . . . Perhaps more troubling, the Order sought by the Trustee would result in the judicial invasion and taking of thoughts and memories that have not been memorialized but are contained solely within the debtor's mind. This is a terrifying Orwellian prospect that would destroy the long-standing protections guaranteed by the Bankruptcy Code.¹²³

116. Palmer v. Schonhorn Enters., Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967).

117. See Isler, *supra* note 107.

118. See Estate of Presley v. Russen, 513 F. Supp. 1339, 1354 (D.N.J. 1981).

119. See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977).

120. *Id.*

121. See Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.") (footnote omitted).

122. See Chuck, *supra* note 28 (internal quotation marks omitted).

123. Chuck, *supra* note 28.

The attorneys' focus relies heavily on the idea of a financial fresh start, as well as the idea that, at the time of filing, there had yet to exist a tangible account of Casey Anthony's life story.¹²⁴ As previously discussed in this article, as well as being alluded to by Schober,¹²⁵ it is likely that Casey Anthony's "life story rights" held present value at the time that the bankruptcy estate was created, and therefore, should be viewed as an asset.¹²⁶ What then becomes of the idea that an individual's future earning potential should be unencumbered by his previous financial indiscretions?

One view may be that because the "life story rights" hold present value they should be treated by the bankruptcy court the same as an existing executory contract or lease.¹²⁷ The trustee has an option to first assume any such agreements and then assign those agreements to third parties for value, thus increasing the likelihood that a debtor's creditors will be repaid that which they are owed.¹²⁸ This idea is relatively straightforward and easy enough to understand. The issue here is that there is not necessarily an existing agreement, but only an asset that can be exploited for profit. Thus any agreement that the debtor becomes a party to, on his own volition or otherwise, may represent an encumbrance on his ability to earn a future wage. It is important however, to remember that the goals of a Chapter 7 bankruptcy do not exist in a vacuum independent of each other, but rather they are competing claims which must be balanced against each other.¹²⁹ A hybrid of existing theories may help to reach a realistic compromise.

A sensible resolution would be to view the agreement in two distinct parts: a purchase price, and subsequent royalties with a time limiting reversion clause.¹³⁰ In this case, the purchase price of the publicity rights would go to the estate in order to pay back a debtor's creditors.¹³¹ The royalties, however, would be the rightful property of the debtor.¹³² This framework seeks to resolve the issues between both competing goals. On one hand, the value of the estate has been increased through the purchase price.¹³³ This makes sense. The "life story rights" likely hold value, even absent a memorialization, thus, that value really should become part of the estate that the creditors are entitled to.¹³⁴ However, without any payment going to the debtor, it may be said that this solution amounts to an unallowable prohibition of future income.¹³⁵

Herein lies the necessity for subsequent royalty payments to go to the debtor. This again makes sense. While the nebulous "life story rights" hold actual value, evidenced by the purchase price, the resulting sales of any tangible goods resulting

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See* TABB, *supra* note 64, at 863.

129. *See id.* at 1.

130. *See* 1-5 Entertainment Industry Contracts FORM 5-3.

131. *See* TABB, *supra* note 64, at 394.

132. *See id.* at 426-28.

133. *See* Chuck, *supra* note 28.

134. *See id.*

135. *See id.*

from such a purchase are merely speculative.¹³⁶ This means that at the time of the creation of the bankruptcy estate, they do not represent a real or present value.¹³⁷ Any value derived therefrom would be postpetition and thus property of the debtor.¹³⁸

Further complicating the issue of royalty payments is the fact that the trustee would be acting in place of the debtor during negotiations. The easiest solution would be to create an objective standard. This standard could be something as simple as what would be considered the industry “norm.” Once it is established that the estate has a right to assign such rights, it is in the best interest for the debtor to cooperate. Thus, the onus would fall on the would-be-purchaser, as well as the debtor, to show what is just and reasonable. This is merely one solution to a problem that may not ever amount to a real issue.

It is important to remember that both sides have an interest in obtaining what is best. As previously discussed, it is unlikely that a court would allow a debtor’s right to privacy to be contracted away by the estate (the same can be said for issues arising under defamation, which will be discussed later).¹³⁹ In fact, it is even likely that a would-be-purchaser would not need these covenants, but he may still be interested in them.¹⁴⁰ Again, there is an issue of goal balancing. What this really means is that the issue of royalty payments may actually be resolved collaboratively.¹⁴¹ Rather than preparing briefs or motions for the trustee to review, the two parties may find it more beneficial to work together when determining the fairness and adequacy of subsequent royalty payments.¹⁴² The debtor can offer the covenants that the estate will unlikely be allowed to offer.¹⁴³ In return, the would-be-purchaser may be more open to royalty payments slightly above that which are currently being offered.¹⁴⁴ Both parties have an interest in limiting the amount of litigation surrounding the sale, in that time is essentially money. Further, a collaborative process would remove much of the ambiguity for both parties.¹⁴⁵ In writing a book or motion picture script, the purchaser would have far less doubt about whether or not any future litigation would arise under a right to privacy or defamation claim.¹⁴⁶ The debtor would be far more in control of how much the royalties are worth.¹⁴⁷ This is all assuming that the purchaser chooses to exert his newly obtained rights of publicity.

