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Torts -- Right of Privacy -- Unauthorized Use of Photograph

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powers as is that of the United States.²¹ The court relies mainly on *United States v. Cotton Valley Oil Operators Committee*,²² where the Supreme Court ruled that it would decide if a privilege existed and rejected the claim of the Attorney General to determine if F.B.I. records were within the privilege.

This case²³ and others recently decided²⁴ act to curb the mushrooming administrative power of the executive branch of the government from usurping judicial functions. This is in line with the checks and balances system under our Constitution and is in harmony with the doctrine of separation of powers.

TORTS—RIGHT OF PRIVACY UNAUTHORIZED USE OF PHOTOGRAPH

Plaintiffs, husband and wife, sued defendant publisher for the unauthorized use in its magazine of plaintiffs' photograph, taken without their consent at their place of business. The photograph's caption and an accompanying article described the photograph as typical of an unwholesome marital relationship. *Held*, the publication of the photograph and accompanying article is an invasion of the plaintiffs' right of privacy and is actionable. *Bill v. Curtis Publishing Co.*, 239 P.2d 630 (Cal. 1952).

In the United States the acceptance of the invasion of the right of privacy as an independent tort was first crystallized in the nineteenth century writings of two eminent authorities.¹ Although it has been stated that the right of privacy is not subject to concrete definition,² it nevertheless has been defined by a number of courts³ and legal writers,⁴ as the right to be let alone,⁵ or the right to live in seclusion without being subjected to unwarranted and undesired publicity⁶ or the right of a person of ordinary sensibilities to be protected from mental suffering, shame or humiliation.⁷ The right is essentially personal and does not survive after death in the absence of a contract.⁸ The courts have held that the action

21. 192 F.2d at 997 (1951).

22. 339 U.S. 940 (1950).

23. *Brauner v. United States*, 192 F.2d 987 (3d Cir. 1951).

24. *United States v. Cotton Valley Oil Operators Comm.*, *supra* note 14; *Evans v. United States*, *supra* note 18; *Cresmer v. United States*, *supra* note 10; *Wunderly v. United States*, *supra* note 10.

1. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943).

3. *Cf. Mavity v. Tyndall*, 225 Ind. 360, 74 N.E.2d 914 (1947).

4. *Larremore, The Law of Privacy*, 12 COL. L. REV. 693 (1912); *McClellan, The Right of Privacy*, 15 GREEN BAG 494 (1903); *Pound, Interests of Personality*, 28 HARV. L. REV. 343 (1915). But see *Green, The Right of Privacy*, 27 ILL. L. REV. 237 (1932).

5. *Barber v. Time, Inc.*, 438 Mo. 199, 159 S.W.2d 510 (1942).

6. *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942); RESTATEMENT, TORTS § 867 (1939).

7. *McCovern v. Van Riper*, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945).

8. *Lunceford v. Wilcox*, 80 Misc. 194, 88 N.Y.S.2d 225 (City Ct. 1949).

for invasion of the right of privacy is limited if the subject is legitimate for public comment,⁹ and those who are involved in litigation are legitimate subjects for public comment.¹⁰

Historically, the courts, questioning the existence of either the right or the remedy for an invasion of the right, were reluctant to accept the development of the invasion of the right of privacy as a separate tort in the absence of statute.¹¹ The first cases to hold the right of privacy to be an actionable common law right rested on the theory of natural law, and declared the use of photographs in advertisements an invasion of the right of privacy.¹² Later, some courts allowed recovery in cases involving the use of photographs for advertising purposes,¹³ such as the use by an undertaker of a photograph of the corpse of plaintiff's husband,¹⁴ on the basis of a contractual right. Other courts based their holdings for recovery on a property right theory.¹⁵ On this basis the use of plaintiff's name in a motion picture depicting her past life as a prostitute was held to be an invasion of the right of privacy.¹⁶ Today approximately nineteen jurisdictions¹⁷ give approval to the common law right to privacy. A recent Florida case recognized the invasion of the right of privacy as a separate tort, the court declaring that such right is, in substance, the right to be let alone and the right to live in a community without being held up to the public

9. *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948).

10. *Berg v. Minneapolis Star-Tribune Co.*, 340 U.S. 935 (1948).

11. *Robertson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

12. *Pavesich v. New England Mut. Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Voelker v. Tyndall*, 226 Ind. 43, 75 N.E. 2d 548 (1947) (natural law right of privacy guaranteed by both federal and state constitutions).

13. *Pollard v. Photographic Co.* 40 Ch. D. 345 (1888); *McCreery v. Miller's Grocerteria Co.*, 99 Colo. 499, 64 P.2d 803 (1936).

14. *Fitzsimmons v. Olinger Mortuary Assoc.*, 91 Colo. 544, 17 P.2d 535 (1932).

