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Public Interest as a Limitation of the Right to Privacy

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the use of force is not to be comtemplated,[17] where no dangerous instrumentality is used, and where the master is under no duty to protect the debtor from harm.[18] The Connecticut rule seems too strict in imposing liability, for it makes the master liable in many case where he properly should not be. On the other hand, the Kentucky rule will not leave the debtor at the tender mercies of unscrupulous creditors, yet it will protect the master from the personal wilfull acts of his servants in situations which are often provoked by the debtor-plaintiff himself.

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PUBLIC INTEREST AS A LIMITATION OF THE RIGHT TO PRIVACY

"Redress for the invasion of the right of privacy has been recognized so generally in recent years that it no longer may be questioned."[1] Based on the idea that each individual has a right to lead his life unhampered by the prying fingers of publicity, this doctrine has gained more and more importance in the field of tort law, protecting those whose histories, names and likenesses have been needlessly held before the public eye.

When the right of privacy was first championed in 1890 by Samuel D. Warren and Louis D. Brandeis, the authors proposed limitations upon the right, the first of which was that "the right to privacy does not prohibit any publication of matter which is of public or general interest."[2] This limitation is generally recognized today in jurisdictions which acknowledge the right of privacy.[3] Therefore, one of the

[17] As in the cases of guards (see cases cited *supra* note 12), or where agent is put in charge of premises and is expected to maintain order or protect them. J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W. 2d 359 (1935) (Store manager); Dennert v. Dee, 308 Ky. 687, 215 S.W. 2d 575 (1948) (bar-tender); Moore v. Blanchard, (La. App.) 35 So. 2d 667 (1948) (bouncer.)

[18] As in the case of a carrier, which is under a duty to protect passengers from assaults by its servants, strangers, or fellow passengers. Gladdish v. South Eastern Greyhound Lines, 293 Ky. 498, 169 S.W. 2d 297 (1943); Hull v. Boston & M. R. R., 210 Mass. 159, 96 N.E. 58 (1911).

[1] Voneye v. Turner, 240 S.W. 2d 588, 590 (Ky. 1951).

[2] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV., 193, 214 (1890).

[3] "If any (right of privacy) exists, it does not protect one from having his name or likeness appear in a newspaper when there is a legitimate public interest in his existence, his experiences, his words, or his acts." Themo v. New England Newspaper Publishing Co., 306 Mass. 54, 27 N.E. 2d 753, 755 (1940). See also Peay v. Curtis Pub. Co., 78 Fed. Supp. 305 (D. C. 1948); Sidis v. F-R Pub. Corp. 113 F. 2d 806 (C.C.A. 2d 1940); Cohen v. Marx, 94 Cal. App. 2d 704, 211 P. 2d 320 (1949); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. 2d 133 (1945); Sarat Lahiri v. Daily Mirror Inc., 295 N.Y.S. 382 (Sup. Ct. Special Term 1937); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

perplexing problems now before the courts is: "What matter is privileged as being in the public interest?"

Last year a United States Court of Appeals was faced with this question in the case of *Leverton* v. *Curtis Publishing Co.*[4] Plaintiff, a ten year old child, was nearly run over by an automobile due to the carelessness of the driver. A photographer who happened to be on hand snapped a picture of a woman lifting the shaken girl to her feet, and the following day this picture, because of its current news value and dramatic effect, appeared in the local newspaper.

The incident appeared to be closed, but twenty months later the defendant, Curtis Publishing Company, printed an article in the Saturday Evening Post emphasizing pedestrian carelessness. The article, "They Asked To Be Killed" by David G. Wittels, was illustrated with the plaintiff's picture beside a caption reading, "Do you invite massacre by your own carelessness? Here's how thousands have committed suicide by scorning laws that were passed to keep them alive." Upon learning of the unauthorized use of her picture accompanying an article foreign to the incident as it actually happened, plaintiff sued and recovered for the wrongful invasion of her right of privacy.

The questions presented to the court were twofold: whether the privilege involved in the original publication of plaintiff's picture had lapsed during the interval of twenty months, and whether the use of plaintiff's picture to illustrate a magazine article on pedestrian carelessness instead of a news story constituted an actionable invasion of her right of privacy.