One may ask why anyone would purchase such rights and then choose not to exert them, but this scenario may in fact end up being far more common than one

136.

*Id.*137. TABB, *supra* note 64, at 397–98.138. *See id.* at 402, 426–28.139. Chuck, *supra* note 28.140. *See* Isler, *supra* note 107.141. *See* TABB, *supra* note 64, at 427–28.142. *See id.*143. *See* Isler, *supra* note 107.144. *See* TABB, *supra* note 64, at 427–28.145. *See* Isler, *supra* note 107.146. *See id.*147. *See* TABB, *supra* note 64, at 427 (discussing the courts breakdown of royalty payments as postpetition proceeds).

would expect. In fact, Schober was seeking to do just that when he attempted to purchase the “life story rights” from Casey Anthony’s estate.¹⁴⁸ For those individuals who become public figures not of their own volition, but by their notoriety connected to a heinous crime, there will be people who essentially seek to prevent them from profiting off of a tragedy.¹⁴⁹ Perhaps a more likely scenario would be something as simple as fate. Issues may arise with securing funding for a production that prevents the purchaser from creating a tangible good that is exploitable for profit.¹⁵⁰ This is where the necessity for a reversion clause comes in.¹⁵¹ Using the period of one year, we can see how this would work in practice. Assuming that the purchaser fails to produce, or to start production on, a marketable good related to the acquired rights within the period of year, such rights would revert back to the debtor.¹⁵² This prevents a purchaser from using the right to publicity as a gag order, as Schober was attempting to do.¹⁵³ It is not difficult to see how a working model could be achieved through legislation and judicial opinion.

The analysis on defamation causes of action is similar to that of the right to privacy. In his law review article, Brandeis explains defamation as “damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows” and “in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen”¹⁵⁴

When we look at the harm that such causes of action seek to prevent—specifically, the damage to an individual’s reputation and subsequent difficulty he may have in conducting his affairs with others—it is plain to see that courts are unlikely to allow one individual to sign away these rights for another. To do so would be unilaterally unfair to the debtor.¹⁵⁵ Unlike the right to publicity, there is no balancing of goals, only the one-sided loss for the debtor and therefore, no workable justification.¹⁵⁶ In all reality, this ultimately plays out much in the same way as does the right to privacy.

Just like with the right to privacy, covenants to refrain from bringing a defamation cause of action are unlikely to be allowed, but they are also likely to be of far less value than the right to publicity.¹⁵⁷ Using the *Restatement (Second) of Torts* as an example, it is clear that in order to bring a cause of action for defamation one of the elements is “fault amounting at least to negligence on the part of the publisher.”¹⁵⁸

148. See CNN Library, *supra* note 8.

149. See Weiner, *supra* note 4.

150. See Isler, *supra* note 107.

151. See 1-5 Entertainment Industry Contracts FORM 5-3 (“A reversion can be used to provide for the return of rights if [production] does not commence within a specified period of time”).

152. See *id.*

153. See Weiner, *supra* note 2.

154. Warren & Brandeis, *supra* note 49, at 197.

155. See *id.*

156. See *id.* at 213.

157. See *id.* at 197.

158. RESTATEMENT (SECOND) OF TORTS (1965) § 558.

VIII. CONCLUSION

In the end, it would seem as though the trustee for Casey Anthony's bankruptcy estate may have been reaching. Schober's offer, as was put forth in a motion to the court, was clearly far too restrictive to pass constitutional scrutiny.¹⁵⁹ While it may have been over-inclusive, it did introduce the idea that a story not yet memorialized can hold value.¹⁶⁰ It also brought to light the type of social injustice that might occur when we allow a person to profit from his wrongs.¹⁶¹ The idea of selling "life rights" requires a complex blending of constitutional law, bankruptcy law, intellectual property law, as well as the wants and needs we hold closest as a society.

The theory that a person's "life story rights" should be able to be sold in Chapter 7 bankruptcy proceedings may be novel,¹⁶² but that does not mean that it is without merit. Until now, this article has focused on existing laws and how they may be adapted to help balance the fairness between the competing goals of the debtor and creditors in a bankruptcy proceeding. In closing, I believe that it is also important to ask ourselves if we want to live in a society that would allow those individuals who are responsible for, or involved in, tragedies so atrocious that they mesmerize a nation, to subsequently profit from these tragedies, all the while shirking financial responsibilities that they incurred to protect themselves from the consequences of their actions. I know I do not.

159. See Chuck, *supra* note 28.

160. See *id.*

161. See Bordman, *supra* note 3.

162. Mike Schneider, *Casey Anthony Will Pay \$25,000 Not to Sell Her Life Story*, HUFFINGTON POST (Aug. 1, 2013), http://www.huffingtonpost.com/2013/08/01/casey-anthony-life-story_n_3689734.html.