15. *Prince Albert v. Strange*, 2 De G. & S. 652, 64 Eng. Rep. 293 (Ch. 1848) (etchings made by Queen Victoria and Prince Albert for their private amusement).

16. *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

17. *E.g.*, *Corliss v. E. W. Walker Co.*, 64 Fed. 280 (C.C.D. Mass. 1894) (biography and portrait of case arising in Mass.); *Smith v. Doss*, *supra* note 9; *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.C. Cir. 1948); *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944) (publication of character sketch of plaintiff in sketch book); *Pavesich v. New England Mut. Life Ins. Co.* *supra* note 12; *Davis v. General Finance and Thrift Corp.*; 80 Ga. App. 708, 57 S.E. 2d 225 (1950); *Mavity v. Tyndall*, *supra* note 3; *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918) (taking motion pictures of plaintiffs and using same for advertising purposes); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909) (use of picture and name for advertising); *Istkovitch v. Whittaker*, 115 La. 479, 39 So. 499 (1905), *aff'd on rehearing*, 117 La. 708, 42 So. 228 (1906) (photographing plaintiff for rogues' gallery); *Pallas v. Crowley Milne & Co.*, 322 Mich. 411, 33 N.W.2d 911 (1948); *Vanderbilt v. Mitchell*, 72 N.J. Eq. 910, 67 Atl. 97 (Ct. Err. & App. 1907); *Bednarik v. Bednarik*, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940) (blood-grouping tests); *McGovern v. Van Ripper*, *supra* note 7; *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) (use of picture for advertising purposes); *Freedman v. Cincinnati Local Executive Bd.*, 20 Ohio Ops. 473 (1941) (making of moving pictures of patrons of plaintiffs' restaurant by pickets); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941) (letter to the governor urging veto of bill, name signed without consent); *Clayman v. Berstein*, 38 Pa. D. & C. 543 (1940) (photograph made by physician of patient); *Holloman v. Life Ins. Co. of Va.*, 192 S.C. 454, 7 S.E.2d 169 (1940).

gaze against one's will.¹⁸ Other courts continue to hold that no actionable right will arise unless granted by statute.¹⁹ Several states afford statutory protection.²⁰

In the face of modern methods of communication and dissemination of information, the use of photographs as illustrations of written materials,²¹ without the consent of the persons photographed is considered to be an invasion of the right of privacy, *per se*, as held in the instant case.²² This should be distinguished from cases involving the theories of contract²³ and property rights²⁴ where the photograph was used for commercial purposes. Although such commendable holdings by the courts place a heavy burden upon the defendant publisher and have led to agitation for a uniform law on the subject,²⁵ the modern view is buttressed by language from the Supreme Court of the United States, "that the rights of privacy and personal security protected by the Fourth Amendment . . . are to be regarded as the very essence of constitutional liberty and that the guaranty of them is as important and imperative as are the guaranties of the other fundamental rights of the individual citizen."²⁷ On another occasion, the Court said, ". . . no right is more vital to 'liberty and the pursuit of happiness' than the protection of the citizens' private affairs, their right to be let alone."²⁸

18. *Cason v. Baskin*, *supra* note 17.

19. *Robertson v. Rochester Folding Box Co.*, *supra* note 11; *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 186 N.E. 217 (1933); *Ross v. Macfadden Publications*, 174 Misc. 1019, 22 N.Y.S.2d 519 (Sup. Ct. 1940).

20. *E.g.*, N.Y. CIVIL RIGHTS LAW § 51 (limits protection only to the use of an individual's name or picture for commercial purposes); see *Bauman v. Bauman*, 250 N.Y. 382, 165 N.E. 819 (1929); VA. CODE § 3782 (1919) (unauthorized use of name or picture of any person); UTAH C.L. 17, § 8178 (1943) (use of name or picture of the individual).

21. *Leverton v. Curtis Pub. Co.*, 97 Supp. 181 (E.D. Pa. 1951); *Gill v. Curtis Pub. Co.*, 239 P.2d 630 (Cal. 1952).

22. *Gill v. Curtis Pub. Co.*, *supra* note 21.

23. *Lunceford v. Wilcox*, *supra* note 8.

24. *Melvin v. Reid*, *supra* note 16.

25. *Gregory v. Bryan-Hunt Co.*, *supra* note 2.

26. Ludwig, "Peace of Mind" in 48 *Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948); 60 HARV. L. REV. 941 (1947).

27. *Harris v. United States*, 331 U.S. 145, 150 (1947) (involving admissibility of evidence in a criminal prosecution).

28. *Zimmerman v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936) (attempt by internal revenue agents to obtain books on plaintiff's business transactions of past years).