Holding that the lapse of twenty months did not effect the immunity from liability of the original publication, the court cited the Restatement of Torts,[5] for the proposition that one who attains public attention has relinquished part of his right to privacy and that:

> "One who unwillingly comes into the public eye . . . is subject to the same limitations upon his right to be let alone. Community custom achieves the same result with reference to one unjustly charged with crime or the subject of a striking catastrophe. Both groups of persons are the *objects of legitimate public interest during a period of time after their misfortune has brought them to the public attention;* until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."[6] (Writer's italics)

If, therefore, a person who has been an object of legitimate public interest should regain the full privilege of privacy afforded to the bulk

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[4] 192 F. 2d 974 (C.C.A. 3rd 1951).
[5] RESTATEMENT, TORTS sec. 867, Comment (c) (1939).
[6] *Ibid.*

of the community after a period of time, what then is a reasonable period of time? Research has failed to reveal any privacy case which turns directly on this point. However, there have been several cases in which the time element was important. Twenty-seven years had elapsed since a child prodigy had been a famous mathematical genius, when a magazine carried an article exposing the intimate details of the humdrum existence now voluntarily led by the former famous person. Despite the intervening years, the court held that it "would permit limited scrutiny of the 'private life' of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a 'public figure'."[7]

Yet a period of eight years was an important consideration in an earlier California decision. This case concerned a motion picture produced by the defendant which was based on the life of the plaintiff, a prostitute, who had been acquitted of a murder charge. During the eight years between the trial and the production, however, the plaintiff had been conducting a normal and respectable life, and the court held that the defendant's act of revealing the plaintiff's past as a prostitute and an alleged murderess had violated the plaintiff's constitutional right to freedom from unnecessary attacks on one's character.[8]

Two other cases involving sizeable lapses of time resulted in dissimilar decisions. In one, the court held the plaintiff still subject to privileged invasions of his privacy, because ten years previously he had become widely known as a prize fighter and had thereby relinquished a part of his right.[9] In the other the court held that the plaintiff had a right not to be again dragged into publicity when a radio broadcast dramatization was based on a holdup and shooting of which the plaintiff was the victim seventeen months earlier.[10]

Such disparity in decisions leads to the conclusion that an absolute rule cannot be set forth as to what is a sufficient lapse of time to do away with the privilege of publication. What is a reasonable lapse of time depends on the degree of importance of the news at the time it was current. Since the time element affects the ultimate newsworthiness in relation to the original degree of newsworthiness, making the decision a judgment based upon the facts of each case, it is perhaps more desirable that the time element be not the deciding factor in the privacy cases, nor a question set apart, but merely an important factor in the decision as to whether or not the right to privacy has been invaded.

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[7] Sidis v. F-R Pub. Corp., 113 F. 2d 806, 809 (C.C.A. 2d 1940).
[8] Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).
[9] Cohen v. Marx, 94 Cal. App. 2d 704, 211 P. 2d 320 (1949).
[10] Mau v. Rio Grande Oil Inc., 28 Fed. Supp. 845 (N.D. Cal. 1939).

In considering what publications are in the public interest, and therefore immune to attack as a violation of the right of privacy, several factors should be examined.

(1) The type of publication in which the plaintiff's name, history or likeness appears is an important factor in ascertaining if the defendant is privileged to invade the plaintiff's privacy, because the type of publication indicates what sort of matter is contained therein. For instance, it has been held that a person may not complain of having his name or likeness appear in a newspaper when there is a legitimate interest in his person and deeds.[11] Such privileged invasion is necessary in order to facilitate the dissemination of current news and information of general concern.

This privilege is usually extended to magazines, when the subject of the article is informative or involves current events.[12] However, when the article is fictional, the public concern in information is no longer involved and the defendant may then be liable for infringing upon the plaintiff's rights.[13] Thus, a Federal court recently held that a motion picture supposedly based on the life of a public figure and making use of the person's name was not privileged when the plot of the story was primarily fiction.[14] However, a biography of a public figure is privileged as long as it imparts the truth concerning his career, and unfolds nothing that would be repugnant to ones sense of decency.[15] But if a person is not a public figure, putting a true character sketch of that person in a novel may subject the author to liability.[16]

Use of the name in advertisements is an invasion of the right of

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[11] Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E. 2d 753 (1940) (Defendant published on the front page of the newspaper, a picture of plaintiff in conversation with a captain of police. The court held that if the right of privacy existed in that jurisdiction, defendant had not invaded it because the photograph was of legitimate public concern.); *accord,* Kelley v. Post Publishing Co., 98 N.E. 2d 286 (Mass. 1951); Barber v. Time Inc., 348 Mo. 1199, 159 S.W. 2d 291 (1942).

[12] *Supra* note 7; accord, Derounian v. Stokes, 168 F. 2d 305 (C.C.A. 10th 1948). Berg v. Minneapolis Star & Tribune Co., 79 Fed. Supp. 957 (D.C.D. Minn. 1948).

[13] Garner v. Triangle Publications Inc., 97 Fed. Supp. 546 (S.D.N.Y. 1951) (A person may not print a fictional or novelized representation of another, even if the other is a public figure.); Peay v. Curtis Pub. Co., 78 Fed. Supp. 305 D.C. D.C. 1948) (Plaintiff, who was not a public figure, claimed that her privacy had been infringed when the defendant used her picture to illustrate a magazine article without her consent.); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. 2d 133 (1945) (Publishing a photograph in connection with a magazine story of a crime is actionable.).

[14] Donahue v. Warner Bros. Pictures Inc., 194 F. 2d 6 (C.C.A. 10th 1952).

[15] Koussevitzky v. Allen, Towne & Heath, 272 App. Div. 759, 69 N.Y.S. 2d 432 (1947).

[16] Cason v. Baskin, 155 Fla. 198, 20 S. 2d 243 (1944).

privacy even when the subject is a prominent person. In *Foster-Milburn Co.* v. *Chinn*, the court held that:

> ". . . the publication of the picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, is a violation of the right of privacy . . . It has become a custom in the press to publish the picture of prominent public men; but it is a very different thing for a manufacturer to use without authority such a man's picture to advertise his goods . . ."[17]

The growing hostility of the courts toward the unauthorized use of a name or picture in an advertisement is the result of the commercialization of something the publisher has no right to use, and it would seem that whether the person is a public figure or a private citizen would be immaterial since in either case the publisher is holding a person before the public gaze without that person's consent and for no purpose other than the publisher's own gain.

(2) As mentioned above, public interest usually places a limitation upon the right to privacy when the article in which the plaintiff's name, history or likeness appears is informative. Informative articles must, however, be differentiated from merely *instructive* articles. In the case of *Almind* v. *Sea Beach Ry. Co.*,[18] the defendant took the plaintiff's picture as she was entering a railway car, and used it for advertising purposes, i.e., to teach others the safe method of entering the cars. The court held that: "No cause is so exalted that it may alure by exposing the portrait of a person to the public gaze."[19] In a similar California case the defendant had made an unauthorized use of plaintiff's picture to illustrate a supposedly instructive article entitled "Love", and there too it was held that the informative value did not justify the use of the photograph without the plaintiff's consent.[20]

The obvious difference between the articles concerned in the foregoing cases, and those considered in the *Sidis*[21] and other similar cases is that the articles in the foregoing cases are instructive while the latter are informative in that they impart news about the plaintiff. It is submitted that the cases concerning instructive material have been given too harsh treatment by the courts. It may be that few cases are so exalted that they may allure by placing someone's picture before the eyes of the public without his consent, especially when their use is often wholly unnecessary as such pictures can be posed. However,

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[17] Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364, 366 (1909); *accord*, Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918).

[18] 157 App. Div. 230, 141 N.Y.S. 842 (1913); *accord*, Humiston v. Universal Film Mfg. Co., 101 Misc. Rep. 3, 167 N.Y.S. 101 (1917).

[19] *Id.* at 843.

[20] Gill v. Curtis Pub. Co., 231 P. 2d 565 (Cal. 1951).

[21] *Supra* note 7.

if no cause is deemed of sufficient worthiness, and necessity is never to be considered, publishers could be held liable even for printing a picture of a soldier receiving a blood transfusion on the battlefield as an inducement for civilians to donate blood. A better solution would be to balance the public gain against the private loss in each case.

(3) A third factor which must be considered when answering the question "is this a matter privileged in the public interest", is whether or not the person whose name, history or likeness has appeared in a publication is a public figure; and if he is a public figure, then to what degree. It cannot be denied that being involved in an automobile accident or being the victim of a felony, and other similar incidents, casts a limited glow of public interest over a hitherto unknown person. Yet the degree of public interest and the duration of public interest in such a person is obviously less than that which surrounds an important political figure, a famous scientist, a notorious criminal, or other like individuals. It has been said that:

> "The determining factor is the content and character of the publication, not the standing of the individual. Even the most famous have a right to be protected against unauthorized use of their names and photographs in a manner not connected with their public life."[22]

Certainly a famous person should be protected from invasions of his privacy which are not connected with his public life. Therefore, it is true that *one* determining factor is the content of the publication. Yet, in order to differentiate those subjects connected with public life from those having no such connection, a consideration of the degree of importance attributable to prominent persons seems essential. Today, through the medium of the press, the public is made familiar with the intimate details of prominent figures' private lives even though the details are not connected with their public capacity. The publication of such personal habits would undoubtedly be an invasion of privacy, were the person not a prominent figure. Furthermore, as to the duration of the interest, an article about a famous general would, no doubt, be of interest, and thereby privileged many years after he had retired from active service, while the interest span of an article concerning a victim of an automobile accident would be comparatively short.

Thus, not only the subject matter of the article but the notoriety of the individual as a prominent public figure is pertinent to the problem at hand. The degree of prominence must necessarily be determined as a question of fact. As the court said in the *Donahue* case, "The question whether a person is a public figure . . . may rest upon

[22] Louis Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1940-41), construing Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909).

various and variable facts and circumstances. And no rule of thumb has been evolved for its easy solution in all cases."[23]

(4) One of the purposes behind adopting the doctrine of the right to privacy is to protect the individual from unauthorized publications of his name, history or likeness which would affect his relations with third persons.[24] Of course, all publications concerning living people effect their relationships with the public in some way. Therefore, a consideration which could be used to facilitate the determination of whether or not there has been an invasion of an individual's right to privacy by an unprivileged use is whether the publication affects the person's relationships with others in such a way as to be expected to wound a reasonable person's sensibilities.

In cases of legitimate public interest, wounded sensibilities will not subject the publisher to liability.[25] However, in a close case such as *Gill* v. *Hearst Publishing Co.*,[26] the effect of the publication upon the plaintiff's relationships with third persons might well be examined. In the *Gill* case, the defendant published a picture of plaintiff and his wife in a romantic pose. The plaintiff, in bringing this action for the invasion of his privacy, did not allege that offensive implications arose from the use of the picture, although he did allege humiliation and annoyance. The court found that the use did not go beyond the limits of decency, and denied recovery. It has been said that there are few limits upon the right to take pictures; the limitations concern the use to which the photographs are put.[27] Justice Wilson dissented, saying that any publication of a picture of an individual, taken surreptitiously and published without his consent should be deemed an intrusion of that person's privacy.[28]

Unquestionably, printing a picture of an individual which has been taken surreptitiously may well have unpleasant effects upon that individual's relations with third persons. The law should extend its protection to this and similar cases. The factor of the invasion's effect on third persons is the important consideration in this extension of the rule.

One of the original arguments for adopting the doctrine of the right of privacy was that the press was overstepping the bounds of decency.[29] Whether the person involved in the publication in question

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[23] *Supra* note 14 at 13.
[24] Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 244 (1932).
[25] Wilfred Feinberg, *Recent Developments In The Law of Privacy*, 48 COL. L. REV. 713 (1948).
[26] Gill v. Hearst Pub. Co., 231 P. 2d 570 (Cal. 1951).
[27] *Supra* note 24.
[28] *Supra* note 26.
[29] *Supra* note 2 at 196.

be a public figure, a private individual or a child; whether the subject of the publication be connected with his public life, his private life, or not in truth connected with his life at all; still, there are some topics presented in certain manners which will offend not only the sensibilities of the individual, but the sense of decency of the community as a whole. Print the story of an accident, a crime, an election, and the courts nod their approval; but print an unauthorized picture of a woman suffering from a strange disease,[30] or the picture of a dead, malformed child,[31] and the courts uphold the protestations of the injured parties. Again the degree of public interest must be balanced against the effect of the publication on the sensibilities of the individual.

In conclusion, public interest must necessarily place a limitation on the right to privacy so that information of general concern, and for general knowledge and benefit may be put before the public. In determining whether the subject matter is of public interest and thereby privileged, factors which should be considered include the nature of the publication, the informative or instructive value of the article, the degree of public prominence which had heretofore been attained by the plaintiff, and the effect the publication will have upon the plaintiff's relations with third persons. In addition, publishers may not go beyond the limits of decency in their efforts to inform and interest, thereby subjecting public or private persons to unwarranted publicity.

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[30] Barber v. Time Inc., 438 Mo. 1199, 159 S.W. 2d 291 (1942).
[31] Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).